BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JON S. MATZ,

Claimant,

vs.

AMERICAN CERTIFIED SERVICES,

Employer,

and

AUTO OWNERS INSURANCE,

Insurance Carrier,
Defendants.

File No. 5063722

ARBITRATION

DECISION

Head Note Nos.: 1803, 2502, 2701, 4000.2

STATEMENT OF THE CASE

Claimant, Jon Matz, filed a petition in arbitration seeking workers' compensation benefits from American Certified Services (American), employer, and Auto Owners Insurance, both as defendants. This matter was heard in Sioux City, Iowa on August 20, 2018 with a final submission date of October 8, 2018.

The record in this case consists of Joint Exhibits 1-7, Claimant's Exhibits 1-14, Defendants' Exhibits A through H (with the exception of Exhibit F, pages 28-29, 31-37, and Exhibit H, pages 53-54), and the testimony of claimant and Teresa Bokemper.

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

ISSUES

1. The extent of claimant's entitlement to permanent partial disability benefits.

2. Commencement of benefits.

3. Whether claimant is entitled to reimbursement for an independent medical evaluation (IME).

4. Whether claimant is entitled to alternate medical care under Iowa Code section 85.27.

5. Whether defendants are liable for penalty.

6. Credit.

At hearing, the parties indicated medical bills were at issue for $414.00 for an emergency room visit at the date of injury. Defendants indicated in their post-hearing brief that bill had been paid. As a result, payment of this medical bill is not discussed as an issue in dispute in this decision.

FINDINGS OF FACT

Claimant was 54 years old at the time of hearing. Claimant attended high school through the 10th grade.

Claimant has done painting and roofing work. Claimant worked as a forklift operator for Gateway Computer. Claimant has worked in construction. Claimant has worked for various manufacturers. Claimant has done window and door installations. Most of claimant's work involved unskilled physical labor. Claimant testified he had to lift more than 50 pounds in most of his prior jobs.

Claimant began working for American in July of 2015. Claimant worked as a painter. His job duties included painting the interiors and exteriors of homes with a spray gun, and power washing houses and decks.

Claimant's prior medical history is relevant. In 1998 claimant injured his lower back when he was thrown approximately five feet due to an explosion. Claimant was assessed as having a lumbar strain. (Joint Exhibit 1, pages 1-3)

In 2005 claimant fell on concrete hitting his right forearm and head. (Jt. Ex. 1, p. 4)

In 2015 claimant was treated for pancreatitis caused by alcohol abuse. (Jt. Ex. 2)

On November 5, 2015 claimant fell from a ladder while going down from a roof of a one-story home. Claimant landed on a barbeque grill. Claimant testified he hit his head on the grill. Claimant said he lost consciousness. A coworker drove claimant to a doctor's office. Claimant said the doctor instructed claimant to go to the emergency room.

On November 5, 2015 claimant was evaluated at the emergency room at St. Luke's Medical Center. Claimant fell off a ladder and fell on a grill. X-rays showed multiple rib fractures. A CT of claimants' head was normal. Claimant was assessed as

having a fracture of the transverse process of the lumbar vertebra, and multiple rib fractures. (Jt. Ex. 1, pp. 5-14)

Claimant was evaluated by Mark Abraham, M.D. on November 11, 2015 in follow up. Claimant was treated with medication and taken off work for two weeks. (Jt. Ex. 3, pp. 25-26)

Claimant continued to treat with Dr. Abraham in follow up through November and December of 2015. Claimant returned to Dr. Abraham on December 30, 2015. He had resolved rib fractures, but his lower back was still stiff. Claimant was referred to a neurosurgeon. (Jt. Ex. 3, pp. 27-33)

On January 12, 2016 claimant was evaluated by Grant Shumaker, M.D., a neurosurgeon. An MRI of the lumbar spine was recommended. Claimant was kept off work. (Jt. Ex. 4, pp. 37-38)

On January 25, 2016 claimant underwent an MRI of the lumbar spine. The MRI was relatively normal and showed minimal degenerative disc disease. (Jt. Ex. 4, pp. 40-41)

Claimant returned to Dr. Shumaker on January 28, 2016. Dr. Shumaker limited claimant to light duty work. Claimant was referred to physical therapy. (Jt. Ex. 4, pp. 42-43)

Claimant returned to Dr. Shumaker on April 13, 2016. Claimant was returned to work at medium duty full time. Defendant employer was not able to accommodate this restriction. Claimant continued physical therapy. Dr. Shumaker anticipated claimant would return to full duty as of May 1, 2016. (Jt. Ex. 4, pp. 47-49)

Claimant saw Dr. Shumaker on May 12, 2016 with complaints of mid-lumbar pain after returning to work full duty. Claimant was returned to work at light/medium duty. A functional capacity evaluation (FCE) was recommended. (Jt. Ex. 4, pp. 50-51)

On May 14, 2016 claimant underwent an FCE. The FCE suggested claimant had overt symptom behavior. Claimant was found to have given poor, invalid effort in testing. The FCE determined claimant was capable of performing work at the medium physical demand level. (Jt. Ex. 5)

On July 14, 2016 Dr. Shumaker released claimant to full-duty work. Claimant was found to be at maximum medical improvement (MMI) as of that date. Dr. Shumaker found claimant could lift 35 pounds occasionally. Dr. Shumaker found claimant had a 5 percent permanent impairment to the body as a whole based upon a finding that claimant fell in the DRE category II under the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition. (Jt. Ex. 4, pp. 53-57)

Claimant testified he had difficulty returning to work full duty. He said he had difficulty lifting ladders and dealing with the power washer.

In August of 2016 claimant was terminated from his employment with American.

Teresa Bokemper testified she was an office manager for American. In that capacity Ms. Bokemper was familiar with claimant and his workers' compensation claim. Ms. Bokemper testified claimant was terminated from American due to his attendance, insubordination, and poor attitude. (Transcript pages 121-124)

Claimant testified he looked for work from approximately August of 2016 until he found a job in January of 2018.

On May 8, 2017 claimant was seen in the emergency department at St. Luke's due to vomiting caused by drinking vodka and eating poorly. Claimant was assessed as having vomiting and alcohol abuse. (Jt. Ex. 1, pp. 15-16)

In a May 31, 2017 report, Sunil Bansal, M.D., gave his opinions of claimant's condition following an independent medical evaluation (IME). Claimant told Dr. Bansal he had constant aching in the lower back. Dr. Bansal found claimant at MMI as of December 30, 2015. He found claimant had a 2 percent permanent impairment due to his fractured ribs. He found claimant had a 10 percent permanent impairment to the body as a whole due to the fracture of his transverse process. He recommended claimant receive additional CT of the lumbar spine, additional physical therapy and "additional prescriptions." (Claimant's Ex. 1)

In a June 27, 2017 note, Dr. Bansal opined claimant should not lift more than 30 pounds occasionally, and not engage in standing more than 30 minutes at a time. He also recommended claimant avoid using multiple stairs and ladders. (Ex. 1, pp. 39-40)

On July 26, 2017 claimant was involved in a motor vehicle accident. Claimant indicated he had been in a motor vehicle accident in 2015 and had chronic back pain since that time. Claimant noted pain at a level 10, on a scale where 10 is excruciating pain. (Jt. Ex. 1, pp. 17-20)

On August 2, 2017 claimant was seen by Pat Luse, DC. Claimant was given chiropractic manipulations. Claimant underwent approximately six more chiropractic treatments for lower back pain in August of 2017. (Jt. Ex. 7, pp. 105-116)

In a September 14, 2017 report, Dr. Ripperda, gave his opinions of claimant's condition following an IME. He opined claimant had reached MMI as of July 14, 2016. He agreed with Dr. Shumaker's opinions that claimant had a 5 percent permanent impairment to the body as a whole. Based on the invalid FCE, he believed claimant could lift up to 50 pounds occasionally and 25 pounds frequently. (Defendants' Ex. B)

In a December 8, 2017 note, Dr. Luse found claimant at MMI. (Jt. Ex. 7, p. 144)

In a January 24, 2018 letter, written by claimant's counsel, Dr. Luse appears to question if claimant had any permanent impairment regarding fractured ribs. Dr. Luse believed claimant had an 8 percent permanent impairment to the body as a whole

based on fractures of the transverse process. He opined claimant needed additional CT scans, x-rays, and MRIs of the lumbar spine. He also opined claimant needed additional prescriptions, physical therapy, and chiropractic care. (Cl. Ex. 2, pp. 45-46)

In a July 12, 2018 report, Rick Ostrander, LPC, CRC, gave his opinions of claimant's vocational opportunities. Mr. Ostrander opined that, given claimant's permanent restrictions from Dr. Bansal, claimant would only be able to perform jobs in the medium work category. Based on Dr. Bansal's permanent restrictions, he opined claimant had a loss of earning capacity of 60-70 percent. Based on Thomas Ripperda M.D.'s permanent restrictions, Mr. Ostrander opined claimant had a 20-30 percent loss of earning capacity. (Cl. Ex. 4)

In an August 13, 2018 report Lana Sellner, MS, CRC, gave her opinions regarding claimant's vocational opportunities.

Ms. Sellner opined claimant could perform work in approximately 13 different job categories. These jobs had median hourly wages ranging from $9.32 an hour to $20.00 an hour. Ms. Sellner opined claimant did not sustain a significant loss of access to the labor market. (Ex. C)

In a September 12, 2018 report, Mr. Ostrander indicated he had reviewed Ms. Sellner's report. He found Ms. Sellner's report ignored claimant had restrictions placing him in the median work category. Mr. Ostrander found Ms. Sellner's wage ranges of listed occupations unreasonable. He also believed Ms. Sellner did not correctly address claimant's limited education and lack of a GED, and how this would affect his ability to qualify for jobs that she listed. (Cl. Ex. 4, pp. 80a - 80c)

At the time of hearing claimant was working as a night shift custodian for Seaboard Triumph in Sioux City. Claimant said his job required he clean offices, mop floors, and operate a Bazoni machine to clean floors. Claimant said he started with Seaboard at $12.50 an hour. At the time of hearing claimant was earning $13.50 an hour. Claimant testified that mopping at work aggravated his back problems.

Personnel records from Seaboard indicate claimant can comfortably lift 50 pounds. (Ex. F, p. 42) A physical found claimant had full range of motion in his back and hips. (Ex. F. p. 42) Claimant indicated on the physical he had no back injury. (Ex. F, p. 43)

Claimant testified that because of his back injury, he can no longer ride a bike, go boating, fishing, or ride an ATV. Claimant said he can only walk four to five blocks. He said he can only stand or sit for approximately 20 minutes at a time.

CONCLUSIONS OF LAW

The first issue to be determined is the extent of claimant's entitlement to permanent partial disability benefits.

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).

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

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

Compensation for permanent partial disability shall begin at the termination of the healing period. Compensation shall be paid in relation to 500 weeks as the disability bears to the body as a whole. Section 85.34.

Claimant was 54 years old at the time of hearing. Claimant did not graduate from high school. Most of claimant's work life has involved unskilled physical labor.

Four experts have opined regarding claimant's permanent impairment. Dr. Shumaker treated claimant for an extended period of time. He found claimant had a 5 percent permanent impairment to the body as a whole based upon the healed fracture of the transverse process. (Jt. Ex. 4, pp. 55-57) Dr. Shumaker released claimant to return to full-duty work on July 14, 2016. (Jt. Ex. 4, pp. 56-57)

The opinions of Dr. Shumaker were corroborated by Dr. Ripperda. Dr. Ripperda evaluated claimant once for an IME. (Jt. Ex. 7, p. 144)

Dr. Bansal saw claimant on one occasion for an IME. Dr. Bansal found claimant had a permanent impairment of 2 percent to the body as a whole due to fractured ribs and a 10 percent permanent impairment to the body as a whole due to the fracture of the transverse process. He also gave claimant a 30-pound lifting restriction. (Cl. Ex. 1)

I find Dr. Bansal's report flawed for several reasons. First, Dr. Bansal found claimant had a permanent impairment to his fractured ribs. Dr. Shumaker's clinical notes indicate claimant's fractured ribs had healed as of December of 2015. (Jt. Ex. 3, p. 32) Claimant testified he had no rib pain. (Tr. p. 76) There is no rating under the Guides for a healed fractured rib.

Second, Dr. Bansal found claimant had a 10 percent permanent impairment, indicating he rated claimant's two fractures of the transverse process separately. (Cl. Ex. 1, p. 25) Dr. Ripperda indicates, in his report, this is improper under the Guides, as the fractures both occurred at the same vertebral level. For that reason, claimant really has a 5 percent permanent impairment to the body as a whole. (Ex. B, p. 10)

Finally, Dr. Bansal found claimant should only lift 30 pounds occasionally and 20 pounds frequently. Dr. Bansal makes little reference to the FCE regarding restrictions. It is unclear why Dr. Bansal chose these values for claimant's permanent restrictions. As noted above, claimant's physical requirements with Seaboard indicate claimant can lift 50 pounds comfortably. (Ex. F, p. 52)

Dr. Bansal found claimant had a permanent impairment to the ribs, which is inappropriate under the Guides. He essentially gives claimant a double rating for a fracture to one vertebral level. Dr. Bansal's permanent restrictions are contrary to all other evidence in the record, including claimant's job requirements of the job he held at the time of hearing. For these reasons, the opinions of Dr. Bansal regarding permanent impairment and permanent restrictions are found not convincing.

Dr. Luse treated claimant for an extended period of time. He found claimant had an 8 percent permanent impairment to the body as a whole due to the transverse fracture. Records indicate claimant had approximately 20 chiropractic adjustments with Dr. Luse from August of 2017 through December of 2017. Claimant did not have any medical care for his back between July of 2016 and August of 2017. He did not require treatment with Dr. Luse until after he had a motor vehicle accident. Claimant testified at hearing that his motor vehicle accident aggravated his back condition and caused him to have treatment with Dr. Luse. (Tr. pp. 79-80) Claimant testified he told Dr. Luse he had a motor vehicle accident. However, there is no mention in any of Dr. Luse's records of claimant's July of 2017 motor vehicle accident. Given this record, it is found claimant's testimony is not convincing that he told Dr. Luse he was in a motor vehicle accident.

The record indicates claimant did not tell Dr. Luse he was in a motor vehicle accident that resulted in claimant having pain at a level 10. (Jt. Ex. 1, pp. 17-20) Because Dr. Luse's opinions are based on incomplete information, it is found Dr. Luse's opinions regarding permanent impairment and permanent restrictions are also found not convincing.

Dr. Shumaker and Dr. Ripperda found claimant had a 5 percent permanent impairment to the body as a whole due to his accident. Dr. Ripperda found claimant could lift up to 50 pounds occasionally and 20 pounds frequently. Those permanent restrictions are based, in part, on the FCE. These restrictions also appear to correlate to claimant's lifting requirements at this current job at Seaboard. (Ex. F, p. 42) Given this record, it is found claimant has a 5 percent permanent impairment, and his permanent restrictions that limit him to occasionally lifting 50 pounds and frequently lifting up to 25 pounds.

Two vocational experts have opined regarding claimant's vocational opportunities. Mr. Ostrander found claimant had a 40 percent loss of earning capacity based on Dr. Bansal's permanent restrictions and a 10 percent loss of earning capacity based on Dr. Ripperda's permanent restrictions. (Cl. Ex. 4, pp. 73-74) He then added an additional 20 percent to each estimate based on claimant's age and education. I appreciate that claimant's age and educational level limit his ability to find work. However, the 20 percent addition to the loss of earning capacity based upon these factors appears arbitrary. Mr. Ostrander also makes no mention of claimant's motor vehicle accident and his report suggests he was not provided with this information.

Ms. Sellner opines claimant had no significant loss of access to the labor market. (Ex. C, p. 19) However, the record suggests most of claimant's prior jobs required him to lift 50 pounds or more. Ms. Sellner offers no analysis why a 54-year-old man, with no high school degree and a 50-pound lifting restriction, has no loss of access to the labor market.

In brief, there are some deficiencies in both vocational reports. However, despite the inconsistencies, it is found both reports are useful in understanding claimant's loss of earning capacity.

Claimant has a 5 percent permanent impairment to the body as a whole. He has a 50-pound lifting restriction. Claimant was terminated from defendant employer for non-accident related reasons. At the time of hearing claimant was working as a custodian for Seaboard. According to the hearing report, claimant's average weekly wage with American was $736.92 per week. Claimant earns $13.50 an hour at Seaboard at 40 hours a week. (Tr. p. 103) In brief, at the time of hearing claimant was earning $550.00 a week ($13.50 x 40 hours). When all relevant factors are considered, it is found claimant has a 20 percent loss of earning capacity or industrial disability.

The next issue to be determined is the commencement date of benefits.

Healing period compensation describes temporary workers' compensation weekly benefits that precede an allowance of permanent partial disability benefits. Ellingson v. Fleetguard, Inc., 599 N.W.2d 440 (Iowa 1999). Section 85.34(1) provides that healing period benefits are payable to an injured worker who has suffered permanent partial disability until the first to occur of three events. These are: (1) the worker has returned to work; (2) the worker medically is capable of returning to substantially similar employment; or (3) the worker has achieved maximum medical recovery. Maximum medical recovery is achieved when healing is complete and the extent of permanent disability can be determined. Armstrong Tire & Rubber Co. v. Kubli, Iowa App., 312 N.W.2d 60 (Iowa 1981). Neither maintenance medical care nor an employee's continuing to have pain or other symptoms necessarily prolongs the healing period.

Dr. Shumaker returned claimant to full duty as of May 1, 2016. (Jt. Ex. 4, pp. 49-50) Claimant testified he returned to work as of May 1, 2016. (Tr. 76; Cl. Ex. 9, p 121)

Based upon these facts, claimant's permanent partial disability benefits should commence as of May 1, 2016.

The next issue to be determined is whether claimant is due reimbursement for an IME under Iowa Code section 85.39.

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

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

Dr. Shumaker, the physician retained by defendants, indicated claimant had permanent impairment as of July 20, 2016. (Jt. Ex. 4, p. 57) Dr. Bansal, the employee-retained physician, issued his opinions regarding claimant's permanent impairment in a May 31, 2017 report. (Claimant's Ex. 1) Given this chronology, defendants are entitled to reimbursement for all costs associated with Dr. Bansal's IME.

The next issue to be determined is whether claimant is entitled to alternate medical care under Iowa Code section 85.27.

Iowa Code section 85.27(4) provides, in relevant part:

> For purposes of this section, the employer is obliged to furnish reasonable services and supplies to treat an injured employee, and has the right to choose the care. . . . The treatment must be offered promptly and be reasonably suited to treat the injury without undue inconvenience to the employee. If the employee has reason to be dissatisfied with the care offered, the employee should communicate the basis of such dissatisfaction to the employer, in writing if requested, following which the employer and the employee may agree to alternate care reasonably suited to treat the injury. If the employer and employee cannot agree on such alternate care, the commissioner may, upon application and reasonable proofs of the necessity therefor, allow and order other care.

An application for alternate medical care is not automatically sustained because claimant is dissatisfied with the care he has been receiving. Mere dissatisfaction with

the medical care is not ample grounds for granting an application for alternate medical care. Rather, the claimant must show that the care was not offered promptly, was not reasonably suited to treat the injury, or that the care was unduly inconvenient for the claimant. Long v. Roberts Dairy Co., 528 N.W.2d 122 (Iowa 1995).

Four experts have opined regarding claimant's need for further medical care. Dr. Shumaker, the treating physician, opined claimant did not require additional care. (Jt. Ex. 4, p. 54) Dr. Ripperda also did not believe claimant required additional treatment and noted imaging studies showed claimant's transverse fracture had healed. (Ex. B, pp. 10-11)

Dr. Bansal opined claimant required additional care including referral to a pain specialist. (Cl. Ex. 1, p. 26) However, as noted above, it is found that Dr. Bansal's report is flawed, as he found permanent impairment for claimant's healed fractured ribs, because he gave a double rating for claimant's fractured vertebra, and because he applied an arbitrary permanent restriction. Based on these inconsistencies in his report, it is found that Dr. Bansal's opinions regarding further care are also found not convincing.

Dr. Luse also opined claimant should have further care including, but not limited to, additional CT scans, additional MRIs and x-rays, and "additional prescriptions." (Cl. Ex. 2, pp. 45-46)

As noted above, claimant received no treatment for his low back injury for a year after being released by Dr. Shumaker. In late July of 2017 claimant had a motor vehicle accident. He began treating with Dr. Luse shortly after his motor vehicle accident. It appears, from the record, Dr. Luse had no information regarding claimant's motor vehicle accident. As a result, Dr. Luse based his opinions on further medical treatment based on incomplete information. The recommendation that claimant requires "further prescriptions" for additional care is also vague at best. Based on this record, it is found the opinions of Dr. Luse for additional medical care are found not convincing.

Dr. Shumaker and Dr. Ripperda both opined claimant does not require additional medical care. The opinions of Dr. Bansal and Dr. Luse are found not convincing. Based on this record, claimant had failed to carry his burden of proof he is entitled to alternate medical care.

The next issue to be determined is whether defendants are liable for penalty under Iowa Code section 86.13.

In Christensen v. Snap-on Tools Corp., 554 N.W.2d 254 (Iowa 1996), and Robbennolt v. Snap-on Tools Corp., 555 N.W.2d 229 (Iowa 1996), the supreme court said:

> Based on the plain language of section 86.13, we hold an employee is entitled to penalty benefits if there has been a delay in payment unless the

employer proves a reasonable cause or excuse. A reasonable cause or excuse exists if either (1) the delay was necessary for the insurer to investigate the claim or (2) the employer had a reasonable basis to contest the employee's entitlement to benefits. A "reasonable basis" for denial of the claim exists if the claim is "fairly debatable."

Christensen, 554 N.W.2d at 260.

The supreme court has stated:

(1) If the employer has a reason for the delay and conveys that reason to the employee contemporaneously with the beginning of the delay, no penalty will be imposed if the reason is of such character that a reasonable fact-finder could conclude that it is a "reasonable or probable cause or excuse" under Iowa Code section 86.13. In that case, we will defer to the decision of the commissioner. See Christensen, 554 N.W.2d at 260 (substantial evidence found to support commissioner's finding of legitimate reason for delay pending receipt of medical report); Robbennolt, 555 N.W.2d at 236.

(2) If no reason is given for the delay or if the "reason" is not one that a reasonable fact-finder could accept, we will hold that no such cause or excuse exists and remand to the commissioner for the sole purpose of assessing penalties under section 86.13. See Christensen, 554 N.W.2d at 261.

(3) Reasonable causes or excuses include (a) a delay for the employer to investigate the claim, Christensen, 554 N.W.2d at 260; Kiesecker v. Webster City Meats, Inc., 528 N.W.2d at 109, 111 (Iowa 1995); or (b) the employer had a reasonable basis to contest the claim—the "fairly debatable" basis for delay. See Christensen, 554 N.W.2d at 260 (holding two-month delay to obtain employer's own medical report reasonable under the circumstances).

(4) For the purpose of applying section 86.13, the benefits that are underpaid as well as late-paid benefits are subject to penalties, unless the employer establishes reasonable and probable cause or excuse. Robbennolt, 555 N.W.2d at 237 (underpayment resulting from application of wrong wage base; in absence of excuse, commissioner required to apply penalty).

> If we were to construe [section 86.13] to permit the avoidance of penalty if any amount of compensation benefits are paid, the purpose of the penalty statute would be frustrated. For these reasons, we conclude section 86.13 is

> applicable when payment of compensation is not timely . . . or when the full amount of compensation is not paid.

Id.

(5) For purposes of determining whether there has been a delay, payments are "made" when (a) the check addressed to a claimant is mailed (Robbennolt, 555 N.W.2d at 236; Kiesecker, 528 N.W.2d at 112), or (b) the check is delivered personally to the claimant by the employer or its workers' compensation insurer. Robbennolt, 555 N.W.2d at 235.

(6) In determining the amount of penalty, the commissioner is to consider factors such as the length of the delay, the number of delays, the information available to the employer regarding the employee's injury and wages, and the employer's past record of penalties. Robbennolt, 555 N.W.2d at 238.

(7) An employer's bare assertion that a claim is "fairly debatable" does not make it so. A fair reading of Christensen and Robbennolt, makes it clear that the employer must assert facts upon which the commissioner could reasonably find that the claim was "fairly debatable." See Christensen, 554 N.W.2d at 260.

Meyers v. Holiday Express Corp., 557 N.W.2d 502 (Iowa 1996).

Weekly compensation payments are due at the end of the compensation week. Robbennolt, 555 N.W.2d 229, 235.

Penalty is not imposed for delayed interest payments. Davidson v. Bruce, 593 N.W.2d 833, 840 (Iowa App. 1999). Schadendorf v. Snap-On Tools Corp., 757 N.W.2d 330, 338 (Iowa 2008).

When an employee's claim for benefits is fairly debatable based on a good faith dispute over the employee's factual or legal entitlement to benefits, an award of penalty benefits is not appropriate under the statute. Whether the issue was fairly debatable turns on whether there was a disputed factual dispute that, if resolved in favor of the employer, would have supported the employer's denial of compensability. Gilbert v. USF Holland, Inc., 637 N.W.2d 194 (Iowa 2001).

Industrial disability can be equal to, less than, or greater than functional impairment. Taylor v. Hummel Insurance Agency, Inc., 2-2, Iowa Industrial Comm'r Dec. 736 (1985); Kroll v. Iowa Utilities, 1-4, Iowa Industrial Comm'r Dec. 937 (App. 1985);Birmingham v. Firestone Tire & Rubber Company, II, Iowa Industrial Comm'r Rep., 39, (App. 1981).

Claimant contends a penalty should be assessed against defendants for failure to pay claimant permanent partial disability benefits above the rating given by Dr. Shumaker.

Claimant was found to have a 5 percent permanent impairment by Dr. Shumaker. There is no evidence in the record that permanent partial disability benefits based on the 5 percent were paid untimely.

As noted in the record, claimant had an invalid FCE. Claimant was returned to work by Dr. Shumaker, the treating physician, without any permanent restrictions. As noted, the opinions of Dr. Bansal and Dr. Luse are found not convincing regarding permanent impairment, permanent restrictions or further medical care. Claimant was terminated from American for reasons unrelated to his injury. Claimant did find employment following his termination from American. Although it is found claimant has a 20 percent industrial disability, based on all the factors as detailed above, a penalty is not appropriate in this case.

The next issue is whether defendants are entitled to a credit for benefits paid and if so, how that credit is to be applied.

The parties stipulated to a rate of 452.16 at hearing. Defendants paid claimant at a rate of $459.03 per week. In short, benefits were overpaid by $6.87 per week throughout the period of time when temporary and permanency benefits were paid. (Ex, G, pages 49-51). Claimant does not contest these figures.

The sole issue for consideration with respect to credit is whether defendants are entitled to a credit against permanent disability benefits for amounts of temporary disability benefits overpaid. In Swiss Colony, the Court ruled the plain language of Iowa Code section 85.34(5) directed that the overpayment of *any* weekly benefits is to be credited against a subsequent injury with the same employer. However, section 85.34(5) is not the controlling statutory section with respect to the overpayment at issue in this claim. Rather, the undersigned finds section 85.34(4) contains the proper remedy for determining defendants' credit. Iowa Code section 85.34(4) states:

> 4. Credits *for excess payments.* If an employee is paid weekly compensation benefits for temporary total disability under section 85.33, subsection 1, for a healing period under section 85.34, subsection 1, or for temporary partial disability under section 85.33, subsection 2, in excess of that required by this chapter and chapters 85A, 85B, and 86, the excess shall be credited against the liability of the employer for permanent partial disability under section 85.34, subsection 2, provided that the employer or the employer's representative has acted in good faith in determining and notifying an employee when the temporary total disability, healing period, or temporary partial disability benefits are terminated.

Section 85.34(4) is directly on point to the overpayment at issue in this claim. As section 85.34(4) governs claimant's credit for the excess of temporary disability benefits paid, it is determined defendants are entitled to a credit for overpaid temporary disability benefits against the award of permanent partial disability benefits.

This determination is consistent with the case of McBride v. Casey's Marketing Co., File No. 5037617 (Remand February 9, 2015). In McBride, the presiding deputy found defendants were only entitled to a credit for an overpayment of healing period benefits against payments made for future work injuries claimant sustained with the same employer. On appeal, the former workers' compensation commissioner applied the Swiss Colony case and denied defendants' credit argument. Defendants filed a petition for judicial review and the district court judge authored a ruling reversing the commissioner's decision with respect to this issue, concluding section 85.34(5) and the Swiss Colony case did not apply to the overpayment of temporary total disability. Rather, the judge ruled section 85.34(4) applied and remanded the case to the commissioner to apply section 85.34. On remand, the acting workers' compensation commissioner made the following determination:

> In light of the order of Judge Blaine, it is the determination of this acting workers' compensation commissioner; defendants shall take credit against any permanent partial disability benefits for all overpayments defendants made to claimant in the form of healing period benefits. Such a remedy for the credit is provided by Iowa Code section 85.34(4) which specifically addresses healing period benefits. To hold otherwise, would render Iowa Code section 85.34(4) utterly meaningless. Section 85.34(4) is a specific section. It is the section that governs in the present case.

(McBride at page 5)

Given agency precedent, I find that defendants are entitled to a credit for overpayment of any temporary benefits against the award of permanent benefits in this case. Regarding any overpaid permanency benefits, defendants are entitled to a credit under 85.34(5), if claimant has a subsequent injury with the same employer.

ORDER

Therefore, it is ordered:

That defendants shall pay claimant one hundred (100) weeks of permanent partial disability benefits at the rate of four hundred fifty-two and 68/100 dollars ($452.68) per week commencing on May 1, 2016.

That defendants shall pay accrued weekly benefits in a lump sum.

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).

That defendants shall receive a credit for benefits previously paid as detailed above.

That defendants shall reimburse claimant for costs associated with the IME.

That defendants shall pay costs.

That defendants shall file subsequent reports of injury as required by this agency under rule 876 IAC 3.1(2).

Signed and filed this 19th day of December, 2018.

JAMES F. CHRISTENSON
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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