BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

KRYSTAL FOSTER, Claimant, vs. EAST PENN MANUFACTURING CO., INC., Employer, and SENTINEL INSURANCE CO., Insurance Carrier, Defendants.	File No. 5061342.01 REVIEW-REOPENING DECISION Head Notes: 1803, 2501, 2502, 2905

STATEMENT OF THE CASE

Claimant, Krystal Foster, filed a petition in review-reopening seeking workers' compensation benefits from East Penn Manufacturing Company, Inc. (East Penn), employer, and Sentinel Insurance Company, insurer, both as defendants. This matter was heard on May 16, 2022, with a final submission date of June 20, 2022.

The record in this case consists of Joint Exhibits 1 through 8, Claimant's Exhibits 1 through 26, Defendants' Exhibits A through F and H, and the testimony of claimant.

Exhibit C, pages 5 through 10, 36 through 37, 39 through 47, and Exhibit G were excluded from the record for being untimely filed.

The parties filed a hearing report at the commencement of the review-reopening hearing. On the hearing report, the parties entered into various stipulations. All of those stipulations were accepted and are hereby incorporated into this review-reopening 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. Whether claimant is entitled to permanent partial disability benefits under review-reopening proceeding.

2. Whether there is a causal connection between the injury and the claimed medical expenses.

3. Whether defendants are liable for a penalty.

4. Credit.

5. Whether claimant is entitled to reimbursement for an independent medical exam (IME) under Iowa Code section 85.39.

6. Costs.

The hearing report filed with this agency did not indicate credit was an issue in dispute in this matter. (Hearing Report) Initially defendants' counsel did not indicate credit was an issue in this case. (Hearing Transcript pages 5-6) Prior to the taking of testimony from claimant, defendants' counsel indicated credit was an issue in this case. The hearing report was amended orally to include credit as an issue in dispute. (Tr., pp. 13-14)

FINDINGS OF FACT

Claimant was 30 years old at the time of hearing. (Tr., pp. 25-26) Claimant began working for East Penn in 2014. East Penn is a manufacturer of batteries. (Arbitration Decision page 2) Claimant worked as a finisher floater with East Penn. This job required claimant to do multiple functions on an assembly line. (Arb. Dec., p. 2)

On November 21, 2016, claimant was offloading batteries at the end of a line when she pushed batteries across a pallet. Claimant said she felt her shoulder pop. (Arb. Dec., p. 2)

Claimant resigned from East Penn on February 10, 2017. (Arb. Dec., p. 2)

On February 20, 2017, claimant underwent left shoulder surgery consisting of a subacromial decompression and a mini rotator cuff repair. Surgery was performed by Richard Goding, M.D. (Arb. Dec., p. 2)

After her surgery, claimant had difficulty with continued pain and popping in the left shoulder. Claimant was kept off work for a month in July of 2017. Claimant had cortisone injections in the left shoulder in May of 2017 and January of 2018. Claimant also had an AC joint injection in October of 2017. (Arb. Dec., pp. 2-3)

On April 3, 2018, claimant had a second shoulder surgery consisting of a distal clavicle resection and a biceps tenodesis. Surgery was performed by Dr. Goding. (Arb. Dec., p. 3)

In June of 2018, William Boulden, M.D., gave his opinions of claimant's condition following a records review. Dr. Boulden opined claimant's second shoulder surgery was not work-related. There was no evidence in Dr. Boulden's report what specific records, if any, he reviewed to reach this conclusion. (Arb. Dec., pp. 3, 7)

Claimant was off work from January 25, 2018, through April 12, 2018. Claimant did not receive any temporary benefits during this period of time. (Arb. Dec., p. 5)

An arbitration hearing was held on February 15, 2019. In the arbitration decision issued April 19, 2019, defendants were ordered to pay claimant temporary total disability benefits from January 25, 2018, through April 12, 2018. Defendants were also assessed a penalty of $2,390.41 for failure to pay claimant temporary benefits during the period of time detailed above. Defendants were also ordered to pay claimant's medical costs related to claimant's second shoulder surgery. (Arb. Dec., pp. 12-13)

On February 27, 2019, claimant underwent a third shoulder surgery consisting of a subacromial bursectomy, a revision of the distal claviculectomy and a revision rotator cuff repair. Surgery was performed by Mark Fish, D.O. (Joint Exhibit 4, pp. 50-53)

Claimant was taken off work by Dr. Fish from February 27, 2019, through March 14, 2019. (JE 4, p. 53)

Claimant returned to Dr. Fish on March 11, 2019, in follow-up. Claimant was returned to work in one week with no use of the left arm. Claimant was to remain in a sling for an additional four weeks. At that time, claimant was also prescribed physical therapy. (JE 4, pp. 54-56)

Dr. Fish provided follow-up care for claimant on April 15, 2019. Claimant was released to modified work status at that time. (JE 4, pp. 63-65)

In April of 2019, claimant began working for Air Filtration. Claimant worked with Air Filtration until April of 2021. During her time with Air Filtration, claimant earned $15.00 an hour and worked 40 hours per week. (Claimant's Exhibit 10, p. 26)

In a May 6, 2019, opinion, Dr. Fish opined that claimant's third shoulder surgery was related to the work injury of November 21, 2016. (JE 4, p. 66)

In a May 30, 2019, letter, Dr. Fish limited claimant to lifting up to 10 pounds over shoulder height with the left arm. (JE 4, p. 74)

Claimant returned to Dr. Fish on July 8, 2019. Claimant indicated she was doing great. Claimant was continuing physical therapy. She was limited to lifting up to 15 pounds shoulder height with the left arm. (JE 4, pp. 78-80)

Claimant saw Dr. Fish on August 8, 2019. Dr. Fish found claimant at maximum medical improvement (MMI) as of that date. He returned claimant to work with no restrictions. (JE 4, pp. 82-83)

On September 12, 2019, claimant was discharged from physical therapy and told to continue exercises at home. (Ex. H, p. 3)

In April of 2021, claimant left employment with Air Filtration. From approximately April of 2021 through August of 2021, claimant worked providing elder care in a client's home. Claimant worked an overnight shift. (Ex. 10, p. 26; Tr., p. 31) From August 2021 through March 2022 claimant worked as a shipping clerk at Air Filtration. Claimant earned $15.75 an hour at that job. (Ex. 10, p. 27)

On April 8, 2022, claimant underwent a functional capacity evaluation (FCE) performed by John Kruzich, OTR/L. Claimant was found to have given consistent effort

in the FCE. Occupational therapist Kruzich found that claimant was able to function in a light physical demand level. He restricted claimant to lifting 10 pounds occasionally waist to shoulder. He also restricted claimant to bilateral lift of 25 pounds and to avoid waist to overhead lifting and overhead reaching on the left. (JE 8)

In an April 14, 2022, report, Sunil Bansal, M.D., gave his opinions of claimant's condition following an IME. Claimant had continued weakness in the left shoulder. Claimant was unable to raise her left arm overhead. Claimant could not reach out to lift with the left. Dr. Bansal found claimant's left shoulder condition was caused by her work accident at East Penn on November 21, 2016. (JE 3, pp. 28-36)

Dr. Bansal found claimant had a 15 percent permanent impairment to the left upper extremity, converting to a 9 percent permanent impairment to the body as a whole. He agreed with permanent restrictions detailed in the April 8, 2022, FCE report. (JE 3, pp. 35-36)

Claimant testified she has difficulty reaching overhead. She said she uses her right arm to reach things. Claimant said it is hard for her to reach or lift above her head with her left arm. Claimant has some difficulty with sleep because of her left shoulder. (Tr., pp. 45-47)

Claimant testified that the third surgery improved her condition. She also testified that after the third surgery she did not feel her shoulder was completely healed. Claimant testified she has lost strength and range of motion in the left shoulder. She said she still has pain and soreness in the left shoulder. (Tr., pp. 45-47, 59)

CONCLUSION OF LAW

The first issue to be determined is whether claimant is entitled to additional benefits under review-reopening proceeding.

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. 6.904(3).

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

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

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

Upon review-reopening, claimant has the burden to show a change in condition related to the original injury since the original award or settlement was made. The change may be either economic or physical. Blacksmith v. All-American, Inc., 290 N.W.2d 348 (Iowa 1980); Henderson v. Iles, 250 Iowa 787, 96 N.W.2d 321 (1959). A mere difference of opinion of experts as to the percentage of disability arising from an original injury is not sufficient to justify a different determination on a petition for review-reopening. Rather, claimant's condition must have worsened or deteriorated in a manner not contemplated at the time of the initial award or settlement before an award on review-reopening is appropriate. Bousfield v. Sisters of Mercy, 249 Iowa 64, 86 N.W.2d 109 (1957). A failure of a condition to improve to the extent anticipated originally may also constitute a change of condition. Meyers v. Holiday Inn of Cedar Falls, Iowa, 272 N.W.2d 24 (Iowa App. 1978).

At the time of the arbitration hearing, claimant had undergone two shoulder surgeries and was not at MMI. Claimant had not yet been found to have any permanent impairment. At the time of the arbitration hearing, claimant did not have any permanent restrictions. (Arb. Dec., pp. 2-4, 7)

At the time of the review-reopening hearing, claimant had undergone three shoulder surgeries. Claimant was found to be at MMI. She was also found to have a permanent impairment to the left shoulder. (JE 4, pp. 50-53; JE 3, pp. 28-36) Given this record, claimant has carried her burden of proof she has had a physical change in condition related to the original injury since the arbitration decision was issued.

Claimant also needs to carry her burden of proof to show she has sustained an impairment of earning capacity proximately caused by the original injury. E.N.T. Associates v. Collentine, 525 N.W.2d 827, 829 (Iowa 1994)

Claimant was able to work at Air Filtration on two different occasions. She also provided in-home care for an elderly client. Claimant had a job at Hy-Vee that she was to begin in April 2022, but declined the job due to a back condition. The back condition was not related to the November 21, 2016, work injury. (Ex. 10, pp. 26-27)

Three experts have opined regarding claimant’s permanent restrictions. Occupational therapist Kruzich performed an FCE on claimant. The results of that testing showed that claimant was capable of working up to a light physical demand level. He limited claimant to occasionally lifting 10 pounds waist to shoulder, and occasionally carrying up to 25 pounds with both hands. The FCE also limited claimant to avoid waist to overhead lifting, left hand overhead reaching, and left unilateral sustained overhead reaching. (JE 8, p. 89)

Dr. Bansal performed an IME on claimant. He agreed with the restrictions found in the FCE. (JE 3, pp. 35-36)

Dr. Fish performed claimant's third surgery. (JE 4, pp. 82-83) Dr. Fish opined claimant had no permanent restrictions. Dr. Fish's opinion regarding permanent restrictions is questionable. It is unclear how Dr. Fish arrived at his opinion that claimant has no permanent restrictions. His August 8, 2019, report does not show he performed any testing or assessments on claimant to reach the opinion claimant has no permanent restrictions. He offers no rationale why claimant, who has had three shoulder surgeries, has no permanent restrictions to the left upper extremity. Given these problems, Dr. Fish's opinion regarding permanent restrictions is found not convincing.

Occupational therapist Kruzich and Dr. Bansal opined that claimant has permanent restrictions that limit her ability to lift, reach, push and pull. Dr. Fish's opinions regarding permanent restrictions are found not convincing. Given this record, it is found that claimant has permanent restrictions as detailed in the FCE.

Claimant has a high school education. She has had three shoulder surgeries. The only opinion regarding permanent impairment finds that claimant has a 9 percent permanent impairment to the body as a whole regarding her left shoulder. Claimant has been able to find employment since leaving East Penn. Claimant does have permanent restrictions which limit the type of employment she can perform in the future. Given this record, it is found that claimant has a 10 percent loss of earning capacity or industrial disability due to her November 21, 2016, injury. Based on the finding from Dr. Fish that claimant was at maximum medical improvement as of August 8, 2019, commencement of benefits shall begin on that date. (JE 4, pp. 82-83)

The next issue to be determined is whether there is a causal connection between the injury and the claimed medical expenses.

The employer shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance, and hospital services and supplies for all conditions compensable under the workers' compensation law. The employer shall also allow reasonable and necessary transportation expenses incurred for those services. The employer has the right to choose the provider of care, except where the employer has denied liability for the injury. Section 85.27. Holbert v. Townsend Engineering Co., Thirty-second Biennial Report of the Industrial Commissioner 78 (Review-Reopening October 1975).

The record indicates East Penn stipulated that they are liable for claimant's causally related medical expenses. (Tr., pp. 18-19; Defendants' Exhibit G) Claimant's date of injury is November 21, 2016. Claimant has had three shoulder surgeries. Defendants are liable for all three of these shoulder surgeries. At the time of the review-reopening hearing, a number of providers still had outstanding medical bills for the first and second surgeries. (Ex. 12, p. 32; Tr., p. 40) Given this record, defendants are liable for all medical bills causally connected to claimant's three shoulder surgeries and her injury as detailed in Exhibit 12.

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

> If we were to construe [section 86.13] to permit the avoidance of penalty if any amount of compensation benefits are paid, the purpose of the penalty statute would be frustrated. For these reasons, we conclude section 86.13 is applicable when payment of compensation is not timely . . . or when the full amount of compensation is not paid.

Id.

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

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

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

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

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

Penalty is not imposed for delayed interest payments. Davidson v. Bruce, 594 N.W.2d 833, 840 (Iowa App. 1999). Schadendorf v. Snap-On Tools Corp., 757 N.W.2d 330, 338 (Iowa 2008).

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

Claimant seeks penalties for two periods. In the arbitration decision, defendants were ordered to pay temporary total disability benefits at the rate of $434.62 from January 25, 2018, through April 12, 2018. (Arb. Dec., p. 12)

East Penn untimely appealed that decision to the Iowa Court of Appeals. The Court of Appeals issued a decision on December 15, 2021, affirming the agency decision. (Ex. 21, pp. 100-116) The record indicates the Court of Appeals' decision was electronically served to both parties on December 15, 2021. (Ex. 22, pp. 117-118) Defendants paid claimant $7,770.44 on February 14, 2022, or approximately 61 days after the Court of Appeals' decision.

Defendants' counsel made a professional statement at the time of hearing that the Appeals' decision went to his spam folder, which was the cause of the delay in payment of the benefits ordered by the Court of Appeals. (Tr., p. 21) The fact that defendants untimely paid benefits owed to claimant because defendants' counsel was unable to monitor his email is not a reasonable explanation for the delay of benefits in this case. A 50 percent penalty is appropriate. Defendants are liable for a penalty of $3,885.22 for the delay of payment of benefits as awarded by the Iowa Court of Appeals ($7,770.44 x 50 percent).

Claimant also seeks a penalty for the late payment of temporary benefits for the period of February 20, 2019, through April 9, 2019. Dr. Fish took claimant off work on February 27, 2019, for her left shoulder surgery. (JE 4, p. 53) Dr. Fish saw claimant again on March 11, 2019, and kept her off work for another week. He returned claimant to work with no use of the left arm. (JE 4, pp. 55-57) On March 13, 2019, claimant's counsel requested claimant receive temporary benefits from defendants. (Ex. 2, p. 2) On or about April 8, 2019, a check for temporary benefits was paid to claimant for the period of time from February 20, 2019, through April 8, 2019. (Ex. 23) Claimant returned to Air Filtration in April 2019.

It is unclear from the record what day in April 2019 claimant returned to Air Filtration. It is clear that temporary total disability benefits from February 20, 2019, through March 26, 2019, were paid untimely. Defendants offered no rationale why temporary benefits for this period of time were paid untimely. Temporary benefits owed from February 20, 2019, through March 26, 2019, total approximately $2,173.10. (Ex. 23) A 50 percent penalty is appropriate. Defendants are liable for $1,086.55 for the untimely payment of temporary benefits from February 20, 2019, through March 26, 2019 ($2,173.10 x 50 percent).

In brief, defendants are liable for a total penalty of $4,971.77 for the late payment of benefits as ordered by the Iowa Court of Appeals and for the late payment of temporary benefits as detailed above ($3,885.22 plus $1,086.55).

The next issue to be determined is whether defendants are due a credit for benefits previously paid.

The burden of proving entitlement to a credit rests on the employer who seeks the credit. Albertson v. Benco Manufacturing, File Number 5010764 (Appeal Decision July 27, 2007); Greenlee v. Cedar Falls Community Schools, File Number 934910 (Appeal Decision December 27, 1993); McKernan v. Morningside College, File Number 955069 (Appeal Decision February 22, 1993)

Defendants appear to contend that they are due a credit for permanent partial disability benefits previously paid. Exhibit A, page 1 states: "Defendants' [*sic*] voluntarily paid 5% permanent impairment on June 28, 2018, 50 weeks at $461.31 = $11,533.00." Defendants appear to contend this credit is for 50 weeks of benefits paid at $461.31 for a total of $11,533.00. (Ex. A, p. 1)

Payment records indicate that claimant's counsel was paid $11,533.00 on or about June 29, 2018. Payment records do not indicate what this amount was for. No witness testified as to what the $11,533.00 represented. Fifty weeks of benefits at the rate of $461.31 equals $23,065.50, not $11,533.00.

The Court of Appeals' decision does suggest that the $11,533.00 at issue was potentially paid for permanent partial disability benefits. (Ex. 21, pp. 113-115) However, as noted, defendants bear the burden of proof in establishing credit. Payment records at Exhibit A, page 3, do not indicate what the amount of $11,533.00 was for. No witness testified, and no affidavits were provided, that explain what the $11,533.00 represents. Fifty weeks of benefits at the rate of $461.31 does not equal $11,533.00 as defendants indicate in Exhibit A, page 1. Given the numerous ambiguities in the record, defendants have failed to carry their burden of proof they are due a credit for the alleged payment of $11,533.00 toward permanent partial disability benefits.

The next issue to be determined is whether claimant is due reimbursement for Dr. Bansal's 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).

Regarding the IME, the Iowa Supreme Court provided a literal interpretation of the plain language of Iowa Code section 85.39, stating that section 85.39 only allows the employee to obtain an independent medical evaluation at the employer's expense if dissatisfied with the evaluation arranged by the employer. Des Moines Area Reg'l Transit Auth. v. Young, 867 N.W.2d 839, 847 (Iowa 2015).

Under the Young decision, an employee can only obtain an IME at the employer's expense if an evaluation of permanent disability has been made by an employer-retained physician.

Iowa Code section 85.39 limits an injured worker to one IME. Larson Mfg. Co., Inc. v. Thorson, 763 N.W.2d 842 (Iowa 2009).

The Supreme Court, in Young noted that in cases where Iowa Code section 85.39 is not triggered to allow for reimbursement of an independent medical examination (IME), a claimant can still be reimbursed at hearing the costs associated with the preparation of the written report as a cost under rule 876 IAC 4.33. Young at 846-847.

Dr. Bansal gave his opinions of claimant's permanent impairment in an April 14, 2022 report. (JE 3) There is no evidence an expert retained by defendants gave an opinion of permanent impairment for the review-reopening proceeding prior to Dr. Bansal's report. Based on this, claimant is not due reimbursement of the IME under Iowa Code section 85.39.

However, claimant can still be awarded the costs of preparation of the report as a cost under Rule 876 IAC 4.33. Costs are awarded at the discretion of the agency. Claimant has prevailed on most of the issues in this matter. Given this record, claimant is awarded the costs associated with the preparation of Dr. Bansal's report of $2,060.00. (JE 3, p. 37)

The final issue to be determined is costs. Claimant seeks a number of costs as detailed in Exhibit 25. Claimant seeks costs for the transcript of the arbitration hearing. This is a cost related to the arbitration decision and is not related to this hearing. The transcript of the arbitration decision is already available in this agency's docket. Given this record, the cost of the hearing transcript is not awarded to claimant.

Claimant also seeks reimbursement for the cost of the FCE. The FCE was not ordered by a treating or evaluating physician and is not reimbursable as a medical expense under Iowa Code section. 85.27. There was no itemization for the billing of the FCE as to the costs associated with the report and the exam. (Ex. 26, p. 127) Based on this, the cost of the report for the FCE cannot be taxed as a cost under rule 876 IAC 4.33. Jasper v. Nordstrom, File No. 5052714 (Ruling on Application for Rehearing October 16, 2020)

Claimant also seeks copying costs for the arbitration hearing transcript and copy of briefs regarding the arbitration decision. There is no indication that the arbitration transcript is relevant to the review-reopening hearing. The arbitration transcript is available in this agency's docket. Given this record, claimant is not awarded copying costs for these materials.

Claimant is awarded the costs of the filing fee, service costs, and costs associated with the deposition transcript.

ORDER

THEREFORE IT IS ORDERED:

Defendants shall pay claimant 50 (fifty) weeks of permanent partial disability benefits at the rate of four hundred thirty-four and 62/100 dollars ($434.62) per week commencing on August 8, 2019.

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

Defendants shall pay claimant four thousand nine hundred seventy-one and 71/100 dollars ($4,971.71) in penalty.

Defendants shall pay claimant's medical costs as described above.

Defendants shall pay claimant two thousand sixty and 00/100 ($2,060.00) for the costs of the preparation of Dr. Bansal's report.

Defendants shall pay other costs as detailed above.

Defendants shall file subsequent reports of injury as required by this agency under Rule 876 IAC 3.1(2).

Signed and filed this 31st day of August, 2022.

JAMES F. CHRISTENSON
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Randall Schueller (via WCES)

Tiernan Siems (via WCES)

Right to Appeal: This decision shall become final unless you or another interested party appeals within 20 days from the date above, pursuant to rule 876-4.27 (17A, 86) of the Iowa Administrative Code. The notice of appeal must be filed via Workers' Compensation Electronic System (WCES) unless the filing party has been granted permission by the Division of Workers' Compensation to file documents in paper form. If such permission has been granted, the notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 150 Des Moines Street, Des Moines, Iowa 50309-1836. The notice of appeal must be received by the Division of Workers' Compensation within 20 days from the date of the decision. The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or legal holiday.