BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

DARREL D. KRAMER,

Claimant,

vs.

DOHRN TRANSFER COMPANY, INC.,

Employer,

and

AMERICAN ZURICH INS. COMPANY,

Insurance Carrier,
Defendants.

File No. 5052289

ARBITRATION

DECISION

Head Note Nos.: 1801, 1801.1. 2501, 2502, 2907, 3003, 4000.2

STATEMENT OF THE CASE

Claimant, Darrel D. Kramer filed a petition in arbitration seeking workers' compensation benefits from Dohrn Transfer Company, Inc. (Dohrn), employer and American Zurich Insurance Company, insurer, both as defendants. This case was heard in Des Moines, Iowa on July 21, 2016 with a final submission date of September 9, 2016.

The record in this case consists of claimant's Exhibits I-II, defendants' Exhibits A through D and F through L, and the testimony of claimant, Lori Lu Kramer and Katie Koenecke.

On the hearing report, the parties entered into numerous stipulations. Those stipulations were accepted and the parties are bound by those stipulations. Those stipulations are not discussed in this decision.

The parties indicated, at hearing, they wanted judicial notice taken of exhibits filed with pre-hearing motions in this matter. Because there were approximately 300-400 pages of pre-hearing motions and exhibits filed in this case, the parties were instructed to furnish the list of exhibits, in the pre-hearing motions, they wanted included in the record to the undersigned. The parties were instructed to furnish that list within one week from the date of the hearing. The parties failed to respond to that request. As a result, none of the exhibits filed in the pre-hearing motions in this case are considered to be a part of the record. (Transcript pages 11, 81)

ISSUES

1. Whether the injury is a cause of permanent disability; and if so

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

3. The extent of claimant's entitlement to temporary benefits.

4. Rate.

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

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

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

8. Costs.

FINDINGS OF FACT

Claimant was 55 years old at the time of hearing. Claimant graduated from high school. Claimant has poured concrete and driven a forklift. From 2000 to 2004 claimant was self-employed laying carpet and doing concrete work. Claimant worked as a janitor. In 2004 claimant worked as a driver for Fed Ex. In 2008 claimant worked as a freight driver for Crouse Cartage. Claimant began working as a truck driver for Dohrn in approximately May of 2008. (Exhibit C, page 2; Ex. K, pp. 4-5; Deposition pp. 13-20)

Claimant's medical history is relevant. In 2007 claimant was assessed as having depression and prescribed Lexapro. In 2010 claimant was prescribed Buspiron. Record suggests claimant was using this medication in 2012.

On May 23, 2014 claimant was involved in a motor vehicle accident while driving for Dohrn. The other vehicle involved in the accident failed to stop at a stop sign. An 18-year-old woman, driving the car died. The other two passengers in the car, the driver's mother and child, survived the accident. (Ex. B, p. 5)

Claimant indicated feeling shook up to emergency personnel. (Ex. I, pp. 1-2)

Claimant was evaluated on the date of injury at the Spencer Hospital by Bruce Feldman, M.D. Claimant was assessed as being anxious and shaking. (Ex. I, p. 1)

Katie Koenecke testified she is claimant's daughter. Ms. Koenecke testified claimant called her on the date of the accident and told her to meet him at the hospital. Ms. Koenecke testified when she met with her father at the hospital, he was crying and

kept repeating "I killed her, I killed her." She said she took her father home and stayed with him for the remainder of the night.

Claimant was off work until June 4, 2014. Lori Kramer testified she is claimant's wife. She testified she was told claimant was off during this period of time for evaluation of a urine test taken following the accident. She said she asked her husband repeatedly why he was kept off work and when he would be returned to work.

Claimant returned to work on June 4, 2014. Ms. Kramer said her husband had a difficult time returning to work. She said during this time claimant was depressed and had nightmares. Claimant also testified he had a difficult time returning to work. (Tr. pp. 16-17)

On June 10, 2014 claimant was evaluated by David Robison, D.O. Dr. Robison is claimant's family doctor. Claimant was taking lorazepam. Claimant was doing okay with driving. Claimant was having difficulty sleeping at night. Claimant was put on medication to help with sleeping. (Ex. I, pp. 27-28; Tr. pp. 35, 41)

On July 20, 2014 claimant's mother died. Claimant took off of work for the funeral from July 21, 2014 through July 25, 2014. (Ex. B, p. 10; Ex. D, pp. 6, 7; Ex. I, p. 35)

On September 15, 2014 claimant was tardy for work. (Ex. D, p. 12) Claimant testified that on that date, he blew up when his supervisor asked him to deliver tires. Claimant said his coworkers told him he was not the same. (Tr. p. 70)

Ms. Kramer testified that between September 15, 2014 and October 5, 2014 claimant did not have any medical help. She said she called Dr. Robison and told his office claimant needed medical help.

Ms. Kramer testified claimant was taken off of work on September 15, 2014 by a supervisor, Chris Tuttle. She says at that time Dohrn knew something was wrong with claimant and they wanted to get claimant evaluated. (Tr. pp. 22-27)

On September 25, 2014 claimant was evaluated by Dr. Feldman. Claimant complained of difficulty with sleeping. He denied depression. He believed he had some anxiety. Claimant said he revisited the accident in his mind. Claimant said coworkers told him he was not himself. Claimant was assessed as having insomnia related to a mentally traumatic event. Claimant was found to be able to drive. He was told to return to Dr. Robison. Claimant was also given the name of a local counselor. (Ex. I, pp. 30-32)

On October 1, 2014 claimant was evaluated by John Hilsabeck, M.D. Dr. Hilsabeck works in the same clinic as Dr. Robison. Claimant admitted he was anxious with driving and had difficulty with sleep. Claimant had been impacted by the accident and by the death of his mother. Claimant was interested in seeking counseling. (Ex. 1, pp. 33-39)

On October 2, 2014 claimant returned in followup with Dr. Robison. Claimant was having depression and anxiety. He was having difficulty sleeping. Claimant was assessed as having posttraumatic stress disorder (PTSD). Counseling was discussed. (Ex. I, 40-43)

On October 14, 2014 claimant was evaluated by Deon Wynia, LMHC. Claimant had been restricted to driving between 8:00 a.m. to 6:00 p.m. Claimant's problems involved the truck driving accident and his mother dying six weeks later. Claimant was recommended to have Lifespan Integrative Therapy to decrease symptoms of PTSD. (Ex. I, pp. 75-77)

Claimant returned to counseling with Mr. Wynia on October 21, 2014. (Ex. I, p. 78) Claimant had followup counseling sessions with Mr. Wynia on November 4, 2014 and November 11, 2014. Notes indicate progress was made with claimant's mood. (Ex. I, pp. 79-81)

On November 12, 2014 claimant had a confrontation with a dispatcher. Claimant attributed his behavior to PTSD. Claimant was suspended for 22 days for violation of workplace harassment policy. (Ex. C, p. 1) On November 19, 2014 claimant was evaluated by Dr. Robison for a recheck of his PTSD. Claimant had an outburst at work and had taken a leave of absence. Claimant's medication was changed to better deal with PTSD symptoms. Claimant was assessed as "doing quite well." (Ex. I, p. 45; Ex. I)

Claimant returned for counseling with Mr. Wynia on December 9, 2014. Mr. Wynia noted improvement in mood for claimant. (Ex. I, p. 85)

Claimant returned to Mr. Wynia on December 23, 2014. Claimant had told his employer he would be leaving employment on January 31st, as he had a new job waiting for him. Claimant's anxiety increased when being at work. (Ex. I, p. 86) Claimant returned to Mr. Wynia on January 13, 2015. No change was indicated in claimant's mood. (Ex. I, p. 87)

On January 14, 2015 claimant quit his job at Dohrn. Claimant sought extra vacation after January 14, 2015. Extra vacation time was not approved. Claimant told his employer, "forget it, I will just quit now". (Ex. C, p. 2)

On January 19, 2015 claimant saw Dr. Robison. Claimant was having a lot of problems with PTSD. Claimant quit his job due to stressors. Claimant's medication was adjusted. (Ex. I, pp. 49-50)

Claimant returned to Dr. Robison on January 23, 2015. Claimant had made a bad decision and quit work. Claimant's medication was again adjusted. (Ex. I, pp. 52-53)

Claimant returned in counseling to Mr. Wynia on February 17, 2015 and February 24, 2015. Claimant noted improvement in mood. (Ex. I, pp. 89-90)

On February 19, 2015 claimant had an on-line psychiatric counseling with Clifford McNaughton, M.D. Claimant was seen on short notice emergency basis as per Dr. Robison's office. Claimant had difficulty sleeping and had anxiety. No assessment was rendered by Dr. McNaughton and the dictation of the session appears to have been interrupted by a phone call and never completed. (Ex. I, pp. 104-106)

Claimant returned to Mr. Wynia on four occasions in March of 2015. Claimant's mood was noted as improving in all four sessions with decreased anxiety and decreased PTSD symptoms. (Ex. I, pp. 91-94)

Claimant saw Mr. Wynia in counseling on April 28, 2015. Claimant's wife had noted claimant was withdrawing more due to his upcoming anniversary of the accident. (Ex. I, p. 95)

Claimant underwent counseling with Mr. Wynia on four more occasions in May of 2015. During this period claimant had to help relatives with planting. Claimant was discussing trying to honor the anniversary of the accident. (Ex. I, pp. 96-99)

On May 22, 2015 claimant was seen by Mark Davis, PA-C. Ms. Koenecke testified she had seen Mr. Davis speak, and after conferring with the insurer, had claimant authorized to treat with Mr. Davis. Claimant was assessed as having symptoms of PTSD. Claimant was referred to a therapist for cognitive therapies. His medication was also adjusted. (Ex. I, pp. 107-108)

The record suggests that PA Davis referred claimant to Mia Hegarty-Roach, Ph.D. for counseling. Records indicate once counseling was transferred to Hegarty-Roach, counseling with Mr. Wynia was discontinued. Ms. Koenecke testified in receiving care with PA Davis, she did not want to discontinue counseling with Mr. Wynia.

Claimant underwent counseling with Dr. Hegarty-Roach. Cognitive redirection and relaxation techniques were discussed. (Ex. I, p. 109)

Claimant returned to PA Davis on June 19, 2015. Claimant had improvements with nightmares with panic attacks. (Ex. I, p. 110)

Claimant returned to Dr. Hegarty-Roach on two occasions for counseling in September and October of 2015. He had driven his vehicle several times by the accident site. He was unsure if he could drive a truck again, as he was uncomfortable doing so. Claimant discussed the possibility of returning to work. (Ex. I, pp. 123-124)

In a November 2, 2015 report James Gallagher, M.D., gave his opinions of claimant's condition following an independent psychiatric evaluation (IPE). Claimant's daughter provided much of the information for claimant at the session. Dr. Gallagher assessed claimant as having PTSD related to, and caused by, the accident of May 23, 2014. Dr. Gallagher opined he did not think claimant was capable of competitive employment. (Ex. I, pp. 154-161)

Dr. Gallagher noted claimant's mother's death was an additional stressor, but the cause of his PTSD was the accident. He noted the care and treatment provided by Drs. Feldman, Robison and Hilsabeck was reasonable, necessary and somewhat effective and beneficial. He also noted the treatment provided by Dr. Hegarty-Roach, PA Davis and Mr. Wynia was also reasonable and necessary, effective and beneficial. He said it was reasonable for claimant to try to seek employment. Dr. Gallagher did not believe claimant had reached maximum medical improvement (MMI). He opined claimant should continue to receive medication and cognitive behavior therapy. (Ex. I, pp. 161-164)

Claimant continued to have counseling sessions with Dr. Hegarty-Roach in November and December of 2015. Claimant discussed the possibilities of returning to work. (Ex. I, pp. 125, 134)

In a December 9, 2015 letter Dr. Gallagher opined he would have taken claimant off work immediately after the May 23, 2014 accident. Dr. Gallagher believed records indicated claimant was symptomatic of PTSD shortly after that accident. He also opined claimant's return to work was hindered by the lack of suitable treatment in a timely fashion. (Ex. I, pp. 173-174)

Claimant was evaluated by Dr. Robison on January 15, 2016. Claimant reported a blackout episode in late December of 2016. Dr. Robison believed claimant had had a stroke. Claimant is noted in the record as being a heavy smoker and drinking lots of coffee. Claimant's daughter indicated claimant did not appear to have permanent neurological deficits. (Ex. I, p. 58)

In an April 19, 2016 letter Dr. Robison responded to a number of questions raised by claimant's counsel. He indicated claimant had mild depression due to his workplace environment prior to the May of 2014 incident. He opined the May 23, 2014 accident was a proximate cause of claimant's PTSD and a major depressive disorder. Dr. Robison believed claimant had already reached MMI, but did not believe claimant's condition would improve. Dr. Robison also noted:

> . . . Mr. Kramer would live paycheck to paycheck and all he knew was truck driving and working, his 'therapy' was going back to work and driving. He felt that he needed to work in order to stay busy and therefore that is why he was not removed from the situation. In retrospect he probably would have benefited from being removed from the workplace for four to six weeks placed on family medical leave with aggressive therapy and counseling, however that's pure conjecture. . . I am sure it was recommended that he take some time off to recover that he refused and wanted to go back to work as soon as possible even though this was not documented in the charts.

(Ex. I, p. 70)

In a May 27, 2016 report, Matthew Cooper, Psy.D., PLLC, gave his opinions of claimant's condition following an IPE. Claimant had difficulty with concentration and appeared confused during the evaluation. Claimant reported he had difficulty sleeping. Claimant reported symptoms of depression. Claimant avoided driving by the scene of the accident. (Ex. B, pp. 1-15)

Dr. Cooper found claimant met criteria for a primary diagnosis of PTSD. Claimant's symptoms were related to the May of 2014 accident. He opined claimant seemed to improve during some phases of treatment and then later regress. He opined claimant was not at MMI. (Ex. B, pp. 16-18)

Mr. Cooper recommended PA Davis consult with a psychiatrist or refer claimant to a psychiatrist. He recommended claimant continue psychotherapy and that it should be increased to 45 to 60 minutes per session one to two times a week. He did not believe claimant was fit to work at this time. Mr. Cooper noted it was possible claimant could return to work if his symptoms of PTSD were reduced. He did not believe claimant was employable at the time of the evaluation. (Ex. B, pp. 18-20)

Ms. Koenecke testified that between the date of injury until the time of hearing her father was agitated and would cry a lot. She said he also spent a lot of time staring into space. She said it was obvious to her her dad was struggling after his accident with his mental health condition. Ms. Koenecke testified because of her parents' financial situation, she had helped them financially.

Ms. Koenecke testified she does not believe her dad can return to work. She says he has a hard time functioning, and when he encounters stress he blows up.

Ms. Kramer testified that prior to his accident, claimant was a happy person. She said since the accident he does not smile, his memory is poor, and he sits and stares for hours. She said claimant has not tried to return to work since leaving Dohrn. She said she did not believe claimant would return to work. She said claimant has a poor memory and is often depressed. Ms. Kramer testified no doctor said claimant could not drive when claimant quit his job at Dohrn.

Claimant testified he would like to return to work. He said he would like to learn how to cope better with his mental health issues. He said he has not done a job search. He said no doctor has taken him off work. He testified some doctors told him it was okay to drive. He testified he did not believe Dohrn complied with the restrictions given by Dr. Robison.

Claimant worked the following hours for the 13 weeks before the date of injury. The week of May 17, 2014 is excluded from the calculation. The weeks ending March 1, 2014 and March 18, 2014 were also excluded, as claimant was off during this period of time for vacation.

Week #	Week Ending	Hourly Pay	Hours Worked	Gross Wage
1	5/10/2014	$18.50	60.75	$1,123.88
2	5/3/2014	$18.50	44.25	$818.63
3	4/26/2014	$18.00	56.25	$1,012.50
4	4/19/2014	$18.00	41.75	$751.50
5	4/12/2014	$18.00	54.75	$985.50
6	4/5/2014	$18.00	59.5	$1,071.00
7	3/29/2014	$18.00	55.25	$994.50
8	3/22/2014	$18.00	53.75	$967.50
9	3/15/2014	$18.00	56	$1,008.00
10	2/22/2014	$18.00	56.5	$1,017.00
11	2/15/2014	$18.00	63.5	$1,143.00
12	2/8/2014	$18.00	55.75	$1,003.50
13	2/1/2014	$18.00	51.5	$927.00

CONCLUSIONS OF LAW

The first issue to be determined is whether claimant's injury is the result of a permanent disability.

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 AMA Guides, Fifth Edition, p. 601, indicates maximum medical improvement occurs if:

> A condition or state that is well stabilized and unlikely to change substantially in the next year, with or without medical treatment. Over time, there may be some change; however, further recovery or deterioration is not anticipated.

The Guides notes that "An impairment should not be considered permanent until the clinical findings indicate that the medical condition is static and well stabilized, often

termed the date of maximum medical improvement (MMI)." (AMA Guides, Fifth Ed., p. 19)

In Bell Bros. Heating v. Gwinn, 779 N.W.2d 193 (Iowa 2010), the Iowa Supreme Court discussed the issue of permanent disability and indicated:

> When the period of recovery and stabilization will provide relevant evidence to make a full and fair assessment of conflicting medical opinions over the existence of a permanent impairment, the decision must not be made until maximum medical improvement has occurred.
>
> If the commissioner decides the issue of permanency before an award is ripe, the commissioner risks making a final decision that could be undermined by later relevant evidence. Thus, a procedure that allows for the adjudication of issues before the relevant evidence is known could undermine the entire system of workers' compensation by creating the risk of either denying permanent disability benefits to a deserving claimant or requiring an employer to pay permanent disability benefits to a worker who did not suffer a permanent impairment

Bell Bros., 779 N.W.2d at 201

Dr. Gallagher, claimant's expert, opined claimant had not yet reached MMI. (Ex. 1, p. 163) Dr. Cooper, defendants' expert, also found claimant was not at MMI. (Ex. B, pp. 17-18)

Dr. Robison, claimant's family doctor did note claimant had a permanent impairment and claimant had most likely not improved with time. However, Dr. Robison also noted with therapy and medication, only time would tell whether claimant would improve. (Ex. I, p. 69)

Claimant has a mental-mental injury. Dr. Cooper is a licensed clinical psychologist. Dr. Gallagher is a licensed psychiatrist. Both of them opine claimant is not at MMI. Dr. Robison, claimant's family doctor, equivocates on the issue of permanent impairment. Based on this record, it is found claimant, at this time, is not at MMI. For this reason the issue of whether claimant sustained any permanent impairment due to the May of 2014 injury, is not ripe for adjudication at this time.

Because the record indicates the issue of permanent impairment is not ripe, at this time, it is also found the issue of claimant's entitlement to permanent partial disability benefits is also not ripe for adjudication at this time.

The next issue to determine is the extent of claimant's entitlement to temporary benefits.

An employee is entitled to appropriate temporary partial disability benefits during those periods in which the employee is temporarily, partially disabled. An employee is

temporarily, partially disabled when the employee is not capable medically of returning to employment substantially similar to the employment in which the employee was engaged at the time of the injury, but is able to perform other work consistent with the employee's disability. Temporary partial benefits are not payable upon termination of temporary disability, healing period, or permanent partial disability simply because the employee is not able to secure work paying weekly earnings equal to the employee's weekly earnings at the time of the injury. Section 85.33(2).

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).

Claimant seeks temporary benefits for essentially two periods of time. First, claimant seeks temporary benefits for the period of time he was still working. Second, he seeks a running award of temporary benefits commencing on January 15, 2015 when he quit employment with Dohrn.

Claimant seeks temporary partial disability benefits for October 6, 2014 through November 3, 2014 and for December 15, 2014 through January 15, 2015. (Claimant's post-hearing brief, pp. 6-25) He also seeks temporary total disability benefits for May 24, 2014 through June 3, 2014; July 28, 2014; September 6, 2014; September 12, 2014; September 19, 2014 through September 21, 2014; September 23, 2014 through October 5, 2014; October 14, 2014; November 13, 2014 through December 14, 2014; December 26, 2014; December 31, 2014; and January 2, 2015. (Claimant's post-hearing brief, pp. 26-40)

The record indicates claimant sustained PTSD and depressive disorder as a result of the May 24, 2014 accident. (Ex. I, pp. 154-164; Ex. B) The record also indicates the accident changed claimant causing him to have symptoms including, but not limited to difficulty with sleeping, moodiness and outbursts of anger. (Ex. I, pp. 154-164; Ex. B) Regarding temporary partial disability benefits for the period of time when claimant was still employed with Dohrn, claimant carries the burden of proof to show he was not medically capable of returning to work as a full-time truck driver but was still able to perform other work consistent with his disability.

Regarding his claim for temporary total disability benefits, claimant has the burden of proof to show his mental-mental injury caused him to be unable to work during the periods of temporary total disability benefits sought.

On September 25, 2014 claimant was evaluated by Dr. Feldman. At that time, Dr. Feldman found claimant was able to drive. (Ex. I, pp. 30-32)

Claimant was also evaluated by Dr. Robison. Dr. Robison is claimant's family doctor. On October 2, 2014 Dr. Robison opined claimant could drive, but should be limited to driving from 8:00 a.m. to 6:00 p.m. (Ex. I, pp. 42-43) Although claimant contends Dohrn did not follow these restrictions, there is little hard evidence to support this claim.

Claimant was also treated by Dr. Hilsabeck, Mr. Wynia, PA Davis, and Dr. Hegarty-Roach. Dr. Gallagher opines the care provided by all of these care providers was reasonable, necessary, effective and beneficial. (Ex. I, pp. 162-163) None of these providers took claimant off work from the date of injury, until claimant terminated employment, for the periods claimant now seeks temporary partial disability benefits and temporary total disability benefits. None of these providers opined claimant was unable to work, for the periods claimant now seeks temporary partial disability benefits and temporary total disability benefits.

Dr. Gallagher does note if he had been involved with claimant's care, he would have taken claimant off of work almost immediately. (Ex. I, p. 173) However, as reflected in the finding of facts, claimant did work full time at Dohrn for over six months after the accident. Dr. Gallagher's blanket opinion, that claimant should have been off of work from May 23, 2014, is insufficient for claimant to prove entitlement to temporary benefits, while still working at Dohrn, given the other evidence in this case.

Dr. Robison, claimant's family doctor, found claimant could drive for Dohrn after the date of injury. Dr. Feldman also found claimant could have returned to work after the accident. None of the doctors, PAs or counselors who treated claimant, from the date of injury until he left employment with Dohrn, took claimant off of work. None of these providers, from the date of injury, until claimant terminated with Dohrn, found claimant was unable to work. For these reasons, and for the others detailed above, it is found claimant failed to carry his burden of proof he is due temporary partial disability benefits or temporary total disability benefits for any of the periods of time from May 23, 2014, until January 14, 2015.

The next issue to be determined is if claimant is entitled to temporary total disability benefits following his termination of employment with Dohrn. Claimant seeks a running award of temporary total disability benefits after he left Dohrn on January 14, 2015. Defendants contend claimant is not due any temporary benefits after January 14, 2015 by application of Iowa Code section 85.33(3).

The law, detailed above, regarding temporary benefits, is applicable to this period of time, but will not be repeated.

Iowa Code section 85.33(3) provides:

> If an employee is temporarily, partially disabled and the employer for whom the employee was working at the time of injury offers to the employee suitable work consistent with the employee's disability the

> employee shall accept the suitable work, and be compensated with temporary partial benefits. If the employee refuses to accept the suitable work with the same employer, the employee shall not be compensated with temporary partial, temporary total, or healing period benefits during the period of the refusal. If suitable work is not offered by the employer for whom the employee was working at the time of the injury and the employee who is temporarily partially disabled elects to perform work with a different employer, the employee shall be compensated with temporary partial benefits.

When seeking to disqualify a recuperating employee from weekly benefits under Iowa Code section 85.33(3), the employer has the initial burden of proof to show the work was suitable, in the sense of being consistent with the disability. When that burden is met, the burden of proof then shifts to the employee to show that the work was actually unsuitable. Lange v. Crestview Acres, File No. 5002953 (App. December 27, 2005).

The Iowa Supreme Court held there is a two-part test to determine eligibility under section 85.33(3): "(1) whether the employee was offered suitable work, (2) which the employee refused. If so, benefits cannot be awarded, as provided in section 85.33(3)." Schutjer v. Algona Manor Care Center, 780 N.W.2d 549, 559 (Iowa 2010). "If the employer fails to offer suitable work, the employee will not be disqualified from receiving benefits regardless of the employee's motive for refusing the unsuitable work." Neal v. Annett Holdings, Inc., 814 N.W.2d 512 (Iowa 2012).

As noted, records indicate claimant sustained PTSD and a depressive disorder from the May 23, 2014 accident. The record indicates claimant struggled with mental health issues after the accident.

Dr. Gallagher, claimant's expert, opined claimant is not capable, at this time, of returning to work as a truck driver. (Ex. I, pp. 163, 173-174) This opinion is corroborated by defendants' expert, Dr. Cooper, who noted:

> . . . Approximately seven months after the identifiable traumatic event, Mr. Kramer quit his job, as it appeared to be an ongoing stressor that involved identifiable triggers for the claimant. There was an apparent shift in mood, personality, and ability to manage day-to-day stressors. Near the end of his employment, he was described as being irritable, having significant trouble with insomnia, was anxious, and 'not himself.' Mr. Kramer has reportedly been offered a few jobs but has not started working likely due to the incapacitating nature of his symptoms at this time.
>
> Mr. Kramer does not seem to be fit for work at this time.

(Ex. B, p. 19)

Both claimant and defendants' experts opine claimant cannot return to work as a truck driver at this time. Defendants contend because claimant left his job as a truck driver on January 14, 2015 he has declined suitable work and is not due temporary benefits. Given that both Drs. Gallagher and Cooper opine claimant cannot return to work as a truck driver, and the work that defendants claim suitable, is that of a truck driver, defendants have failed to carry their burden of proof the work offered was suitable. Based on this, claimant is due a running award of temporary total disability benefits from January 15, 2015 until such time as claimant has reached MMI.

I recognize it may appear to be inconsistent that claimant has failed to carry his burden of proof he is not due temporary benefits from the date of injury until he left Dohrn, and yet is found to be due temporary benefits after he left his employment with Dohrn. This is due, in large part to the evidence in the record and the shifting burden of proof each party bears.

Regarding temporary benefits between the date of injury and the termination of employment, as noted in claimant's post-hearing brief, claimant seeks specific dates for temporary benefits. Claimant saw three doctors, a physician's assistant and two counselors during this period. No healthcare provider found claimant was unable to work during the periods of time when claimant was still employed with Dohrn. No expert has found claimant was unable to work during these specific periods of time. Both Dr. Feldman and Dr. Robison found claimant could return to work as a truck driver. As noted, given this record, claimant failed to carry his burden of proof he was due temporary benefits during the time he was still employed with Dohrn.

Regarding temporary benefits after he left employment, the burden of proof shifts. Under Iowa Code section 85.33(3), defendants have the burden of proof to show claimant was offered suitable work and that claimant refused that suitable work. The suitable work offered was to return to work as a truck driver. Both defendant and claimant's experts opine claimant could not return to work as a truck driver. Based on that record, defendants failed to carry their burden of proof, under Iowa Code section 85.33(3), that the statute is applicable. For that reason, claimant is due a running award of temporary benefits commencing on January 15, 2015.

The next issue to be determined is rate.

Section 85.36 states the basis of compensation is the weekly earnings of the employee at the time of the injury. The section defines weekly earnings as the gross salary, wages, or earnings to which an employee would have been entitled had the employee worked the customary hours for the full pay period in which the employee was injured as the employer regularly required for the work or employment. The various subsections of section 85.36 set forth methods of computing weekly earnings depending upon the type of earnings and employment.

If the employee is paid on a daily or hourly basis or by output, weekly earnings are computed by dividing by 13 the earnings over the 13-week period immediately

preceding the injury. Any week that does not fairly reflect the employee's customary earnings is excluded, however. Section 85.36(6).

The record indicates the total earnings for the 13 weeks prior to the accident (excluding the work for the week ending on March 1, 2014, March 18, 2014 and May 17, 2014) results in total earnings of $12,822.50. This results in an average weekly wage of $986.42. Claimant was married with two exemptions. Claimant's rate is $624.51 per week.

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

An itemization of claimant's medical bills and medical mileage is found as an attachment to the hearing report. The medical charges and medical mileage correlate to care provided for claimant's mental injury with the exception of references to Dr. Gallagher.

With the exception of the medical mileage and billings referring to Dr. Gallagher, records indicate the costs detailed in the medical summarization, found attached to the hearing report, are related to the care and treatment of claimant he received for his May 2014 work injury. There is no evidence these bills detailed in the records were not causally connected to claimant's May of 2014 injury. There is no evidence the costs related to the treatment are not fair and reasonable. Based upon this the defendants are liable for claimed medical expenses including medical mileage, except for those claims made as to Dr. Gallagher.

The next issue to be determined is if claimant is due reimbursement for charges associated with the IME from Dr. Gallagher.

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).

Iowa Code section 85.39 is the sole method for reimbursement of an exam by a physician of the employee's choice. If an injured worker seeks reimbursement for an IME, the provisions established by the legislature, under Iowa Code section 85.39, must be followed. Only the costs associated with preparation of the written report of a claimant's IME can be reimbursed as a cost at hearing under rule 876 IAC 4.33. Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839, 846-847 (Iowa 2015).

Claimant seeks reimbursement for the IME and the reports from Dr. Gallagher. The records indicate Dr. Gallagher, claimant's expert, issued his report on November 2, 2015 and December 9, 2015. Dr. Cooper, defendants' expert, did not issue his report until May 27, 2016. Based on the chronology of the reports, claimant is not due reimbursement for Dr. Gallagher's IME report under Iowa Code section 85.39. As Dr. Gallagher's statements for the IME failed to show how much he charged for preparation of the report for the November 2, 2015 IME, claimant is also not due reimbursement for $3,412.50 for Dr. Gallagher's IME report as a cost. (Ex. I, pp. 139, 165)

Dr. Gallagher did break down the costs associated with preparation of the December 9, 2015 report. For this reason claimant is entitled to reimbursement as a cost and is awarded the $525.00 associated with preparation of the December 9, 2015 report. (Ex. I, pp. 173-175)

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

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

> Based on the plain language of section 86.13, we hold an employee is entitled to penalty benefits if there has been a delay in payment unless the employer proves a reasonable cause or excuse. A reasonable cause or excuse exists if either (1) the delay was necessary for the insurer to investigate the claim or (2) the employer had a reasonable basis to contest the employee's entitlement to benefits. A "reasonable basis" for denial of the claim exists if the claim is "fairly debatable."
>
> Christensen, 554 N.W.2d at 260.

The supreme court has stated:

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

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

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

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

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

Id.

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

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

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

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

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

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

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

As detailed above, claimant failed to carry his burden of proof he is due temporary benefits from the date of injury until the time he left employment with Dohrn. For this reason a penalty is not appropriate for failure to pay temporary benefits during this time.

As noted, defendants have been found liable for a running award of temporary benefits from January 15, 2015 until claimant is found to be at MMI.

The record indicates claimant quit Dohrn January 14, 2015. At that time he indicated he quit because he was not given additional vacation. (Ex. C, p. 2) Records also indicate claimant quit his job at Dohrn, as he had another job lined up. (Ex. I, p. 86)

Dohrn may have been aware claimant had personality changes caused by the May of 2014 accident. Records made at the time claimant quit his job at Dohrn, indicate Dohrn only knew claimant quit his job because he was not happy with not getting extra vacation time. (Ex. C, p. 2)

In a November 2, 2015 report Dr. Gallagher indicated claimant's PTSD would not allow him to return to work to drive a truck. (Ex. I, p. 163) This was the first time defendants were put on notice claimant had a claim for temporary benefits following his termination of employment with Dohrn.

Defendants began making voluntary temporary total disability payments commencing on March 1, 2016. The period between November 2, 2015 and March 1, 2016 is approximately 17 weeks. The records indicate defendants attempted to have claimant undergo an exam with a psychiatrist or psychologist. This exam was delayed, in part, as claimant insisted on having Dr. Gallagher attend the defendants' expert IME, and the defendants had difficulty with finding an expert who would examine claimant under these circumstances. (Ex. II, pp. 186-234)

Claimant told Dohrn he quit because he was not given more vacation. Records also suggest claimant quit Dohrn, as he had another job lined up. Defendants' investigation of claimant's claim for benefits was delayed, in part, because of claimant's insistence in having Dr. Gallagher at the IME exam. Based on this record, a penalty of 10 percent is appropriate. Defendants are liable for a penalty of $1,061.67 (17 weeks x $624.51 x 10%).

The final issue to be determined is costs. Claimant is due reimbursement for costs detailed on the attachment to page 10 of the hearing report, except that claimant is not due reimbursement for the $4,563.75 associated with reports from Dr. Gallagher. Defendants are only liable for $525.00 as a cost for Dr. Gallagher's December 9, 2015 report. (Ex. I, p. 175)

ORDER

THEREFORE IT IS ORDERED:

That defendants shall pay claimant temporary total disability benefits commencing on January 15, 2015 and running until such time that claimant reaches maximum medical improvement.

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

That defendants shall pay interest on unpaid weekly benefits as ordered above and as set forth in Iowa Code section 85.30.

That defendants shall receive a credit for benefits previously paid.

That defendants shall pay claimant a penalty of one thousand sixty-one and 67/100 dollars ($1,061.67), as detailed above.

That defendants shall pay medical expenses and medical mileage as detailed above.

That defendants shall pay costs as detailed above.

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

Signed and filed this 21st day of November, 2016.

JAMES F. CHRISTENSON
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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