BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER



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| DARON JACOBS, | : | File No. 5036386 |
| Claimant, | : | |
| vs. | : | ARBITRATION |
| R.W. TRUCKING, INC., | : | DECISION |
| Employer, | : | Head Note No.: 1402.10, 1402.30, 1801 |
| Defendants. | : | 2501, 3003, 4000.2 |

## STATEMENT OF THE CASE

Claimant, Daron Jacobs, filed a petition in arbitration seeking workers' compensation benefits from R.W. Trucking, Inc. (R.W.), employer. This case was heard in Cedar Rapids, Iowa, on June 18, 2012.

On May 17, 2012, defendants' counsel filed a motion to withdraw as counsel. Defendants' counsel also moved for continuance. The motion to withdraw was granted as defendants' counsel complied with the requirement of rule 876 IAC 4.9(8). Defendant was ordered to have substitute counsel file an appearance, or notify this agency the defendant wished to appear pro se. Defendant did neither and did not comply with the order.

Defendants' motion to continue was denied.

This matter was heard in Cedar Rapids, Iowa, on June 18, 2012, at 1:00 p.m. as scheduled. Defendant was given notice of the hearing and failed to appear or participate. Due to defendants failure to appear, claimant's counsel indicated verbally which issues were ripe at hearing. Because of defendants' failure to participate a court reporter was not available for hearing. This hearing was recorded digitally and serves as the official record of this matter.

The record in this case consists of claimant's exhibits 1 through 10, and the testimony of claimant.

## ISSUES

1. Did an employee-employer relationship exist on October 6, 2009, between claimant and R.W.;

2. Whether the injury arose out of and in the course of employment;

3. Is the injury a cause of temporary disability; and if so

4. The extent of claimant's entitlement to temporary disability benefits;

5. Rate;

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

7. Are defendants liable for penalty under Iowa code section 86.13,

## FINDINGS OF FACT

Claimant was employed with R.W. to drive a semi truck to deliver seed corn. Claimant was hired by Ron Warren (Warren). Mr. Warren owned R.W.

R.W. owned the truck claimant used and paid for the fuel to run the truck. Warren directed claimant's work. Warren told claimant when to come to work and when to leave. Claimant was paid by check by R.W. Claimant testified he earned $1,200.00 a week with R.W. Claimant was paid by check by R.W. Claimant was employed with R.W. for 2 weeks before the October 6, 2009, injury. Claimant was married with 2 exemptions.

On October 6, 2009, claimant was delivering seed corn at a plant in Lone Tree, Iowa. Claimant tripped while unloading and fell on his right elbow. Claimant said Warren was with him at the time of injury. He said Warren completed unloading the truck.

On October 6, 2009, x-rays of claimant's right elbow indicated claimant had a right elbow comminuted fracture. (Exhibit 3, pages 15-16)

On October 7, 2009, claimant underwent surgery with Todd Johnston, M.D. An ORIF procedure was performed on claimant that included implantation of a compression plate and internal fixation wires. (Ex. 3, pp. 13-14)

Claimant said he had complications from medication that were given to him following surgery. Records indicate claimant had lower extremity swelling and increase in blood pressure post surgery. Claimant was treated with medication by Matthew Ulven, M.D. and Joseph Benjamin, M.D., for those problems. (Ex. 1; Ex. 2)

Claimant was prescribed physical therapy for follow-up care. Claimant testified he went to two physical appointments as per his physician's instructions. (Ex. 5)

On October 22, 2009, claimant returned in follow-up with Dr. Johnston. Claimant was not allowed to do any action regarding extension of the right elbow. (Ex. 4, p. 27)

Claimant returned to Dr. Johnston on November 23, 2009. He was released to return to light duty work with no lifting over 10 pounds. (Ex. 4, pp. 29-31)

On January 7, 2010, claimant was released to a full duty work. (Ex. 4, p. 32) Claimant was found to be at maximum medical improvement (MMI) on April 8, 2010. (Ex. 4, p. 34)

Claimant testified that his medical bills, found at Exhibit 6, 7, 8, 9, 10, all relate to treatment he had regarding his fractured elbow and subsequent medical treatment. These bills total $27,691.56. Claimant testified these bills relate to treatment he received for his fractured elbow.

## CONCLUSIONS OF LAW

The first issue to be determined is if an employer-employee relationship existed at the time of injury on October 6, 2009.

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).

Section 85.61(11) provides in part:

> "Worker" or "employee" means a person who has entered into employment of, or works under contract of service, express or implied, or apprenticeship, for an employer. . . .

It is claimant's duty to prove, by a preponderance of the evidence, that claimant or claimant's decedent was an employee within the meaning of the law. Where claimant establishes a prima facie case, defendants then have the burden of going forward with the evidence which rebuts claimant's case. The defendants must establish, by a preponderance of the evidence, any pleaded affirmative defense or bar to compensation. Nelson v. Cities Serv. Oil Co., 259 Iowa 1209, 146 N.W.2d 261 (1967).

Factors to be considered in determining whether an employer-employee relationship exists are: (1) the right of selection, or to employ at will, (2) responsibility for payment of wages by the employer, (3) the right to discharge or terminate the relationship, (4) the right to control the work, and (5) identity of the employer as the authority in charge of the work or for whose benefit it is performed. The overriding issue is the intention of the parties. Where both parties by agreement state they intend to form an independent contractor relationship, their stated intent is ignored if the agreement exists to avoid the workers' compensation laws, however. Likewise, the test of control is not the actual exercise of the power of control over the details and methods

to be followed in the performance of the work, but the right to exercise such control. Also, the general belief or custom of the community that a particular kind of work is performed by employees can be considered in determining whether an employer-employee relationship exists. Caterpillar Tractor Co. v. Shook, 313 N.W.2d 503 (Iowa 1981); McClure v. Union County, 188 N.W.2d 283 (Iowa 1971); Nelson, 259 Iowa 1209, 146 N.W.2d 261; Lembke v. Fritz, 223 Iowa 261, 272 N.W. 300 (1937); Funk v. Bekins Van Lines Co., I Iowa Industrial Commissioner Report 82 (App. December 1980).

Claimant was hired by R.W. to drive a truck to deliver seed corn. Claimant's work was directed by R.W. and Warren. Claimant was furnished a truck and fuel by R.W. to perform the work. There is no evidence that claimant was an independent contractor. Given this record, claimant has proved an employer-employee relationship existed on October 6, 2009.

The next issue to be determined is if the injury arose out of and in the course of employment.

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

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

The question of causal connection is essentially within the domain of expert testimony. The expert medical evidence must be considered with all other evidence introduced bearing on the causal connection between the injury and the disability. Supportive lay testimony may be used to buttress the expert testimony and, therefore, is also relevant and material to the causation question. The weight to be given to an

expert opinion is determined by the finder of fact and may be affected by the accuracy of the facts the expert relied upon as well as other surrounding circumstances. The expert opinion may be accepted or rejected, in whole or in part. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); IBP, Inc. v. Harpole, 621 N.W.2d 410 (Iowa 2001); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995). Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417 (Iowa 1994). Unrebutted expert medical testimony cannot be summarily rejected. Poula v. Siouxland Wall & Ceiling, Inc., 516 N.W.2d 910 (Iowa App. 1994).

Claimant fell and fractured his elbow while delivering seed corn for R.W. Medical records indicate claimant fell and fractured his elbow on October 6, 2009, while delivering seed corn for R.W. Given this record claimant has carried his burden of proof that his injury of October 6, 2009, arose out of and in the course of his employment.

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

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 testified he was taken off of work on October 6, 2009, following his fracture of his right elbow. Claimant underwent surgery for his work injury. Claimant was kept off work following surgery by his physicians. Claimant was not allowed to return to work at full duty until January 7, 2010. (Ex. 4, p. 32) Claimant is due temporary total disability benefits from October 6, 2009 through January 7, 2010.

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 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.

Under section 85.36(7), the gross weekly earnings of an employee who has worked for the employer for less than the full 13 calendar weeks immediately preceding the injury are determined by looking at the earnings of other similarly situated employees employed over that full period, but if earnings of similar employees cannot be determined, by averaging the employee's weekly earnings computed for the number of weeks that the employee has been in the employ of the employer.

Claimant testified he worked for 2 weeks for R.W. He testified he was paid $1,200.00 per week. He testified at the time of hearing he was married and had 2 exemptions. Based on this information claimant's rate of $753.66 per week.

The next issue to be determined is if there is a causal connection between claimant's injury and the claimed medical expenses.

The employer shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance, and hospital services and supplies for all conditions compensable under the workers' compensation law. The employer shall also allow reasonable and necessary transportation expenses incurred for those services. The employer has the right to choose the provider of care, except where the employer has denied liability for the injury. Section 85.27. Holbert v. Townsend Engineering Co., Thirty-second Biennial Report of the Industrial Commissioner 78 (Review-Reopening October 16, 1975).

Medical records indicate claimant received treatment for his fractured elbow following a work related accident. Claimant testified that all treatment detailed in the medical bills, found in Exhibit 6 through 10, are related to the care and treatment he received for the October 6, 2009, work injury. There is no evidence the bills detailed in the record are not causally connected to claimant's October 6, 2009, injury. There is no evidence that the costs related to this treatment are not fair and reasonable. Based on this, defendants are liable for the claimed medical expenses of $27,691.56.

The final issue to be determined is if 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).

Claimant was due temporary total disability benefits at the rate of $753.66 per week from October 6, 2009 through January 7, 2010. Defendants gave no good reason why these benefits were not paid to claimant. A penalty of 50 percent is appropriate in this case. October 6, 2009 through January 7, 2010 is approximately 13 weeks. Defendants are liable for a penalty of $4,898.79. ($753.66 x 13 weeks x 50 percent)

There is no evidence in this case that defendants carried any insurance at the time of claimant's injury. There is no evidence that defendant was an employer that was relieved from the responsibility of providing insurance. Iowa Code section 87.1 requires an employer insure their liability under the Iowa workers' compensation statute. Iowa Code section 87.2 indicates that a specific written notice shall be posted if the employer fails to insure their liability and that failure to do so is a simple misdemeanor. Iowa Code section 87.14(a) indicates that an employer shall not be in business without first obtaining insurance covering workers' compensation benefits or obtaining relief from insurance. Failure to do so willfully and knowingly is a class D felony. As a result, the employer shall be referred for prosecution for failure to have workers' compensation insurance in violation of chapter 87.

ORDER

THEREFORE, IT IS ORDERED:

That defendants shall pay claimant temporary total disability benefits from October 6, 2009 through January 7, 2010, at the rate of seven hundred fifty-three and 66/100 dollars ($753.66) per week.

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

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

That defendants shall pay medical expenses of twenty-seven thousand six hundred ninety-one and 56/100 dollars ($27,691.56) as detailed above.

That defendants shall pay claimant a penalty of four thousand eight hundred ninety-eight and 79/100 dollars ($4,878.79).

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

That defendants shall pay the costs of this matter as required under rule 876 IAC 4.33.

The employer shall be referred to the Iowa Attorney General for the prosecution for failure to insure for workers' compensation liability under Iowa Code sections 87.1, 87.2, and 87.14(a).

Signed and filed this 26th day of June, 2012.

JAMES F. CHRISTENSON
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

Copies to:

R.W. Trucking
1734 – 190th Street
Gladbrook, IA 50635
REGULAR and CERTIFIED

Chad R. Frese
Attorney at Law
111 East Church Street
Marshalltown, IA 50158
chad@kflawllp.com

Jennifer York
Assistant Attorney General
Special Litigation
Hoover State Office Bldg.
Des Moines, IA 50319
jyork@ag.state.ia.us

JFC/dll

**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.