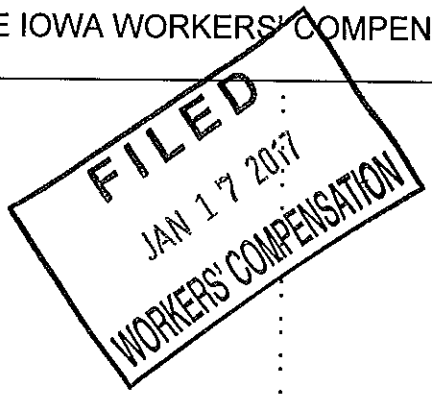
BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER



THERESA ZINNS,

Claimant,

vs.

MENARD, INC.,

Employer,

and

PRAETORIAN INSURANCE COMPANY,

Insurance Carrier,
Defendants.

File No. 5053054

ARBITRATION

DECISION

Head Note Nos.: 1802, 1803, 4000

STATEMENT OF THE CASE

This is a proceeding in arbitration. The contested case was initiated when claimant, Theresa Zinns, filed her original notice and petition with the Iowa Division of Workers' Compensation. The petition was filed on April 13, 2015. Claimant alleged she sustained a work-related injury on August 16, 2014. (Original notice and petition)

Menard, Inc. is located at 5900 Gordan Dr. in Sioux City, Iowa. For purposes of workers' compensation, the retail store is insured by Praetorian Insurance Company. A first report of injury was filed on December 23, 2014.

The hearing administrator scheduled the case for hearing on August 12, 2016 at 1:00 p.m. The hearing took place in Des Moines, Iowa at the Iowa Workforce Development Building. The undersigned appointed Ms. Debra A. Hoadley as the certified shorthand reporter. She is the official custodian of the records and notes.

Claimant testified on her own behalf. Defendants called Mr. William Neal Bankson, First Assistant General Manager at the store to testify. The parties offered exhibits. Claimant offered exhibits marked 1 through 17. Defendants offered exhibits marked A through G. All proffered exhibits were admitted as evidence in the case.

Post-hearing briefs were filed on September 9, 2016. The case was deemed fully submitted on that date.

STIPULATIONS

The parties completed the designated hearing report. The various stipulations are:

1. There was the existence of an employer-employee relationship at the time of the alleged injury;

2. Claimant sustained an injury to the right shoulder on August 16, 2014 which arose out of and in the course of her employment;

3. Temporary benefits are no longer an issue;

4. The parties agree if permanency is found, the permanency is an industrial disability;

5. The parties agree, the weekly benefit rate is $195.96;

6. Prior to the date of the hearing, defendants paid claimant 73.357 weeks of weekly benefits at the rate of $195.96 per week for a total of $73,266.11 paid in indemnity benefits; and

7. The parties agree certain costs that are detailed were paid by claimant.

ISSUES

The issues presented are:

1. Is claimant entitled to permanent disability?

2. If so, what is the extent of permanent disability to which claimant is entitled?

3. On which date did claimant reach maximum medical improvement? (The dates proposed are: December 17, 2015 or February 10, 2016.)

4. Is claimant entitled to penalty benefits pursuant to Iowa Code section 86.13? and;

5. For which costs are defendants liable?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This deputy, after listening to the testimony of claimant and the other witness at hearing, after judging the credibility of the witnesses, and after reading the evidence, and the post-hearing briefs, makes the following findings of fact and conclusions of law:

The party who would suffer loss if an issue were not established has the burden of proving the issue by a preponderance of the evidence. Iowa Rule of Appellate Procedure 6.14(6).

Claimant is 35 years old and right-hand dominant. She has two children. Claimant and her son reside with claimant's father in Sioux City, Iowa. Claimant does not have custody of the other child. That child resides outside of Iowa.

Claimant grew up in Sioux City where she attended school until the eleventh grade. Claimant dropped out of high school in 1998 due to failing grades. She did obtain her General Educational Development equivalency, (GED) in 2006. Claimant entered Western Nebraska Community College in the fall of 2006. She entered the pre-veterinary program. However, claimant performed very poorly in her classes. She earned 21 hours of credit. In 2012 and 2013 claimant attended Eastern Wyoming College in Torrington, Wyoming. Claimant was pursuing a course in veterinary technology. The school lost its accreditation from the U.S. Department of Agriculture and claimant did not receive her certificate. In the spring of 2015, claimant enrolled in the veterinary assistant's program at Western Iowa Technical Community College. She is two classes short of receiving her certification.

Claimant detailed her work history in Exhibit 6, pages 5 through 11. She has held numerous jobs in retail establishments, fast food restaurants, she has had employment as a production worker; she has worked as a finish worker for a modular home company; and she has worked for numerous veterinarians. There were several occasions when claimant worked for temporary employment agencies too.

Claimant commenced employment with Menard, Inc. at its Scottsbluff, Nebraska store on June 26, 2014. She transferred to the Sioux City, Iowa store in July 2014. Claimant worked as a morning stock person in the hardware department. Her hours were from 5:00 a.m. to 9:00 a.m. She worked from Monday through Friday with an occasional Saturday too. The position was classified as part-time.

The company had defined written duties and responsibilities. (Exhibit 3) The physical requirements of the job included:

> Lifting Requirement: Exerting up to 50 pounds of force occasionally, and up to 25 pounds of force frequently, and up to 10 pounds of force constantly to move inventory and other objects;
>
> Moving, standing, sitting, walking around store to perform administrative functions, and assist Guests and Team Members;
>
> Use of arms/hands, legs/feet, climbing stairs/ladders, bending, stooping, reaching, twisting, lifting, pushing, pulling and moving inventory and other objects;

> Talking, hearing, seeing and listening to effectively communicate and exchange information and interpret data for Guests and Team Members;
>
> Physical ability to operate a computer and computer softwear proficiency is required.

(Ex. 3) Up until the date of the work injury, claimant was capable of fulfilling all of her job duties and responsibilities.

On the morning of August 16, 2014, claimant was standing on a ladder that was 8 feet off the ground. A co-worker was standing on the ground and handing boxes up to claimant via an industrial strap. The strap broke and claimant grabbed the box. A great strain was placed on claimant's right arm. Claimant testified she felt immediate pain. She reported the incident immediately.

A co-employee transported claimant to the emergency room at Mercy Medical Center in Sioux City, Iowa. Scott Murray, M.D., attended to claimant for work-related right shoulder pain. The physician noted:

> EXTREMITIES: Right shoulder, she is exquisitely tender to the right shoulder to palpation. She is tender over the AC joint. She is also tender to the posterior shoulder. O'Brien, Neer impingement sign and apprehension sign are all positive to the right shoulder. Grips are equal bilaterally. She does have a decreased range of motion in flexion, extension, abduction, and adduction. She also has a decreased internal and external rotation of the shoulder. No significant soft tissue swelling, no warmth, no erythema is appreciated to the shoulder. Median, ulnar and radial nerve distributions appear to be intact. The rest of general exam noncontributory.
>
> LABORATORY DATA:
>
> X-ray of the right shoulder showed no acute osseous injury or malalignment. This will be overread per radiologist.
>
> ASSESSMENT:
>
> Right shoulder strain.

(Ex. 8, p. 2)

Dr. Murray treated claimant conservatively. The physician prescribed a sling for claimant's right arm, several medications for pain were prescribed, and physical therapy was ordered. The emergency doctor placed claimant on light duty and claimant was restricted from lifting more than 10 pounds. (Ex. 8, p. 2) Dr. Murray discharged claimant from the hospital at approximately 11:15 a.m. Claimant had doctors' notes to be excused from work on August 16, 2014, August 18, 2014, August 21, 2014, August

30, 2014, September 1, 2014, September 2, 2014, September 3, 2014, September 9, 2014, September 10, 2014, and September 11-18, 2014. (Ex. G, pp. 1 and 2)

After a follow-up appointment with Mr. Michael Bobier, PA-C on August 20, 2014, MRI testing of the right shoulder was ordered. (Ex. 9, p. 2) Jon Q. Taylor, M.D., interpreted the results as showing:

> IMPRESSION:
>
> 1. Non-distracted nondisplaced tear the anterior interior labrum
>
> 2. Tendinosis the supraspinatous tendon
>
> 3. Insertion of the rotator cuff signal in the muscles of the rotator cuff is normal.
>
> 4. Minimal amount of fluid in the subacromial subdeltoid bursa
>
> 5. Intracapsular portion of the tendon of long head of biceps is normal
>
> 6. Signal in humeral head and glenoid is normal

(Ex. 9, p. 4)

On September 16, 2014, claimant presented to Steven J. Stokesbary, M.D., an orthopedic surgeon in the Sioux City area. Dr. Stokesbary diagnosed claimant with subacromial impingement of the right shoulder and a possible labral tear. (Ex. 10, p. 3) The orthopedic surgeon injected claimant's right shoulder with 80 mg of Depo-Medrol and Lidocaine. (Ex. 10, p. 3) The orthopedist ordered physical therapy as well. (Ex. 10, p. 3)

Claimant returned for a follow-up appointment with Dr. Stokesbary on October 14, 2016. There was a repeat injection of 80 mg of Depo-Medrol and Lidocaine. Claimant was continued on the same work restriction. (Ex. 10, p. 17) In December of 2014, Dr. Stokesbary opined claimant needed right shoulder arthroscopy for the repair of a SLAP lesion. (Ex. 10, p. 22)

Members of management at Menard, Inc. terminated claimant on October 16, 2014. The rationale for the termination was poor attendance. Claimant had the following unexcused absences or she was tardy on the following dates: July 4, 2014, 36 minutes late; July 9, 2014 unexcused absence; August 7, 2014, 34 minutes late; August 11, 2014, 61 minutes late; October 2, 2014, 155 minutes late; October 3, 2014, 9 minutes late; October 4, 2014, 65 minutes late; October 6, 2014, 21 minutes late; October 14, 2014, absent, no call, no show; October 15, 2014, 14 minutes late. (Ex. G, pp. 1-2) Mr. William Bankson, First Assistant General Manager at Menard, Inc. in Sioux City, testified claimant is eligible for rehire at the store.

Subsequent to her termination from Menard, Inc., claimant worked for J & L Staffing, a temporary employment agency. Managers at the temporary agency sent claimant to work as a dishwasher at the Sioux City Convention Center, then to Conway Freight to work as a customer service representative, and to All Pro Fasteners to work as an administrative assistant. All positions were for a limited period of time.

From October 2014 until November 2014, claimant worked at Palmer Candy Shoppe. She was hired as a seasonal worker to assemble gift baskets. She was paid $9.00 per hour. Claimant was terminated from the position.

In November 2014, claimant was placed through IMKO Workforce Solutions at Pech Optical. Claimant was hired to package eye glasses in the mail room. She was paid $10.00 per hour. Claimant was terminated from the position.

From November 2014 to January 2015 claimant worked at Things Remembered at the Southern Hills Mall in Sioux City. She worked 12 to 16 hours per week at $8.50 per hour. She voluntarily left the position so she could undergo her right shoulder surgery.

On January 23, 2015, Dr. Stokesbary performed a right arthroscopic surgery. The procedure consisted of the repair of a SLAP lesion, debridement of the rotator cuff, and a mini rotator cuff repair. (Ex. 10, p. 23) Approximately ten days following the surgery, claimant fell and jarred her right shoulder. She sustained an increase in her right shoulder pain. (Ex. 10, p. 23) The medical professionals decided to delay any extra ordinary treatment for the right shoulder. The orthopedist took a "Wait and see attitude."

In the spring of 2015, claimant reported her shoulder pain had increased and her range of motion had decreased. (Ex. 10, p. 30) There was tenderness over the bicipital groove. (Ex. 10, p. 30) Dr. Stokesbary scheduled claimant for another MRI. (Ex. 10, p. 30)

On June 3, 2015, claimant underwent MRI testing of the right shoulder. (Ex. 10, p. 32) Dr. Taylor interpreted the results as:

> IMPRESSION:
>
> Small full-thickness tear of anterior fibers of the supraspinatus tendon extending into the bicipital groove
>
> 2. Intracapsular portion of the tendon the long of the biceps is normal
>
> 3. 2 screws in humeral head with high signal in the humeral head indicating a fluid collection
>
> 4. Distention with evidence of complete tear of portions of the anterior capsule
>
> 5. Posterior capsule is intact

6. Signal in muscles of the rotator cuff is normal

7. The labrum appears to have normal signal

(Ex. 10, p. 32)

On June 17, 2015, Dr. Stokesbary opined claimant needed a repair of the recurrent tear of the right rotator cuff. (Ex. 10, p. 34) Claimant was restricted from working. (Ex. 10, p. 35) On July 9, 2015, the orthopedic surgeon performed a right rotator cuff repair, with a biceps tenotomy. (Ex. 10, p. 43) Dr. Stokesbary recommended aggressive physical therapy. (Ex. 10, p. 43)

As of January 18, 2016, Dr. Stokesbary opined claimant was doing reasonably well. (Ex. 10, p.46) The surgeon placed claimant at maximum medical improvement, (MMI) and determined there was no need for any restrictions. (Ex. 10, p. 46) However, claimant returned to Dr. Stokesbary just several days later with right biceps groove pain. (Ex. 10, p. 52) Claimant was advised she could work at full duty. (Ex. 10, p. 52) Claimant was referred for EMG testing. The findings were normal. (Ex. 10, p. 53)

Claimant underwent MRI studies of the left shoulder on February 1, 2016. The results showed, "Longitudinal intrasubstance tear of the subscapularis tendon." (Ex. 10, p. 56)

Dr. Stokesbary examined claimant's left shoulder on February 11, 2016. The orthopedist found:

> **Upper Extremity-** Shoulder – Examination of the left shoulder reveals- no palpable swelling, no erythema, normal strength and tone, normal range of motion, no crepitus, no instability, subluxation or laxity, no known fractures or deformities and normal scapulohumeral rhythm. Inspection and Palpation – Tenderness – moderate, over the anterolateral border of the acromion, (L) and over the long head of the biceps, (L). **Functional Testing – Left** – drop-arm test negative, empty can test negative, lift-off sign negative, Obrien's test negative, Speed's test negative. **Post op** – Skin Assessment – Warm/Dry and Intact. Wound/Incision – Healed. No erythema or drainage. Neurologic Assessment –Sensation Intact to light touch. Vascular Assessment – Good color and brisk capillary refill. ROM to the operative extremity – Slightly limited. Tenderness assessment – Moderate tenderness with palpation. Swelling – No significant swelling noted. Assessment- Patient is recovering from procedure without complications.

(Ex. 10, p. 57) Dr. Stokesbary opined claimant reached maximum medical improvement on February 11, 2016. (Ex. 10, p. 59)

On February 16, 2016, Dr. Stokesbary provided a permanent impairment rating for claimant's right shoulder. The rating equated to 4 percent to the body as a whole

according to the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition. (Ex. 10, p. 60) The orthopedic surgeon released claimant to full-duty work. (Ex. 10, p. 61)

Claimant exercised her right to an independent medical examination pursuant to Iowa Code section 85.39. On March 25, 2016, claimant presented to Sunil Bansal, M.D., M.P.H. for the examination. Claimant reported she had right shoulder pain and a lack of endurance. (Ex. 16, p. 9) She also complained of numbness in the right arm. (Ex. 16, p. 9) Dr. Bansal found tenderness to palpation especially at the acromioclavicular joint and into the subacromial bursa. (Ex. 16, p. 10) Dr. Bansal placed claimant at maximum medical improvement on March 25, 2016, the date of the independent medical examination. (Ex. 16, p. 11)

Dr. Bansal diagnosed claimant with the following right shoulder conditions:

RIGHT SHOULDER:

Right shoulder labral tear.

Status post right shoulder arthroscopy with repair of superior anterior to posterior labral tear, debridement of the rotator cuff, and mini open rotator cuff repair.

Recurrent tear of the right rotator cuff.

Status post right shoulder arthroscopy with debridement, repair of labral tear, and biceps tenotomy, with mini open rotator cuff repair.

(Ex. 16, p. 12)

Dr. Bansal's permanent impairment rating was in line with the rating provided by Dr. Stokesbary. Dr. Bansal provided a 5 percent whole person impairment rating. Dr. Stokesbary opined there was a 4 percent whole person impairment rating. (Ex. 16, p. 12) Dr. Bansal imposed clearly defined restrictions. Claimant was advised not to lift more than 10 pounds on an occasional basis or 5 pounds on a frequent basis with the right arm and claimant was precluded from lifting over her shoulder with her right arm. (Ex. 16, p. 13)

Ian D. Crabb, M.D., a physician with Merit Medical Evaluations in Omaha, Nebraska, was retained by defendants to conduct an independent medical examination. Dr. Crabb examined claimant on June 21, 2016. The evaluating physician agreed with Dr. Stokesbary with respect to the permanent impairment rating for the right shoulder. Dr. Crabb opined claimant could return to work without any weight restrictions for the right shoulder but claimant should not engage in any prolonged overhead use of the right shoulder. (Ex. B, p. 3)

Claimant testified she attempted to return to work in January of 2016. She worked in light food production at Soo Bee Honey. She was placed there by IMKO Workforce Development. All she had to do was place 6 ounce plastic bottles on trays. She performed the job for 8 hours per day. It was a very easy job. She was also assigned the task of making boxes. She could not perform that job without pain. She left the position for which she was paid $8.00 per hour.

Claimant testified she attended a job fair on April 30, 2016 that was sponsored by Goodwill. She also testified she applied for jobs at Lowe's, Casey's, D and A Swine Genetics, Conway Freight, Check into Cash, St. Luke's Hospital as a mail clerk and for employment at two animal hospitals.

RATIONALE AND CONCLUSIONS OF LAW

While a claimant is not entitled to compensation for the results of a preexisting injury or disease, its mere existence at the time of a subsequent injury is not a defense. Rose v. John Deere Ottumwa Works, 247 Iowa 900, 76 N.W.2d 756 (1956). If the claimant had a preexisting condition or disability that is materially aggravated, accelerated, worsened or lighted up so that it results in disability, claimant is entitled to recover. Nicks v. Davenport Produce Co., 254 Iowa 130, 115 N.W.2d 812 (1962); Yeager v. Firestone Tire & Rubber Co., 253 Iowa 369, 112 N.W.2d 299 (1961).

When an expert's opinion is based upon an incomplete history it is not necessarily binding on the commissioner or the court. It is then to be weighed, together with other facts and circumstances, the ultimate conclusion being for the finder of the fact. Musselman v. Central Telephone Company, 154 N.W.2d 128, 133 (Iowa 1967); Bodish v. Fischer, Inc., 257 Iowa 521, 522; 133 N.W.2d 867 (1965).

The weight to be given an expert opinion may be affected by the accuracy of the facts the expert relied upon as well as other surrounding circumstances. St. Luke's Hospital v. Gray, 604 N.W.2d 646 (Iowa 2000).

Expert testimony may be buttressed by supportive lay testimony. Bradshaw v. Iowa Methodist Hospital, 251 Iowa 375, 380; 101 N.W.2d 167, 170 (1960).

The commissioner as trier of fact has the duty to determine the credibility of the witnesses and to weigh the evidence together with the other disclosed facts and circumstances, and then to accept or reject the opinion. Dunlavey v. Economy Fire and Casualty Co., 526 N.W.2d 845 (Iowa 1995).

When disability is found in the shoulder, a body as a whole situation may exist. Alm v. Morris Barick Cattle Co., 240 Iowa 1174, 38 N.W.2d 161 (1949). In Nazarenus v. Oscar Mayer & Co., II Iowa Industrial Comm'r. Report 281 (App. 1982), a torn rotator cuff was found to cause disability to the body as a whole.

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 is a young worker. She has sustained a permanent functional impairment to her right shoulder. The ratings are at the low end of the spectrum. There are two ratings which equal 4 percent to the body as a whole. There is one rating that is equal to 5 percent to the body as a whole. The numeric values of the ratings are very close.

The two orthopedic surgeons did not impose permanent weight restrictions. Dr. Crabb advised claimant to avoid prolonged work above her right shoulder. Only Dr. Bansal opined work restrictions for the right shoulder were necessary. The work restrictions were quite stringent, given the very low functional impairment ratings awarded. The more reasonable and practical restriction seems to be no repetitive lifting over the shoulder on a sustained basis with the right arm. In other words, claimant should use good common sense when she is lifting with her right arm.

Not one medical provider has precluded claimant from working. At the time of her work injury, claimant was a part-time employee whose gross earnings were $213.26 per week. She was not seeking full-time employment. It is true claimant was terminated subsequent to her work injury. However, the termination had nothing to do with claimant's right shoulder condition. Claimant was terminated because she was consistently tardy and absent from work without contacting her supervisor or seeking permission to be away from the store during her assigned shift. Menard, Inc., had been offering claimant suitable work following her injury, but claimant did not always appear for work at the designated time.

Claimant has been successful in obtaining various jobs since she was terminated from Menard, Inc. She is able to obtain positions which pay the same or slightly more than what she earned when she was injured. The main difficulty for claimant is she has had problems keeping employment for one reason or the other. The undersigned

acknowledges there are some jobs claimant is unable to perform such as repetitively building cardboard boxes at high rates of speed. She probably will not be able to return to work as a finish worker for a modular home company. There are certain stocking jobs claimant will not be able to perform if she has to reach over shoulder level. However, there are numerous semi-skilled part-time jobs still available to claimant. Therefore, after considering all of the factors involving industrial disability, it is the determination of the undersigned; claimant is entitled to permanent partial disability benefits in the amount of twenty (20) percent. Claimant is entitled to 100 weeks of permanent partial disability benefits at the stipulated weekly benefit rate of $195.96 per week.

The next issue to resolve is the date claimant reached maximum medical improvement, (MMI). Section 85.34(1) provides that healing period benefits are payable to an injured worker who has suffered permanent partial disability until (1) the worker has returned to work; (2) the worker is medically capable of returning to substantially similar employment; or (3) the worker has achieved maximum medical recovery. The healing period can be considered the period during which there is a reasonable expectation of improvement of the disabling condition. See Armstrong Tire & Rubber Co. v. Kubli, 312 N.W.2d 60 (Iowa App. 1981). Healing period benefits can be interrupted or intermittent. Teel v. McCord, 394 N.W.2d 405 (Iowa 1986).

Dr. Stokesbary released claimant to full-duty work on December 17, 2015. At the time, the authorized treating physician deemed claimant to be at maximum medical improvement. (Ex. 10, p. 50) Moreover, claimant returned to work shortly thereafter on January 14, 2016. Permanent partial disability benefits should have commenced from December 17, 2015.

The third issue for resolution is the matter of penalty benefits pursuant to 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).

Defendants paid weekly benefits to claimant from January 23, 2015 until February 10, 2016. The benefits were paid at the incorrect rate of $170.82. Defendants also paid weekly benefits equaling 4 percent to the body as a whole or $3,709.80. Counsel for claimant contacted the defense counsel in May 2016 and informed him of the underpayment. Claimant was paid the difference with $683.28 in interest. There were 54 weeks and 5 days where defendants had underpaid claimant each week by $25.14. The total underpayment was approximately $1,358.00.

Defendants did not explain why there was a $25.14 per week underpayment. As a result, this deputy is assessing a penalty against defendants in the amount of $250.00.

The final issue is costs to litigate. Iowa Code section 86.40 states:

Costs. All costs incurred in the hearing before the commissioner shall be taxed in the discretion of the commissioner.

Iowa Administrative Code Rule 876—4.33(86) states:

Costs. Costs taxed by the workers' compensation commissioner or a deputy commissioner shall be (1) attendance of a certified shorthand reporter or presence of mechanical means at hearings and evidential depositions, (2) transcription costs when appropriate, (3) costs of service

> of the original notice and subpoenas, (4) witness fees and expenses as provided by Iowa Code sections 622.69 and 622.72, (5) the costs of doctors' and practitioners' deposition testimony, provided that said costs do not exceed the amounts provided by Iowa Code sections 622.69 and 622.72, (6) the reasonable costs of obtaining no more than two doctors' or practitioners' reports, (7) filing fees when appropriate, (8) costs of persons reviewing health service disputes. Costs of service of notice and subpoenas shall be paid initially to the serving person or agency by the party utilizing the service. Expenses and fees of witnesses or of obtaining doctors' or practitioners' reports initially shall be paid to the witnesses, doctors or practitioners by the party on whose behalf the witness is called or by whom the report is requested. Witness fees shall be paid in accordance with Iowa Code section 622.74. Proof of payment of any cost shall be filed with the workers' compensation commissioner before it is taxed. The party initially paying the expense shall be reimbursed by the party taxed with the cost. If the expense is unpaid, it shall be paid by the party taxed with the cost. Costs are to be assessed at the discretion of the deputy commissioner or workers' compensation commissioner hearing the case unless otherwise required by the rules of civil procedure governing discovery. This rule is intended to implement Iowa Code section 86.40.

Iowa Administrative Code rule 876—4.17 includes as a practitioner, "persons engaged in physical or vocational rehabilitation or evaluation for rehabilitation." A report or evaluation from a vocational rehabilitation expert constitutes a practitioner report under our administrative rules. Bohr v. Donaldson Company, File No. 5028959 (Arb. November 23, 2010); Muller v. Crouse Transportation, File No. 5026809 (Arb. December 8, 2010). The entire reasonable costs of doctors' and practitioners' reports may be taxed as costs pursuant to 876 IAC 4.33. Caven v. John Deere Dubuque Works, File Nos. 5023051, 5023052 (App. July 21, 2009).

The following costs are assessed to defendants:

Filing fee	$100.00
Certified Mailing	$12.96
Deposition of Dr. Bansal	$199.65
Deposition of Claimant	$163.50

ORDER

THEREFORE, IT IS ORDERED:

Defendants shall pay unto claimant one hundred (100) weeks of permanent partial disability benefits at the stipulated weekly benefit rate of one hundred ninety-five and 96/100 dollars ($195.96) and payable from December 17, 2015.

Accrued benefits shall be paid in a lump sum, together with interest, as provided by law.

Defendants shall take credit for all benefits previously paid.

Defendants shall pay two hundred fifty dollars ($250.00) to claimant as penalty benefits pursuant to Iowa Code chapter 86.13.

Costs are assessed to defendants as detailed in the body of this decision.

Defendants shall file all subsequent reports as required by this division.

Signed and filed this 17th day of January, 2017.

Michelle A. McGovern

MICHELLE A. MCGOVERN
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

Copies To:

Robert Stewart
Attorney at Law
522 Fourth St., Ste. 300
Sioux City, IA 51101
rstewart@rawlings-law.com

Timothy E. Clarke
Attorney at Law
1248 "O" St., Ste., 600
Lincoln, NE 68508
tclarke@baylorevnen.com

MAM/sam

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.