BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

LESLIE SNYDER, Claimant, vs. MICHELS CORP., Employer, and ARCH INSURANCE CO., Insurance Carrier, Defendants.	File Nos. 5058185, 5058331 A R B I T R A T I O N D E C I S I O N Head Note Nos.: 1402.30, 1403.30, 1802, 1803, 2501, 2502, 2701, 4000.2

STATEMENT OF THE CASE

Claimant, Leslie Snyder, filed petitions in arbitration seeking workers' compensation benefits from Michels Corp. (Michels) employer, and Arch Insurance Company, insurer, both as defendants. This matter was heard in Des Moines, Iowa on September 7, 2018 by Deputy Workers' Compensation Commissioner Erica Fitch.

The record in this case consists of Joint Exhibits 1-6, Claimant's Exhibits 1-10, Defendants' Exhibits A through E, and the testimony of claimant.

By order of delegation of authority, Deputy Workers' Compensation Commissioner Jim Christenson was appointed to prepare the finding of facts and proposed decision in these cases.

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

For file number 5058185 (date of injury November 10, 2016):

1. Whether claimant sustained an injury that arose out of and in the course of employment.

2. Whether claimant's claims for benefits is barred by application of Iowa Code section 85.16(3).

3. Whether the injury resulted in temporary disability.

4. Whether the injury resulted in a permanent disability; and if so

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

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

7. Whether claimant is entitled to reimbursement of an independent medical evaluation (IME) under Iowa Code section 85.39.

8. Whether claimant is entitled to alternate medical care.

9. Whether defendants are liable for a penalty under Iowa Code section 86.13.

10. Costs.

Regarding file number 5058331 (date of injury December 4, 2016):

1. Whether claimant sustained an injury that arose out of and in the course of employment.

2. Whether claimant's claims for benefits is barred by application of Iowa Code section 85.16(3).

3. Whether the injury resulted in temporary disability.

4. Whether the injury resulted in a permanent disability; and if so

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

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

7. Whether claimant is entitled to reimbursement of an independent medical evaluation (IME) under Iowa Code section 85.39.

8. Whether claimant is entitled to alternate medical care.

9. Whether defendants are liable for a penalty under Iowa Code section 86.13.

10. Costs.

FINDINGS OF FACT

Claimant was 63 years old at the time of hearing. Claimant graduated from high school. Claimant went to school for one and a half years for accounting but did not receive a degree. Claimant began working through the International Brotherhood of Electrical Workers beginning in 1979. Claimant became a journeyman lineman in 1991. (Transcript pages 8-9)

Claimant testified he lived in Floodwood, Minnesota. Claimant has worked jobs in Iowa, South Dakota, Florida, and the Virgin Islands. (Tr. pp. 9-10; Exhibit 4)

Claimant was hired by Michels through the union to work as a journeyman lineman in Buffalo, Iowa. (Tr. p. 53)

Claimant's prior medical history is relevant. Claimant injured his right shoulder in a motor vehicle accident in 1981. Claimant had a right shoulder work injury in October of 1992. Claimant testified he strained his hip in 2009. Claimant testified in January of 2011 he strained back muscles lifting a cabinet. There is no record in evidence any of these injuries resulted in permanent restrictions or permanent impairments. (Tr. pp. 11-14; Joint Exhibit 1, pp. 1-5)

On November 10, 2016 claimant was operating an auger mounted on a track unit. As he was climbing off of the seat on the auger unit, claimant's foot slipped on a hammer on a step and claimant fell with his right hand holding onto the ladder. Claimant said he felt pain in his low back, neck and shoulders. Claimant said he worked a few hours after the accident. He said the pain became worse, and he ultimately went to a walk-in clinic. (Tr. pp. 15-17)

On November 14, 2016 claimant was evaluated at UnityPoint Health by George Hopkins, PA-C after falling off a ladder. X-rays showed degenerative changes at the C6-C7 levels and degenerative changes in the lumbar spine thought to be age related. Claimant was assessed as having neck pain and left-sided back pain. Claimant was told to use ice, massage and prescribed medication. (Jt. Ex. 2, pp. 11-14)

Claimant said healthcare providers suggested chiropractic care. Claimant said the general foreman referred claimant to a chiropractic clinic close to the job site. Claimant said he received six to eight chiropractic treatments. (Tr. p. 17)

On November 19, 2016 claimant returned to UnityPoint Health with complaints of worsening neck and back pain. Claimant had been to a chiropractor which helped with symptoms. Claimant said he would treat with his family doctor when he returned home at Christmas. Claimant was treated with medication. (Jt. Ex. 2, pp. 15-16)

Claimant said the job at the Buffalo site was scheduled to be completed around Christmas time. (Tr. p. 17)

On December 4, 2016 claimant was on the ground watching two coworkers who were up in the air. Claimant said a coworker began running towards him. Claimant thought there must be an emergency to his other side, such as a truck fire. He turned and the running coworker tackled him and knocked him into the snow. Claimant said the coworker told him, "I was just looking to have some fun." (Tr. pp. 18-20) Claimant testified he did nothing to provoke the coworker. Claimant said the coworker who tackled him had work issues. (Tr. pp. 19-20) Claimant said he was not a willing participant in the tackling incident. (Tr. pp. 28-29, 61)

Claimant said he had been getting better from the November of 2016 injury. He said getting tackled to the ground aggravated his prior injury and made his pain more intense. (Tr. pp. 20-21)

Claimant said he asked if Doyle Gould, a supervisor, would write a statement regarding the accident. (Tr. pp. 21-22, 61)

In an undated statement, Mr. Gould wrote,

> "To whom it may concern regarding Les Snyder's injury in Dec. of 2016, Buffalo, Iowa
>
> While I was Les's foreman he was hit while walking from crane he had just started. One of the guys Robert? hit Les while he was walking and threw him into the snow.
>
> Les was not a willing participant.
>
> Robert was working for Timmy Shoaf.

(Ex. 3)

Claimant testified he was given a week off paid to get better. Claimant said after he took the week off, he returned to the job site. Claimant testified the coworker who tackled him was disciplined. Claimant testified he was not disciplined. (Tr. p. 24)

On December 20, 2016 claimant was evaluated at UnityPoint Health by James Bain, M.D. for neck and back pain. Claimant was assessed as having chronic neck pain and chronic lower back pain. He was treated with medication. (Jt. Ex. 2, pp. 18-19)

Claimant testified he worked at the Buffalo, Iowa job site until December 20 or December 21, 2016. (Tr. p. 64)

On December 27, 2016 claimant was seen by Joseph McLean, M.D. Notes indicate claimant first injured his neck and back in early November when he fell off a ladder about four feet. Claimant was getting better until " . . . a friend decided to tackle him recently." Claimant's neck and back pain had worsened. Claimant was looking to

have an MRI. Claimant was told he needed to see his primary care physician to set up an order for the MRI. Claimant left without being examined. (Jt. Ex. 3, pp. 20-21)

Claimant was evaluated by Christopher Baumbach, M.D. on January 9, 2017. Claimant indicated he initially hurt his neck stepping off a ladder. He indicated he was healing until one of his coworkers was "roughhousing" with him and tried to tackle claimant resulting in re-injury. (Jt. Ex. 3, p. 22) Claimant had pain and limited range of motion in the neck. Claimant was assessed as having left-sided cervical pain. A cervical MRI was recommended. (Jt. Ex. 3, pp. 22-24)

On January 13, 2017 claimant underwent a cervical MRI. It showed mild swelling at C3-4 facet that might be due to reactive, degenerative, or posttraumatic changes. (Jt. Ex. 4, p. 34)

On January 19, 2017 claimant began physical therapy for neck pain. (Jt. Ex. 5, p. 35)

On February 22, 2017 claimant had a cervical epidural steroid injection (ESI). (Jt. Ex. 6)

Claimant returned to Dr. Baumbach on February 27, 2017 in follow up. Claimant's neck pain had improved. Claimant had been attending physical therapy two times a week for four weeks and this had helped his condition. Claimant was recommended to return to physical therapy two times a week for the next month. (Jt. Ex. 3, pp. 25-26)

Claimant returned to Dr. Baumbach on March 24, 2017. Claimant had physical therapy for two months. Claimant still had pain with some range of motion. Claimant was returned to work without restrictions. (Jt. Ex. 3, pp. 28-30)

Claimant testified he has not seen Dr. Baumbach since March 24, 2017. (Tr. p. 105)

In a July 26, 2017 letter, Lineco wrote to claimant regarding claimant's medical care coverage. (Ex. 8) Claimant testified Lineco was his private health insurer. Claimant said Lineco initially paid for some of his medical charges. Once Lineco found claimant was seeking medical care for a workers' compensation claim, Lineco would not pay for any charges associated with the November of 2016 and December of 2016 work injuries. Lineco told claimant any charges related to those dates of injury would be denied. Claimant says he has had a difficult time getting treatment for his neck injury, as neither Lineco nor the workers' compensation carrier will pay for care. (Tr. pp. 38-40; Ex. 8)

In July of 2017 claimant began working at Gary, South Dakota. (Ex. C, pp. 17-18) Records indicate claimant began on this job site on July 19, 2017. (Ex. C, p. 18)

In early August while on the South Dakota job site, claimant was driving a truck when he hit a rut in the road and hit his head on the top of the cab. Approximately three days later, on or about August 7, 2017, while on the South Dakota job site, claimant was lifting an insulator box crate when he strained his back and neck. After the August 7, 2017 incident, claimant requested a layoff. Claimant testified he did not file a workers' compensation claim regarding either of these two incidences. (Ex. A, p. 3; Ex. D, p. 20; Tr. pp. 35-38, 70-74)

Claimant said after the South Dakota job he worked a job in Southeast or South Central Minnesota for a contractor called Hooper. After the job for Hooper, claimant worked for OneSource Power in Florida in September of 2017. Claimant said this work was done after a hurricane. In December claimant went to the Virgin Islands to work after a hurricane. Claimant said he believed he worked in the Virgin Islands for approximately three and a half months returning in March of 2018. Claimant said he also believed he worked a job for approximately five weeks in July to August of 2018. (Tr. pp. 77-80, 82-86, 88-91, 95-96)

Claimant said he had difficulty getting hired for jobs through the union after these positions. He said, recently, some companies he worked for in the past, began exercising their right to refuse him to work. At the time of hearing, claimant had no jobs lined up for the immediate future. (Tr. pp. 42-46)

In an October 24, 2017 report, David Segal, M.D., gave his opinions of claimant's conditions following an IME. Claimant had continued neck pain aggravated by any movement of the neck to the right or up and down. Claimant also had intermittent right arm pain. Claimant indicated the ESI had helped him with approximately 80 percent of his pain for two months. (Ex. 1, pp. 1-8)

Dr. Segal opined the first and second injuries resulted in a permanent disability. He assessed claimant as having a traumatic cervical facet arthropathy, preexisting degenerative spine disease, right cervical radiculopathy, posttraumatic headaches, lumbar traumatic facet arthropathy and right traumatic SI joint arthropathy. (Ex. 1, pp. 10-11)

Dr. Segal opined claimant had a 20 percent permanent impairment to the body as a whole for the cervical spine injury based upon the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition. He found claimant had a 7 percent permanent impairment to the lumbar spine. Using the combined values charts in the Guides, he found claimant had a 26 percent permanent impairment to the body as a whole.

Dr. Segal prescribed approximately 30 different permanent restrictions. They include, but are not limited to, lifting or carrying less than 10 pounds frequently, pushing or pulling less than 10 pounds frequently, only occasionally looking up and down, limited repetitive bending, and no use of ladders. (Ex. 1, p. 12) He found claimant reached maximum medical improvement (MMI) as of May 4, 2017.

Dr. Segal recommended a number of further treatments. They included, but are not limited to, ESIs, facet injections, repeat MRIs, physical therapy, orthotics, and EMG studies. (Ex. 1, pp. 12-13)

In an April 16, 2018 report, Eric Deal, M.D., gave his opinions of claimant's condition following an IME. Claimant had continued neck pain. Claimant said he still had back pain, but compared to his neck pain, ". . . it is hardly worth mentioning." (Ex. A, p. 4)

Dr. Deal assessed claimant as having chronic neck and back pain and preexisting degenerative disease in his cervical and lumbar spine. He opined claimant had a resolved cervical and lumbar sprain. This was based on an exam that was allegedly normal, ". . . outside of decreased voluntary range of motion mainly to the cervical spine. . ." (Ex. A, p. 10) Dr. Deal indicated there was ". . . no objective or subjective neurologic abnormalities in either the cervical or the lumbar spine to substantiate any work-related diagnosis." (Ex. A, pp. 10-11) He opined claimant's preexisting degenerative arthritic condition in the cervical and lumbar spine were not aggravated or exacerbated by the work incident. (Ex. A, pp. 10-12)

Claimant said he still has neck pain and difficulty with range of motion in his neck. He said his pain will go down his arm when he is forced to turn suddenly. (Tr. p. 46)

Claimant says he has difficulty driving with his neck pain. He said he does not believe he can lift as much as he could before the injury. (Tr. pp. 46-47)

Claimant said he has been able to work all jobs since his work accident but has pain. Claimant said he modifies the ways he positions his body and the way he works to avoid neck pain. (Tr. pp. 95-97) Claimant said he has had limitations with reaching overhead. (Tr. p. 97)

Claimant believes he is limited in duration of his use of power tools since his work injury. (Tr. pp. 98-99) He said he is limited in the time he can drive given his neck pain. (Tr. p. 99)

Claimant said he has not treated with anyone for his neck pain since leaving Dr. Baumbach's care. (Tr. p. 105) He said this is because he cannot afford to pay out of pocket for treatment for his neck, and neither the workers' compensation insurer or his healthcare insurer will pay for care. (Tr. pp. 105-106)

At the time of hearing claimant was not taking any prescription medication for his work injury. (Tr. p. 105) Claimant testified he would like further treatment for his work injury. (Tr. pp. 106-107)

CONCLUSIONS OF LAW

The first issue to be determined is if claimant sustained an injury that arose out of and in the course of employment.

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).

The claimant has the burden of proving by a preponderance of the evidence that the alleged injury actually occurred and that it both arose out of and in the course of the employment. Quaker Oats Co. v. Ciha, 552 N.W.2d 143 (Iowa 1996); Miedema v. Dial Corp., 551 N.W.2d 309 (Iowa 1996). The words "arising out of" referred to the cause or source of the injury. The words "in the course of" refer to the time, place, and circumstances of the injury. 2800 Corp. v. Fernandez, 528 N.W.2d 124 (Iowa 1995). An injury arises out of the employment when a causal relationship exists between the injury and the employment. Miedema, 551 N.W.2d 309. The injury must be a rational consequence of a hazard connected with the employment and not merely incidental to the employment. Koehler Electric v. Wills, 608 N.W.2d 1 (Iowa 2000); Miedema, 551 N.W.2d 309. An injury occurs "in the course of" employment when it happens within a period of employment at a place where the employee reasonably may be when performing employment duties and while the employee is fulfilling those duties or doing an activity incidental to them. Ciha, 552 N.W.2d 143.

The claimant has the burden of proving by a preponderance of the evidence that the injury is a proximate cause of the disability on which the claim is based. A cause is proximate if it is a substantial factor in bringing about the result; it need not be the only cause. A preponderance of the evidence exists when the causal connection is probable rather than merely possible. George A. Hormel & Co. v. Jordan, 569 N.W.2d 148 (Iowa 1997); Frye v. Smith-Doyle Contractors, 569 N.W.2d 154 (Iowa App. 1997); Sanchez v. Blue Bird Midwest, 554 N.W.2d 283 (Iowa App. 1996).

The question of causal connection is essentially within the domain of expert testimony. The expert medical evidence must be considered with all other evidence introduced bearing on the causal connection between the injury and the disability. Supportive lay testimony may be used to buttress the expert testimony and, therefore, is also relevant and material to the causation question. The weight to be given to an expert opinion is determined by the finder of fact and may be affected by the accuracy of the facts the expert relied upon as well as other surrounding circumstances. The expert opinion may be accepted or rejected, in whole or in part. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); IBP, Inc. v. Harpole, 621 N.W.2d 410 (Iowa 2001); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995). Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417 (Iowa 1994). Unrebutted expert medical testimony cannot be summarily rejected. Poula v. Siouxland Wall & Ceiling, Inc., 516 N.W.2d 910 (Iowa App. 1994).

Claimant testified he injured his neck and back while climbing down a ladder or a platform on November 10, 2016. He also testified he reinjured his neck and back after being tackled by a coworker on December 4, 2016. There is no evidence in the record that disputes the occurrence of either incident. Medical records in numerous exhibits corroborate these two work incidents. (Jt. Ex. 2, pp. 11-15; Jt. Ex. 3, pp. 20-22; Ex. 4, p. 31; Ex. 5, p. 35; Ex. A, pp. 2, 1, 9; Ex. 3) Given this record, claimant has carried his burden of proof he sustained work-related injuries on November 10, 2016 and December 4, 2016.

The next issue to be determined is whether claimant's claim for benefits is barred by application of Iowa Code section 85.16(3).

Code section 85.16(3) provides, in relevant part, that no compensation under chapter 85 will be allowed for an injury caused "by the willful act of a third party directed against the employee for reasons personal to such employee."

The employer has the burden of proof to establish this affirmative defense. Nelson v. Cities Service Oil Co., 259 Iowa 1209, 1214; 146 N.W.2d 261 (1967). The affirmative defense under section 85.16(3) can apply to co-workers. Xenia Rural Water Dist. v. Vegors, 786 N.W.2d 250, 258 (Iowa 2010).

Questions of intent or motivation may be drawn from inferences based on the facts and circumstances of a situation. Everts v. Jorgensen, 227 Iowa 818, 827; 289 N.W. 11 (1939).

Horseplay, in which an injured employee instigates the activity or actively participates, does not arise out of and in the course of employment. Id. at 255; Ford v. Barcus, 261 Iowa 616, 623, 155 N.W.2d 507, 511 (1968); Wittmer v. Dexter Mfg. Co., 204 Iowa 180, 185, 214 N.W.2d 700, 702 (1927). On the other hand, not all acts of horseplay bar recovery. Vegors, 786 N.W.2d at 255. Instead, the relevant factual and legal question is whether the injured employee's actions substantially deviated from the employment activities so as to remove claimant from the course of his employment. Id.

If claimant can prove he was not the instigator, and not actively engaged in the horseplay that resulted in his injury, his claim is compensable. Id. at 254

Regarding the November 10, 2016 date of injury (file number 5058185), there is no evidence in the records claimant's fall from the ladder/platform was caused by the willful acts of a third-party directed against claimant for reasons personal to claimant. Given this record, defendants fail to carry their burden of proof the November 10, 2016 date of injury is barred by application of Iowa Code section 86.13(3).

Regarding the December 4, 2016 date of injury (file number 5058331), defendants contend the tackling incident involved in this injury was horseplay and

claimant's claim for benefits for this injury is barred by application of Iowa Code section 85.16(3).

The record indicates claimant was tackled by a coworker at the Buffalo, Iowa job site. There are a few medical records in evidence that suggest claimant participated in the tackling incident. (Jt. Ex. 3, pp. 20-22; Jt. Ex. 4, p. 31) However, claimant consistently and credibly testified in the hearing he did not participate in the incident and that he was blindsided by the tackling incident. (Tr. pp. 19-20, 20-25, 28-29; Ex. 1, p. 7; Ex. A, p. 2) Claimant's testimony is corroborated by the undated statement by his foreman, Mr. Gould. (Ex. 3) It is clear from the evidence in the record claimant was not a willing participant in the tackling incident. The record indicates claimant was merely standing on the ground observing two coworkers when an irresponsible coworker knocked him down to have some fun. Given this record, defendants have failed to carry their burden of proof the December 4, 2016 date of injury is barred by application of Iowa Code section 85.16(3).

The next issue to be determined is whether the injury resulted in temporary disability.

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.

When an injured worker has been unable to work during a period of recuperation from an injury that did not produce permanent disability, the worker is entitled to temporary total disability benefits during the time the worker is disabled by the injury. Those benefits are payable until the employee has returned to work, or is medically capable of returning to work substantially similar to the work performed at the time of injury. Section 85.33(1).

Regarding the November 10, 2016 date of injury, in the hearing report claimant indicated he only sought temporary benefits for the periods of December 21, 2016 through March 26, 2017. Claimant testified he had no recollection if he missed any work from November 10, 2016 through December 4, 2016. (Tr. p. 58) Given this record, claimant has failed to carry his burden of proof his November 10, 2016 date of injury resulted in a temporary disability.

Regarding the December 4, 2016 date of injury, claimant contends he is due temporary benefits from December 21, 2016 through March 26, 2017. Claimant testified at hearing, the Buffalo job site was scheduled to finish around Christmas. Records from claimant's visit at UnityPoint Clinic on December 20, 2016 do not indicate claimant was given any restrictions at that time. Claimant indicated at that visit his job was completed in Buffalo, Iowa and he was returning home. (Jt. Ex. 2, p. 18; Tr. p. 64) Claimant sought medical treatment in Minnesota from January 9, 2017 through March 27, 2017. He also received physical therapy from approximately January 19, 2017 through February 17, 2017. None of these records indicate claimant was under any temporary or permanent restrictions. (Jt. Ex. 3, pp, 20, 22, 25; Jt. Ex. 4, pp. 31-34; Jt. Ex. 5; Jt. Ex. 6) On March 27, 2017 claimant was released to return to work without restrictions. (Jt. Ex. 3, p. 30) Given this record, claimant has failed to carry his burden of proof he is due temporary benefits, of any kind, from December 21, 2016 through March 26, 2017.

The next issue to be determined is whether claimant's injury resulted in a permanent disability.

Regarding the November 10, 2016 date of injury (file number 5058185), there is little evidence indicating the injury resulted in a permanent disability. The record does not show claimant was off work between November 10, 2016 and December 4, 2016. Claimant testified that between the two dates of injury, his neck injury was feeling better. He testified he did not recall if he took off any time between the two dates of injury. (Tr. pp. 57-58) Given this record, claimant has failed to carry his burden of proof his November 10, 2016 injury resulted in permanent disability.

As claimant failed to carry his burden of proof his November 10, 2016 date of injury resulted in a permanent disability, the issue of claimant's entitlement to permanent partial disability benefits for the November 10, 2016 date of injury is moot.

Regarding the December 4, 2016 tackling injury, claimant testified he has continued neck pain since his date of injury. Claimant treated for this neck pain from December 20, 2016 through March 27, 2017. Claimant testified he stopped treating for neck pain at this time, as neither the workers' compensation insurer nor his personal health insurer would pay for further treatment.

Two experts have opined regarding the permanent impairment claimant has from the cervical injury. Dr. Deal evaluated claimant once for an IME. Dr. Deal opined claimant has a resolved cervical strain and resolved lumbar stress sprain. (Ex. A, p. 10) He also opined, "there are no objective or subjective neurologic abnormalities in either the cervical or the lumbar spine to substantiate any work-related diagnosis." (Ex. A, pp. 10-11)

There are several problems with Dr. Deal's opinion regarding permanent impairment. First, as noted, Dr. Deal appears to opine claimant's neck and back injury were temporary in nature. However, in the above quoted sentence, Dr. Deal also

seems to suggest claimant did not have a work-related injury at all. It is unclear whether Dr. Deal believes claimant had a temporary injury to his neck and lower back, or that claimant simply had no work-related injury to his neck and lower back.

Second, Dr. Deal notes, "imaging studies to date demonstrate nothing but pre-existing degenerative changes." (Ex. A, p. 11) This is not entirely true. Claimant's MRI showed mild swelling at the C3-4 facet areas that may be reactive, degenerative or posttraumatic changes. (Jt. Ex. 4, p. 34) Other than the problems claimant had following the November of 2016 injury, there is no evidence in the record claimant had a preexisting neck problem prior to 2016. The MRI showed swelling at the C3-4 facet levels. Claimant did not have symptoms of neck pain until 2016. This indicates at least a temporal relationship between the injury, the MRI and claimant's neck pain. Dr. Deal ignores this relationship.

Dr. Deal's report is unclear if he believes claimant had a temporary work injury or no work injury at all. He offers no explanation for the chronological relationship between claimant's tackling injury, claimant's ongoing continued neck pain, and an MRI showing swelling at the C3-4 levels of the cervical spine. For these reasons, his opinions regarding permanent impairment are not convincing.

Dr. Segal also evaluated claimant once for an IME. He found claimant had a permanent impairment to the cervical spine. This is because, in part, there is a sequential relationship between the tackling incident, claimant's ongoing complaints of neck pain, and the MRI showing swelling at the C3-4 facet levels. Because Dr. Segal's opinions regarding permanent impairment of the cervical spine comport with the chronology of the tackling incident, claimant's neck pain and diagnostic testing, it is found his opinions regarding permanent impairment to claimant's cervical spine are more convincing.

Claimant was tackled by a coworker. The tackling incident either materially aggravated or caused claimant's neck injury. There is no record indicating claimant had a preexisting neck problem before the work injury at the Buffalo, Iowa job site. Treatment records indicate claimant continually complained of neck pain from the date of injury until March of 2017. Medical records, physical therapy records and claimant's testimony at hearing indicate claimant consistently complained of pain with range of motion of the neck. (Jt. Ex. 3, pp. 27, 28; Jt. Ex. 5, p. 38; Jt. Ex. 3, p. 22; Tr. p. 46) The opinions of Dr. Segal regarding causation of permanent impairment to claimant's cervical spine are found more convincing than those of Dr. Deal. Given this record, claimant has carried his burden of proof he sustained a permanent disability to the cervical spine as a result of the December 4, 2016 date of injury.

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

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.

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 was 63 years old at the time of hearing. Claimant has spent most of his adult work life as a journeyman lineman.

Dr. Segal opined claimant had a combined permanent impairment of 26 percent to the body as a whole. As noted, it is found Dr. Segal's opinion regarding permanent impairment from the December 4, 2016 injury is convincing. However, for various reasons, I find Dr. Segal's opinion regarding the degree of permanent impairment not convincing.

Dr. Segal found claimant had a 20 percent permanent impairment to the cervical spine. Part of the rating is based upon a finding that claimant falls in the DRE Cervical Category III due to significant signs of radiculopathy. (Ex. 1, p. 11) There is little reference in the medical records claimant had problems with his upper extremities from December 20, 2016 through March 24, 2017.

Dr. Segal also opined claimant had a 7 percent permanent impairment to his lumbar spine. (Ex. 1, p. 11) It is true claimant initially complained of lower back pain when treating in January of 2017. However, there is little reference to lower back pain after January 9, 2017. There is no reference to lower back pain in any of the physical therapy records. (Jt. Ex. 5) When claimant last treated with Dr. Baumbach, there was no reference to lower back pain. Other records also suggest claimant has minimal back

pain. (Ex. A, p. 4) Given this record, it is found claimant does not have a permanent impairment to his lower back from the December 4, 2016 tackling incident.

Dr. Segal also recommends a long list of approximately 30 different permanent restrictions. The record reflects claimant has continued difficulty with range of motion in his neck at the time of hearing. The record also reflects claimant worked for four to five different employers since December of 2016. Many of these jobs required claimant to work eight to ten hours a day six days a week. There is no evidence any of Dr. Segal's permanent restrictions were applicable in any of the jobs claimant worked after the tackling incident.

Based on the reasons detailed above, it is found Dr. Segal's opinion regarding the degree of claimant's permanent impairment or permanent restrictions are found not convincing.

The criteria found in Table 15-5 of the Guides suggests claimant's permanent impairment may fall into the DRE Category II of the Guides. This would give claimant a 5-8 percent permanent impairment to his body as a whole. At the time of hearing, claimant had worked four to five different jobs after the tackling incident. Claimant's consistent testimony at hearing was he still has limitations regarding the range of motion in his neck. Given this record, it is found claimant has a 5 percent industrial disability or loss of earning capacity regarding his cervical injury. Dr. Baumbach released claimant to return to work without restrictions on March 24, 2017. Benefits should commence on that date.

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).

Under Iowa Code section 85.27, the employer has the right to choose medical care as long as it is offered promptly and is reasonably suited to treat the injury without undue inconvenience to the employee. An employer is not responsible for the cost of medical care not authorized by section 85.27. A claimant can seek payment of unauthorized medical care by a preponderance of the evidence if the care was reasonable and beneficial. Bell Bros. Heating and Air Conditioning v. Gwinn, 779 N.W.2d 193, 206 (Iowa 2010). To be beneficial, the medical care must provide a more favorable medical outcome than would likely have been achieved by the care authorized by the employer Id. At 206.

Claimant's unrebutted testimony was that after the November 10, 2016 injury, the general foreman for defendant employer told claimant he could get chiropractic care at a chiropractor close to the job site. (Tr. p. 17) Claimant's unrebutted testimony at hearing was his employer told him that after the December 4, 2016 date of injury he could take the week off to get better. (Tr. p. 24) The record indicates defendants knew claimant had two work-related injuries and did not direct claimant to care or provide claimant with medical care. Claimant's unrebutted testimony is defendants have refused to pay for medical care for him for either injury. (Tr. p. 106

The record indicates because defendants refused to pay for claimant's care, claimant had to go to the emergency room for an MRI. (Jt. Ex. 4, p. 31)

The care claimant received after both injuries was reasonable and beneficial. (Jt. Ex. 3, pp. 25, 28; Jt. Ex. 5, pp. 45, 48, 51; Ex. 1, p. 9) Defendants offered claimant no medical care and the record indicates the alleged unauthorized care had a more favorable outcome than the no care given by defendants. Given this record, claimant has carried his burden of proof defendants are liable for charges associated with medical care for both his November 10, 2016 and December 4, 2016 dates of injury.

The next issue to be determined is whether claimant is entitled to 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).

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. Segal's IME was issued prior to the IME of the employer-retained physician, Dr. Deal. As a result, claimant has failed to carry his burden of proof he is entitled to reimbursement of Dr. Segal's IME under Iowa Code section 85.39. Dr. Segal's bill is not itemized and I am unable to identify which portion of the IME fee is attributed to the report preparation. Consistent with the decision in LaGrange v. Nash Finch, Co., File No. 5043316 (Appeal July 1, 2015), defendants are taxed one-third of the IME costs or $500.00.

The next issue to be determined is whether claimant is entitled to alternate medical care.

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 Company, 528 N.W.2d 122 (Iowa 1995).

As noted above, defendants have not offered claimant medical care and have denied liability for the claim. Dr. Segal recommended a long list of recommended treatments, including but not limited to, ESIs, EMG testing, orthotics, radiofrequency ablations, occipital nerve injections, and various medications. (Ex. 1, p. 13) His laundry list of recommended treatments appear to be a shotgun approach to care and as such are found not reasonable. Claimant requested further injections at hearing. (Tr. p. 106)

Because Dr. Segal's recommended care entails such a long queue of recommended treatments, and because it is unclear if all or any of these treatments are reasonable, claimant's specific request for an ESI as alternate medical care is denied. Defendants shall provide claimant with medical care that is reasonably suited to treat his work-related cervical injury.

The final issue to be determined is penalty.

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).

Claimant sustained two work-related injuries. The December 4, 2016 injury is a compensable injury. Defendants denied liability solely on a few references in medical records claimant was roughhousing. The record suggests defendants did not investigate any of the claims of roughhousing. The records indicate the petitions in this matter were filed on January 30, 2017. Defendants had the statement of claimant's supervisor, indicating claimant was an unwilling participant in the tackling incident, after the petitions were filed. (Defendants' Post-Hearing Brief, p. 3) Defendants still denied liability without investigation. A December of 2017 IME report found causation and found claimant had a permanent impairment and permanent restrictions. Defendants still denied liability and still failed to investigate. Given this record it is found a penalty is appropriate. Defendants' rate is $1,138.08 per week. Claimant is found to have a 5 percent industrial disability. A penalty of 50 percent is appropriate given defendants' lack of investigation regarding claimant's work injuries. Defendants are liable for a penalty of $14,226.00 ($1,138.08 x 25 weeks x 50%).

The final issue to be determined is costs. Costs are assessed at the discretion of this agency. Claimant carried his burden of proof both of his work injuries arose out of and in the course of employment, and that one of these injuries resulted in a permanent disability. Defendants are liable for costs regarding filing fees and service.

ORDER

Therefore, it is ordered:

Regarding file number 5058185 (date of injury November 10, 2016):

That claimant shall take nothing in the way of temporary or permanent partial disability benefits from this file.

Regarding file number 5058331 (date of injury December 4, 2016):

That defendants shall pay claimant twenty-five (25) weeks of permanent partial disability benefits at the rate of one thousand one hundred thirty-eight and 08/100 dollars ($1,138.08) per week commencing on March 27, 2017.

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 pay a penalty of fourteen thousand two hundred twenty-six and 00/100 dollars ($14,226.00).

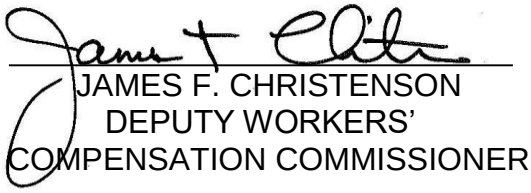
That for both files:

Defendants shall pay claimant five hundred and 00/100 dollars ($500.00) in reimbursement for the costs associated with the IME.

Defendants shall pay costs.

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

Signed and filed this 14th day of February, 2020.



JAMES F. CHRISTENSON
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Garrett Lutovsky (via WCES)
Robert Rosenstiel (via WCES)

Right to Appeal: This decision shall become final unless you or another interested party appeals within 20 days from the date above, pursuant to rule 876-4.27 (17A, 86) of the Iowa Administrative Code. The notice of appeal must be 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.