BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

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| JORGE AYALA,<br><br>Claimant,<br><br>vs. | File Nos. 5063242, 5063243 |
| CENTRAL PROCESSING CORP., a/k/a COUNTY MATERIALS CORP.,<br><br>Employer,<br><br>and<br><br>ZURICH AMERICAN INSURANCE COMPANY,<br><br>Insurance Carrier,<br>Defendants. | ARBITRATION DECISION<br><br>Head Note Nos.: 1803, 1803.1, 2907 |



## STATEMENT OF THE CASE

Jorge Ayala, claimant, filed two petitions for arbitration against Central Processing, Corp., a/k/a County Materials Corporation, as the employer and Zurich American Insurance Company as the insurance carrier. An in-person hearing occurred in Des Moines on June 5, 2018.

File No. 5063242 involves a stipulated work injury occurring on March 2, 2015. File No. 5063243 involves a stipulated work injury occurring on October 21, 2015. The parties filed a hearing report in each file at the commencement of the hearing. On the hearing reports, the parties entered into numerous stipulations. Those stipulations were accepted and no factual or legal issues relative to the parties' stipulations will be made or discussed. The parties are now bound by their stipulations.

The evidentiary record includes Joint Exhibits 1 through 13, Claimant's Exhibits 1 through 15 and Employer's Exhibits A through G. All exhibits were received without objection.

Claimant testified on his own behalf. Claimant also called two of his daughters, Alma Ayala and Estefane Ayala, to testify on his behalf. Defendants did not call any witnesses to testify live. The evidentiary record closed at the conclusion of the arbitration hearing.

However, counsel requested the opportunity to file post-hearing briefs. Their request was granted. All parties filed post-hearing briefs with the agency on July 9, 2018, at which time the case was considered fully submitted before the undersigned.

## ISSUES

In File No. 5063242, the parties submitted the following disputed issues for resolution:

1. Whether the March 2, 2015 injury caused temporary disability and, if so, the extent of claimant's entitlement to healing period benefits, if any.

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

3. The proper commencement date for permanent disability benefits.

4. Claimant's applicable average gross weekly wages immediately preceding the injury date and the corresponding weekly worker's compensation rate at which any benefits should be paid.

5. Whether claimant is entitled to an order requiring defendants to pay past medical expenses detailed in Claimant's Exhibit 11.

6. Whether costs should be assessed against any party and, if so, the extent to which costs should be assessed.

In File No. 5063243, the parties submitted the following disputed issues for resolution:

1. Whether the October 21, 2015 work injury caused temporary disability and, if so, the extent of claimant's entitlement to healing period benefits, if any.

2. Whether the October 21, 2015 work injury caused permanent disability and, if so, the extent of claimant's entitlement to permanent partial disability benefits.

3. Whether any permanent partial disability benefits should be paid based upon an injury to the thumb, the hand, or the arm.

4. The proper commencement date for permanent partial disability benefits, if any.

5. Claimant's applicable average gross weekly wages immediately preceding the injury date and the corresponding weekly worker's compensation rate at which any benefits should be paid.

6. Whether claimant is entitled to an order requiring defendants to pay past medical expenses detailed in Claimant's Exhibit 11.

7. Whether defendants should be ordered to pay penalty benefits pursuant to Iowa Code section 86.13 for unreasonable denial or delay in payment of weekly benefits.

8. Whether costs should be assessed against any party and, if so, the extent to which costs should be assessed.

## FINDINGS OF FACT

The undersigned, having considered all of the evidence and testimony in the record, finds:

Jorge Ayala is a 54-year-old gentleman. He was born in Mexico and attended school there through the fourth grade. Mr. Ayala has no additional schooling beyond the fourth grade. He has a limited grasp of the English language, though he did respond to some questions during his hearing testimony before the question was interpreted into his native tongue. Mr. Ayala has lived in Ainsworth, Iowa for more than 22 years. (Claimant's testimony)

Claimant has worked in a few different lines of work throughout his life. He picked fruit while residing in California. He has worked in the construction industry and in factory jobs. Mr. Ayala worked for Central Processing and its predecessors for approximately 20 years in Iowa. (Claimant's testimony)

In March 2015, claimant was working as a supervisor at the employer's plant in Davenport, Iowa. He earned $19.25 at that time. On March 2, 2015, Mr. Ayala tripped over some loose wires and fell onto his back. (Claimant's testimony)

Mr. Ayala did not immediately seek treatment for his low back injury. Instead, he attempted to work through his symptoms. However, on March 16, 2015, claimant presented to a physician assistant at Quad City Occupational Health describing low back pain and bilateral knee pain. Claimant was diagnosed with a lumbar sprain but returned to regular duty work. (Joint Exhibit 2, page 10)

Claimant returned for follow-up care with Camilla Frederick, M.D. at Quad City Occupational Health on March 24, 2015. By this date, claimant's primary complaint was pain in his back. Claimant was prescribed some physical therapy at this juncture. (Joint Ex. 2, pp. 12-15)

Claimant's symptoms persisted. By May 2015, Dr. Frederick recommended an MRI of claimant's low back. The MRI demonstrated degenerative changes but no obvious acute injury. (Joint Ex. 2, p. 32) Dr. Frederick referred claimant to an orthopaedic surgeon, Michael Dolphin, D.O.

Dr. Dolphin evaluated claimant on July 22, 2015. He concurred with the diagnosis of degenerative changes in the lumbar spine without nerve impingement or disc herniation. Dr. Dolphin recommended performance of a medial branch block. Two such injections were performed, but they proved unhelpful to claimant. Instead, Dr.

Dolphin opined that he had no further treatment to offer and released claimant back to Dr. Frederick for management. Dr. Frederick released claimant to return to work with occasional bending and a 45-pound occasional lifting restriction. (Joint Ex. 2, p. 48) Dr. Frederick opined that claimant sustained a five percent permanent impairment of the whole person as a result of the March 2, 2015 low back injury. (Joint Ex. 2, p. 78)

Claimant's counsel scheduled claimant to perform a functional capacity evaluation (FCE), which occurred on April 6, 2016. (Joint Exhibit 13) The physical therapist selected by claimant's counsel noted that there "was not good correlation between what was reported as the functional ability compared to the level demonstrated in the FCE." (Joint Ex. 13, p. 180) The FCE recommended a 45-pound occasional lifting restriction from floor to waist and was considered a valid evaluation. (Joint Ex. 13)

On May 24, 2016, claimant obtained an independent medical evaluation performed by Robert Milas, M.D. Dr. Milas opined that claimant sustained a ligamentous injury in his lumbar spine as a result of the March 2, 2015 work injury. Dr. Milas opined that the March 2015 work incident caused or materially aggravated claimant's underlying degenerative spine condition. However, Dr. Milas recommended against any surgical intervention for claimant and assigned a 13 percent permanent impairment of the whole person as a result of the low back injury. Dr. Milas did offer an opinion with respect to work restrictions. (Claimant's Ex. 2)

Mr. Ayala continued working his pre-injury job and missed no time from work related to his low back injury between March 2, 2015 and his lay-off due to plant closure on September 20, 2016. (Claimant's testimony) Some of the personnel in the employer's Davenport plant were transferred to another plant operating in Iowa City, Iowa. Claimant was never offered a transfer or further employment opportunity with this employer. (Claimant's testimony; Claimant's Ex. 13)

Claimant did not request defendants provide ongoing care after his evaluation with Dr. Milas. Instead, claimant scheduled and obtained treatment through Robert D. Foster, M.D. at Great River Orthopaedic Specialists. (Joint Ex. 7, p. 96) Dr. Foster diagnosed degenerative disc disease in claimant's lumbar spine and recommended additional physical therapy. Claimant submitted to additional physical therapy without requesting authorization by the defendants.

Dr. Foster also recommended a repeat lumbar x-ray, which occurred on October 3, 2016. (Joint Ex. 7, p. 97) The x-ray was interpreted as unremarkable for claimant's age. (Joint Ex. 76, p. 99) Dr. Foster released claimant from his care.

Once again, claimant self-directed his medical care and sought further evaluation with his primary care physician, Debbie L. Gibbs, M.D., on March 7, 2017. At that time, claimant complained of headaches. Dr. Gibbs indicated that the headaches were likely related to high blood pressure, rather than the low back injury.

In April 2017, claimant returned for further evaluation with Dr. Foster. At this evaluation, claimant reported radiating pain down his legs. Dr. Foster noted the

degenerative nature of claimant's low back condition and diagnosed claimant with common migraine headaches, presumably not related to the low back injury.

Claimant testified to ongoing low back symptoms, as did both of his daughters. Indeed, claimant's primary care physician referred claimant for evaluation at the University of Iowa Hospitals and Clinics' Pain Center, again without request for authorization by the defendants. Joseph Chen, M.D. evaluated claimant on November 22, 2017.

Dr. Chen noted that claimant had a very high propensity for pain catastrophizing, or perceiving himself to be disabled. Dr. Chen opined that sufficient time had passed, that claimant's tissue damage from the March 2, 2015 work injury had healed, and that claimant's residual pain symptoms were the result of hypersensitivity of the nervous system. (Joint Ex. 10, p. 143) Dr. Chen recommended against further pain treatment because claimant was not receptive to the ideas put forth at that time.

Claimant sought another independent medical evaluation performed by Sunil Bansal, M.D. on March 19, 2018. Dr. Bansal diagnosed claimant's back condition as an aggravation of the L4-5 and L5-S1 facet arthropathy. (Claimant's Ex. 5, p. 31) Dr. Bansal opined that claimant sustained a seven percent permanent impairment of the whole person as a result of the low back injury at work on March 2, 2015. (Claimant's Ex. 5, p. 32)

Considering all of the relevant evidence, including the medical opinions from the physicians noted above, I find the opinions of Dr. Frederick to be convincing on this record. Dr. Frederick opined that claimant had a five percent permanent impairment of the whole person. Claimant's ability to return to work after the low back injury and perform the same job duties he performed pre-injury for an extended period of time demonstrates that he had only a minimal functional loss of abilities.

Similarly, Dr. Frederick opined that claimant was capable of lifting up to 45 pounds occasionally. Her recommendation was later confirmed by a functional capacity evaluation obtained by claimant with a provider of his choosing. Therefore, I find that claimant has proven he sustained a five percent permanent impairment of the whole person as a result of the low back injury he sustained at work on March 2, 2015. I find that the low back injury caused claimant to need permanent work restrictions, which include only occasionally reaching and only occasionally lifting up to 45 pounds.

Claimant was able to locate additional work after the low back injury and his termination by the employer. Claimant worked for a couple of weeks at Techos Roofing, manufacturing roofing shingles. Claimant left this employment because he identified alternate employment at West Liberty Foods on June 26, 2017.

Claimant passed a pre-employment physical with West Liberty Foods. However, he described his job with West Liberty Foods as less physically demanding than his prior position with Central Processing. Claimant earned $19.25 per hour at Central Processing but only earns $13.25 per hour at West Liberty Foods.

Having considered claimant's age, employment history, educational background, the situs of his low back injury, his permanent restrictions, permanent impairment, ability to find alternate employment, his motivation, and all other factors of industrial disability identified by the Iowa Supreme Court, I find that claimant has proven a 35 percent loss of future earning capacity as a result of the March 2, 2015 low back injury at work.

Mr. Ayala also asserts a claim for healing period benefits from September 21, 2016 through June 25, 2017. (Hearing Report) This represents the period of time between claimant's lay-off from Central Processing and his hiring at West Liberty Foods. No explanation is provided why the healing period would not end when claimant was hired by Techos Roofing.

With respect to the healing period claim for the March 2, 2015 work injury, I find that claimant demonstrated an ability to return to his pre-injury job. He continued working from March 2, 2015 through his lay-off in September 2016. He missed no work during this period of time as a result of his work injury. I find that claimant was capable of performing substantially similar work to that performed on the date of injury throughout the period of his claimed healing period.

While he was still treating for his low back, Mr. Ayala also sustained a right thumb injury. Specifically, on October 21, 2015, claimant was moving a large piece of concrete when a piece broke and smashed his right thumb. Mr. Ayala continued working but eventually required medical attention.

On October 21, 2015, Joseph Martin, M.D., diagnosed claimant with a fracture of his right thumb. Claimant was under the impression that the fracture would heal with time. He did not seek ongoing medical care for his right thumb.

Then, in October 2017, claimant sought treatment, without authorization by defendants, through his personal physician, Debbie Gibbs, M.D. Dr. Gibbs referred claimant to Ericka Lawler, M.D. at the University of Iowa Hospitals and Clinics. Dr. Lawler ultimately performed surgery on claimant's right thumb on February 8, 2018. (Joint Ex. 10, pp. 149-157)

Mr. Ayala missed no time for the right thumb between the injury occurring and his surgery on February 8, 2018. However, after surgery was performed, claimant missed work from February 8, 2018 through March 19, 2018. Mr. Ayala did not request defendants authorize additional treatment for his right thumb, and all treatment provided for the right thumb by Dr. Gibbs, Dr. Lawler, and the University of Iowa Hospitals and Clinics was unauthorized care.

Mr. Ayala offered no evidence and failed to prove that the defendants were asked or refused to authorize further care of the right thumb. Claimant offered no evidence to suggest that the defendants denied liability for the treatment of the right thumb. Claimant offered no evidence and failed to prove that the treatment he actually received for the right thumb is superior to or provided a more favorable outcome than care that could have been authorized by defendants. Claimant similarly failed to

establish that the care he received for his right thumb through his primary care physician or at the University of Iowa Hospitals and Clinics was emergency care.

Review of the medical records related to claimant's October 21, 2015 work injury demonstrates that the situs of the injury is limited to the right thumb. Claimant was diagnosed with a distal phalanx fracture, which is a fracture at the tip of the thumb. Dr. Lawler described her surgical procedure as involving his thumb pad and pain and pressure in the interphalangeal joint. None of claimant's symptoms, injuries, or treatment involve a part of the thumb near or involving the joint connecting the thumb to the wrist. Therefore, I find that claimant's October 21, 2015 work injury is limited to the right thumb.

Dr. Lawler released claimant to return to work with no restrictions related to the right thumb on March 19, 2018. Dr. Bansal is the only physician that offered a permanent impairment rating for claimant's right thumb injury on October 21, 2015. Dr. Bansal assigned a four percent permanent impairment of the right thumb as a result of this work injury. Dr. Bansal's unrebutted opinion is accepted, and I find that claimant has proven a four percent permanent impairment of his right thumb as a result of the October 21, 2015 work injury.

In spite of the unrebutted permanent impairment rating, defendants did not pay permanent partial disability benefits to claimant. (Hearing Report) I find that claimant established a delay or denial of permanent partial disability benefits. I find that defendants did not establish a reasonable basis for the denial of permanent disability benefits. I find that the employer did not establish that it contemporaneously conveyed the basis, if any, for its denial of permanent disability benefits to claimant.

With respect to claimant's claims for healing period benefits for the October 21, 2015 injury, I find that Mr. Ayala's medical treatment with Dr. Lawler was not authorized by defendants. Although claimant was off working during this period of time, he did not prove that the unauthorized care rendered by Dr. Lawler resulted in a more favorable outcome than care that could have been offered by defendants.

The parties dispute the applicable gross average weekly wages for claimant before each injury date. Review of the parties' post-hearing briefs confirms that the parties can reach consensus on which weekly periods should be used for the March 2, 2015 injury date. However, the parties differ on how those weekly wages should be calculated.

Claimant appears to add all "hours" contained on the wage records at Exhibit G and multiply all hours by the standard or "straight time" hourly rate of $19.25. Claimant's calculations result in gross wages that exceed the actual gross wages reflected on the pay stubs. However, review of the wage records demonstrates that claimant was paid time and a half for his overtime hours and that the mechanism of recording those hours on the wage records artificially inflates the "hours worked." In essence, claimant is including overtime hours at a double-time rate by including the overtime hours twice in the "hours worked" in his calculations. Such calculations

artificially inflate claimant's earnings and do not accurately or fairly represent claimant's earnings prior to the March 2, 1015 injury date.

Defendants' rate calculation is difficult to follow as well. On the hearing report, defendants argue for an average weekly wage of $1,054.00 with a corresponding weekly rate of $689.66. No calculations are provided to support their average weekly wage or weekly rate, as stated on the hearing report.

In their post-hearing brief, defendants argue for an average weekly rate of $973.80 with a corresponding weekly rate of $627.52. In reaching this weekly rate, defendants utilize the same pay periods urged by claimant. I concur with the weeks selected by claimant, as essentially stipulated to by defendants. However, defendants use overtime hours only once in their calculations and only at the straight hourly rate without any premium pay for over time.

I calculate the claimant's average gross weekly wages prior to the March 2, 2015 injury date as follows:

| Pay Period | Total Hours Worked | Gross Wages at Straight Rate |
|---|---|---|
| 9/14/14 – 9/27/14 | 97.68 | $1,880.34 |
| 9/28/14 – 10/11/14 | 113.48 | $2,184.49 |
| 10/12/14 – 10/25/14 | 107.78 | $2,074.77 |
| 10/26/14 – 11/8/14 | 111.73 | $2,150.80 |
| 12/7/14 – 12/20/14 | 86.97 | $1,674.17 |
| 1/18/15 – 1/31/15 | 97.43 | $1,875.53 |
| 2/1/15 – 2/14/15 | 93.15 | $1,793.14 |
| | TOTAL: | $13,633.24 |

Fourteen weeks of wages were utilized in calculating the gross earnings, as noted above. Therefore, I find that the average gross weekly earnings preceding the March 2, 2015 injury date were $973.80.

With respect to the October 21, 2015 injury date, claimant seeks to utilize the same average gross weekly earnings as those utilized for the March 2, 2015 injury date. However, defendants urge use of different weeks immediately preceding the October 21, 2015 injury date. Defendants' rate calculations ultimately result in a higher gross average weekly wage than claimant's calculations. I find defendants' calculations, as set forth on page 23 of their post-hearing brief, to be more convincing. Therefore, I find that claimant had an average gross weekly wage preceding the October 21, 2015 injury date of $990.51.

## CONCLUSIONS OF LAW

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).

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).

The parties stipulate that claimant sustained a work related injury on March 2, 2015 and that the injury caused permanent disability. (Hearing Report) Mr. Ayala seeks an award of healing period benefits from September 21, 2016 through June 25, 2017. 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).

Healing period terminates upon the earliest of the three factors in Iowa Code section 85.34(1). Evenson v. Winnebago Industries, Inc., 881 N.W.2d 360, 372 (Iowa 2016).

In this case, I found that claimant returned to work immediately after the March 2, 2015 work injury. Claimant continued to work his regular duties for the employer through the date of his termination on June 25, 2017. Claimant contends that healing period benefits should commence upon his termination. However, I found that claimant demonstrated from March 2015 through June 2017 that he was medically capable of performing substantially similar employment for his employer. Therefore, I conclude that claimant has not demonstrated any entitlement to healing period benefits in File No. 5063242. Iowa Code section 85.34(1).

The parties stipulate that claimant sustained permanent disability as a result of the March 2, 2015 work injury. (Hearing Report) Claimant's injury involves his low back and the parties have appropriately stipulated that permanent disability benefits should be compensated industrially pursuant to Iowa Code section 85.34(2)(u). (Hearing Report)

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 failed to prove entitlement to any healing period. Therefore, I conclude that the proper commencement date for permanent partial disability benefits is the day after the injury, or March 3, 2015. Iowa Code section 85.34(1).

Having considered all of the industrial disability factors outlined by the Iowa Supreme Court, I found that claimant proved a 35 percent loss of future earning capacity. Therefore, I conclude that claimant has proven a 35 percent industrial disability as a result of the March 2, 2015 work injury. This entitles claimant to an award of 175 weeks of permanent partial disability benefits against the employer. Iowa Code section 85.34(2)(u).

The parties also dispute the applicable weekly rate at which worker's compensation benefits should be paid in File No. 5063242. Claimant contends that the

applicable average gross weekly wage is $1,177.66 and the applicable weekly rate should be $742.76. Defendants contend that the gross average weekly wages total $1,054.00 and the applicable weekly rate is $689.66. (Hearing Report)

Mr. Ayala was paid on a biweekly basis. However, his earnings were actually calculated based upon his work hours. Therefore, the applicable basis for compensation is Iowa Code section 85.36(6).

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). In this case, there was no practical way to break down weekly earnings. Therefore, I included 14 weeks of earnings to calculate the gross average weekly earnings.

However, overtime hours, which were paid to claimant in amounts in excess of claimant's straight time rate are to be included within the rate calculation at their straight hourly rate. See 876 IAC 8.2. In the rate calculations found within the findings of fact, I included overtime hours but calculated the total earnings from those overtime hours at the claimant's straight hourly rate. I did not include those earnings at a double-time rate, as urged by claimant.

The weekly benefit amount payable to an employee shall be based upon 80 percent of the employee's weekly spendable earnings, but shall not exceed an amount, rounded to the nearest dollar, equal to 66-2/3 percent of the statewide average weekly wage paid employees as determined by the Department of Workforce Development. Iowa Code section 85.37.

The weekly benefit amount is determined under the above Code section by referring to the Iowa Workers' Compensation Manual in effect on the applicable injury date. Having accepted the parties' stipulations that claimant was married and entitled to three exemptions on both dates of injury and having found that claimant's gross average weekly wage was $973.80 for the March 2, 2015 injury date, and using the Iowa Workers' Compensation Manual (p. 99) with effective dates of July 1, 2014 through June 30, 2015, I conclude that the applicable weekly rate for permanent partial disability benefits in File No. 5063242 is $627.52. Having found that the claimant's gross average weekly wage was $990.51 for the October 21, 2015 injury date, I conclude that the applicable weekly rate in File No. 5063243 is $637.86.

Claimant also seeks an award of medical expenses in File No. 5063242. 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).

Mr. Ayala seeks award of medical expenses, including satisfaction of a Medicaid lien for treatment obtained and directed through Great River Orthopaedic Specialists and an x-ray of his low back taken on October 3, 2016, at the recommendation of Robert D. Foster, M.D. at Great River Orthopaedic Specialists.

As noted above, an employer has a statutory duty to provide reasonable medical care to treat a work injury. However, when an injured worker abandons the statutory framework and seeks unauthorized care, the employer is only held liable for the unauthorized medical expenses if the medical treatment is reasonable and beneficial under the totality of the circumstances, meaning that the unauthorized medical care provides "a more favorable outcome than would likely have been achieved by the care authorized by the employer." Brewer-Strong v. HNI Corp., 913 N.W.2d 235, 248 (Iowa 2018) (quoting Bell Bros. Heating and Air Conditioning v. Gwinn, 779 N.W.2d 193, 206 (Iowa 2010)). The Iowa Supreme Court has referred to this evidentiary standard as a significant burden. Bell Bros., 779 N.W.2d at 206.

Having found that Great River Orthopaedic Specialists was not an authorized medical provider and that claimant sought care through that facility at his own direction, I conclude that claimant bore the burden to establish that the treatment he received through Great River Orthopaedic Specialists, including the lumbar x-ray, provided a more favorable outcome than could have been achieved by requesting and submitting to authorized medical care through the employer. Claimant elected to proceed in this case without seeking authorization for medical care. He offered no evidence to establish that the care he received provided a more favorable outcome than could have been achieved with another authorized provider.

Therefore, I conclude that claimant has failed to establish entitlement to reimbursement, satisfaction, or payment of the past medical expenses for the lumbar x-ray or expenses incurred at Great River Physicians and Clinics or Great River Medical Center, as detailed on Claimant's Exhibit 11, page 49. Similarly, I conclude that claimant has not established entitlement to medical mileage for those same medical visits. Iowa Code section 85.27.

With respect to claimant's October 21, 2015 work injury (File No. 5063243), claimant seeks an award of healing period benefits from February 8, 2018 through March 19, 2018. This represents the period of time claimant was off work after having

right thumb surgery performed. Defendants dispute entitlement to this claimed healing period because the healing period resulted from unauthorized medical care.

I found that claimant did not request treatment be provided by defendants for his thumb injury. I also found that claimant did not prove his care was emergent in nature. Finally, I found that claimant did not prove the unauthorized treatment he obtained provided a more favorable outcome than care that could have been provided, or authorized, by defendants. In fact, no evidence was generated or submitted on this issue.

Generally, a claimant cannot recover healing period benefits when abandoning the Iowa workers' compensation medical care provisions, rejecting the employer's right to select the authorized medical care, and seeking unauthorized medical care. Brewer-Strong v. HNI Corp., 913 N.W.2d 235, 248 (Iowa 2018); Bell Bros. Heating and Air Conditioning v. Gwinn, 779 N.W.2d 193, 209 (Iowa 2010). Therefore, having reached the above findings of fact, I conclude that claimant failed to prove entitlement to healing period benefits for his October 21, 2015 work injury.

I found that claimant proved an injury that was anatomically limited to the right thumb. The parties stipulated that the injury should be compensated as a scheduled member injury. Therefore, I conclude that the injury should be compensated as a scheduled member injury to the right thumb pursuant to Iowa Code section 85.34(2)(a).

Pursuant to Iowa Code section 85.34(2)(a), loss of the thumb is equivalent to compensation for 60 weeks. "If it is determined that an injury has produced a disability less than that specifically described in the schedule ... compensation shall be paid during the lesser number of weeks of disability determined, as will not exceed a total amount equal to the same percentage proportion of said scheduled maximum compensation." Iowa Code section 85.34(2)(v).

Having found that claimant proved a four percent permanent functional impairment of the right thumb, I conclude that claimant is entitled to a proportional award of weekly benefits equivalent to four percent of the right thumb. Given that the thumb is worth 60 weeks, claimant has proven entitlement to two point four (2.4) weeks of permanent partial disability benefits. Iowa Code section 85.34(2)(a), (v).

Having found that claimant is not entitled to an award of healing period benefits, I conclude that the proper commencement date for permanent partial disability benefits in the October 21, 2015 injury claim is October 22, 2015. Iowa Code section 85.34.

Again, following the October 21, 2015 injury date, claimant did not permit defendants to select authorized medical care. Instead, claimant directed his own medical care. In seeking unauthorized medical care, claimant bore the burden to establish that the care he received was either emergency care or that he obtained a more favorable outcome than could have been obtained through care defendants could have provided. Brewer-Strong v. HNI Corp., 913 N.W.2d 235, 248 (Iowa 2018) (quoting Bell Bros. Heating and Air Conditioning v. Gwinn, 779 N.W.2d 193, 206 (Iowa 2010)). Having found that claimant failed to carry this significant burden of proof, I conclude that

claimant is not entitled to an award of medical benefits in File No. 5063243. Bell Bros., 779 N.W.2d at 206.

Mr. Ayala asserts a penalty benefit claim pursuant to Iowa Code section 86.13. Claimant contends that the defendants' denial of healing period and permanent partial disability benefits for his right thumb injury was unreasonable. Claimant contends that defendants had no medical opinion upon which to base their denial of the thumb claim.

Iowa Code section 86.13(4) provides:

> a. If a denial, a delay in payment, or a termination of benefits occurs without reasonable or probable cause or excuse known to the employer or insurance carrier at the time of the denial, delay in payment, or termination of benefits, the workers' compensation commissioner shall award benefits in addition to those benefits payable under this chapter, or chapter 85, 85A, or 85B, up to fifty percent of the amount of benefits that were denied, delayed, or terminated without reasonable or probable cause or excuse.
>
> b. The workers' compensation commissioner shall award benefits under this subsection if the commissioner finds both of the following facts:
>
> (1) The employee has demonstrated a denial, delay in payment, or termination in benefits.
>
> (2) The employer has failed to prove a reasonable or probable cause or excuse for the denial, delay in payment, or termination of benefits.

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).

Mr. Ayala asserts that defendants unreasonably delayed or denied healing period benefits during the period of time he was off work. However, having concluded that claimant failed to prove entitlement to healing period benefits following his right thumb injury, I conclude that claimant cannot establish a delay in payment of benefits. Any claim for penalty benefits on delayed healing period after the thumb injury is denied.

Claimant also asserts that defendants should be assessed a penalty for delay or denial of permanent partial disability benefits resulting from the thumb injury. Defendants stipulated that an injury happened on October 21, 2015. Claimant produced the only medical opinion rendering a permanent impairment rating. Having accepted Dr. Bansal's impairment rating, I concluded that claimant was entitled to 2.4 weeks of permanent partial disability benefits.

Defendants have not paid any permanent disability to claimant for the October 21, 2015 injury date. (Hearing Report) Claimant has clearly established a delay or denial of permanent partial disability benefits. Therefore, the burden shifts to defendants to demonstrate that their delay or denial of benefits was reasonable.

In order to prove their denial or delay in payment of permanent partial disability benefits was reasonable, defendants must prove three items by a preponderance of the evidence: (1) the defendants conducted a reasonable investigation and evaluation of the claim for permanent disability; (2) the defendants possess a reasonable basis for denial of benefits and the basis for denial resulted from the preceding investigation; and

(3) defendants contemporaneously conveyed the basis for the denial or delay to the employee at the time of the denial or delay. Iowa Code section 86.13(4)(c).

In this case, defendants called no witnesses to testify live or about the issue of their denial of permanent disability benefits. None of the exhibits received into the record demonstrate that the defendants gave claimant a contemporaneous notice of the basis for their delay or denial of permanent partial disability benefits. Dr. Bansal issued an impairment rating for claimant's right thumb in a report dated March 19, 2018. Defendants did not obtain a competing medical opinion or impairment rating. Nor is there evidence that defendants notified claimant of a reason for any delay to seek such an opinion or that defendants denied and gave notice of denial for any other reason after Dr. Bansal's March 19, 2018 impairment rating was issued.

I conclude that claimant has established a delay in payment of permanent partial disability benefits. Having found that defendants did not carry their burden of proof to establish a reasonable basis for delay or denial of these benefits, I conclude that a penalty in some amount is appropriate.

The purpose of Iowa Code section 86.13 is both punishment for unreasonable conduct but also deterrence for future cases. Id. at 237. In this regard, the Commission is given discretion to determine the amount of the penalty imposed with a maximum penalty of 50 percent of the amount of the delayed, or denied, benefits. Christensen v. Snap-On Tools Corp., 554 N.W.2d 254, 261 (Iowa 1996).

In exercising its discretion, the agency must consider factors such as the length of the delays, 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. Meyers v. Holiday Express Corp., 557 N.W.2d 502, 505 (Iowa 1996). In this case, there is only one period of delay. However, the information available to the defendants after issuance of Dr. Bansal's impairment rating was sufficient to alert the defendants that permanent partial disability benefits may be due and owing in some amount. There is no evidence in this record of past penalty awards against these defendants.

Having considered the relevant factors and the purposes of the penalty statute, I conclude that a section 86.13 penalty in the amount of $700.00 is appropriate in this case. Such an amount is appropriate to punish the employer for its unreasonable denial of permanent partial disability benefits for the thumb injury and should serve as a deterrent against future conduct. However, the facts of this case are not of such an egregious nature that an additional penalty is warranted.

Finally, claimant seeks an award of costs. Costs are awarded at the discretion of this agency. Iowa Code section 86.40. In this case, claimant has prevailed and received an award of permanent disability benefits in both cases. On the other hand, defendants have also prevailed on healing period and medical benefit issues. I conclude that it is appropriate to assess costs in some amount against the employer and insurance carrier.

Mr. Ayala seeks assessment of his filing fee ($100.00). This is appropriate and assessed pursuant to 876 IAC 4.33(7). Claimant also seeks assessment of the court reporter fee for obtaining his deposition transcript and the transcript of Brian Rempt ($215.50). Both transcripts were placed into evidence. I conclude these expenses are appropriately assessed against defendants pursuant to 876 IAC 4.33(2).

Claimant also seeks assessment for the cost of a physician report from Dr. Bansal in the amount of $2,303.00. The statement attached to the hearing report indicates that the charges were $2,303.00 for "Record Review and Report." I do not read Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839 (Iowa 2015) to permit the assessment of the costs of an expert preparing for trial. Instead, only the expense of drafting a report in lieu of testimony is permitted. Id.

In this instance, Dr. Bansal's billing statement includes charges for both the records review, which is preparation for his evaluation and preparation to offer opinions, as well as his time spent drafting a report. I conclude that Dr. Bansal's charges related to a records review are not taxable pursuant to 876 IAC 4.33(6). Given that there were mixed results and that defendants won on several issues in these cases, it is inappropriate to assess the cost of Dr. Bansal's charges, even if permitted, under the facts of this case.

## ORDER

THEREFORE, IT IS ORDERED:

In File No. 5063242:

Defendants shall pay claimant one hundred seventy-five (175) weeks of permanent partial disability benefits commencing on March 3, 2015.

All weekly benefits shall be paid at the rate of six hundred twenty-seven and 52/100 dollars ($627.52).

Defendants shall be entitled to a credit for all permanent partial disability benefits paid to date, as stipulated to on the hearing report.

In File No. 5063243:

Defendants shall pay claimant two point four (2.4) weeks of permanent partial disability benefits commencing on October 22, 2015.

All weekly benefits shall be paid at the rate of six hundred thirty-seven and 86/100 dollars ($637.86).

Defendants shall pay penalty benefits in the amount of seven hundred dollars ($700.00).

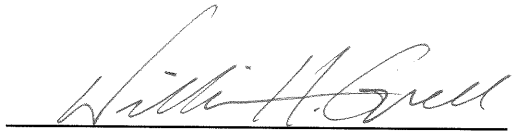
With respect to both files:

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

Defendants shall reimburse claimant's costs in the amount of three hundred fifteen and 50/100 dollars ($315.50).

Defendants shall file subsequent reports of injury (SROI) as required by this agency pursuant to rules 876 IAC 3.1(2) and 876 IAC 11.7.

Signed and filed this 26th day of November, 2018.



WILLIAM H. GRELL
DEPUTY WORKERS'
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WHG/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.