BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JERRY POSTELL,

Claimant,

vs.

THE WEITZ GROUP, LLC,

Employer,

and

ACE AMERICAN INSURANCE COMPANY,

Insurance Carrier,
Defendants.

File No. 5050086

ARBITRATION

DECISION

Head Note Nos. 1100; 1800; 1108; 1802; 1803; 2800; 4000

STATEMENT OF THE CASE

Jerry Postell filed a petition for arbitration seeking workers' compensation benefits from The Weitz Group, employer.

The matter came on for hearing on May 19, 2015, before deputy workers' compensation commissioner Joseph L. Walsh in Cedar Rapids, Iowa at the IowaWORKS Center. The record in the case consists of claimant's exhibits 1 through 10; defense exhibits A through J; as well the sworn testimony of claimant, Jerry Postell, and defense witnesses Deb Stalder, Jerry Junge and Kenneth LaRue. The parties briefed this case and the matter was fully submitted on June 23, 2015.

ISSUES

1. Whether the claimant sustained an injury which arose out of and in the course of his employment on February 3, 2014.

2. Whether the alleged injury is a cause of either temporary or permanent disability.

3. Whether the claimant is entitled to any healing period, temporary total and/or temporary partial disability.

4. Whether the claimant is entitled to permanent partial disability benefits.

Claimant alleges total disability or odd-lot.

5. Whether the claimant is entitled to medical expenses, including IME.

6. Whether the claimant is entitled to alternate medical care.

7. Whether claimant is entitled to penalty benefits.

STIPULATIONS

Through the hearing report, the parties stipulated to the following:

1. The parties had an employer-employee relationship at the time of the alleged injury.

2. If it is determined the claimant suffered a compensable injury which is a cause of temporary disability, it is stipulated that claimant is entitled to temporary or healing period benefits from February 3, 2014, through September 4, 2014.

3. If any permanent partial benefits are owed, the parties stipulate that the disability is industrial.

4. Affirmative defenses have been waived.

5. The weekly rate of compensation is $893.10 per week based upon gross wages of $1,463.01 and being married with two exemptions.

6. There is no issue of credit.

FINDINGS OF FACT

Jerry Postell was 53 years old at the time of hearing. (Transcript, page 13) He left high school during the 10th grade and became a machinist. He later obtained his GED from Scott Community College in approximately 1990. (Claimant's Exhibit 9, page 2) He has taken some college-level courses in computer drafting and industrial equipment. He worked as a machinist and a mechanic through much of the 1980's and 1990's. (Cl. Ex. 9, pp. 4-5) In 1999, he began working as a millwright, installing equipment and turbines for powerhouses and other large facilities. He works through Millwright Local 2158. (Cl. Ex. 10, p. 4)

Mr. Postell was working for Weitz, the employer in this case, in Shell Rock, Iowa on February 3, 2014. Mr. Postell had worked for Weitz in the fall/winter of 2013. February 3, 2014, was his first day back to work for Weitz after a short layoff. It was extremely cold that day. He testified he was on top of a vessel cleaning snow when he slipped. He grabbed a handrail and heard a pop in his left shoulder. (Tr., pp. 17-18) Mr. Postell employer's policy requires employees to report any injury immediately,

regardless of the severity. (Tr., p. 19) There is some dispute regarding when Mr. Postell first told one of his superiors at Weitz. Mr. Postell testified that he did not want to report it for fear of being let go. (Tr., pp. 19-20) He also believed the injury was very minor and would not require any treatment. (Tr., p. 21)

Mr. Postell testified that he had a brief, non-specific conversation about the injury with his boss, Jerry Junge, in the break room on February 3, 2014. (Tr., p. 21) As described by the claimant, he was not really reporting an injury, as much as he was reporting a close call (i.e., he almost fell). For his part, Mr. Junge has no recollection of Mr. Postell reporting any injury on February 3, or February 4, 2014. (Tr., pp. 97-99) Ultimately, I find that this factual dispute has very little bearing on the outcome of the case. In all likelihood, there was an insignificant discussion which Mr. Junge did not recall.

On February 5, 2014, Mr. Postell called Mr. Junge and told him he was going to see a physician for his left shoulder. The phone call is documented by Mr. Junge.

> I got a call at 5:50 AM on Feb 5/2014 from Jerry Postell stating that he would not be coming to work today and stated that he had a doctor Appt at 2:30 in the afternoon and his wife was going to take him. And he stated that he didn't want it to turn into a recordable. I said to let me know how it turns out. Then I called Val to let her know.

(Cl. Ex. 9, p. 23) The person named "Val" referenced is the safety coordinator. (Tr., p. 102) There are few other details recorded on this Supervisor Incident Report. It lists the date of the injury or incident as 2/4/14 and states the time and type of injury were unknown. The reason there are so few details is that Mr. Junge interpreted the Mr. Postell's call as specifically not reporting a work injury. (Tr., pp. 101-104)

Mr. Postell visited Tod Walker, PAC, on February 5, 2014, who recorded the following history:

> HPI Comments: The patient today for evaluation of left shoulder pain. This started maybe about 4 weeks ago overall. He had repeat injury at work to 3 days ago. He states that he slipped and caught himself with an abducted and externally rotated arm. He had acute pain at the left anterior shoulder. No radiation of symptoms. No paresthesia numbness or tingling. He has difficulties with movements of the arm away from his body and overhead. He notes aching at night which has disrupted his sleep. This was significantly worse last night which has prompted his appointment today. He has been taking ibuprofen with some improvement. He denies any previous left shoulder injuries or surgeries. No elbow or wrist pain on the left.

(Cl. Ex. 1, p. 4)

A few days later, Mr. Postell called back to Mr. Junge and asked if any light-duty work was available and he was told there was not. (Tr., p. 102)

On February 10, 2014, Kay Martin, a senior claims representative for the insurance carrier, took a statement from the claimant. The facts she recorded are consistent with what Mr. Postell reported to Mr. Walker. (Cl. Ex. 10, p. 2) Mr. Postell underwent a course of physical therapy from February 6, 2014, through February 20, 2014, before receiving a referral to a shoulder specialist. (Cl. Ex. 6, pp. 1-8)

On March 10, 2014, Ms. Martin wrote to Mr. Postell and denied the claim. She stated:

> We have reviewed medical records as regards this case [sic] and note that there are discrepancies between what the medical records history is stating and what was told as the history of injury to the employer. Based on these discrepancies, it appears that this injury was not in the course and scope of your employment with the Weitz Group.

(Cl. Ex. 9, p. 22)

Thereafter, Mr. Postell underwent a course of treatment with Kyle Switzer, M.D., an orthopedic shoulder specialist. On March 18, 2014, Dr. Switzer reviewed his MRI and other tests and diagnosed a partial thickness rotator cuff tear. (Cl. Ex. 3, p. 2) Surgery (decompression, labral debridement) was performed on April 16, 2014. (Cl. Ex. 3, p. 4) Based upon the history provided by claimant's counsel, Dr. Switzer related the surgery and treatment to the February 3, 2014, work injury. (Cl. Ex. 3, pp. 6-7)

The parties have stipulated that Mr. Postell was off work recuperating from February 5, 2014, through September 3, 2014. The medical records confirm that Mr. Postell was receiving active medical treatment from Dr. Switzer throughout this period of time. (Cl. Ex. 3, pp. 8-14) He also received extensive physical therapy. (Cl. Ex. 6, pp. 9-105) On September 4, 2014, Dr. Switzer provided a return to work status allowing Mr. Postell to work full-duty. (Cl. Ex. 3, p. 15)

A functional capacity evaluation at WorkWell Systems, Inc., was performed in October 2014 which placed Mr. Postell in the medium work category. (Cl. Ex. 4, p. 1) The evaluation set forth some reasonable lifting restrictions, particularly for overhead work and reaching. (Cl. Ex. 4, p. 2) These include the following restrictions: 5 pound occasional waist to overhead lifting with left arm only; 15 pound carry with left arm; bilateral elevated work on an occasional basis only; repetitive overhead reaching on an occasional basis only. (Cl. Ex. 4, pp. 2-5)

David Tearse, M.D., evaluated Mr. Postell on January 9, 2015. He reviewed a history and specific questions from claimant's counsel. (Cl. Ex. 5, pp. 1-3) After his evaluation and records review, he diagnosed: "Status post left shoulder rotator cuff repair, with persistent pain, limited motion, and weakness." (Cl. Ex. 5, p. 6) He

assigned a 7 percent whole person rating and causally connected the impairment to the work injury. With regard to restrictions, he stated the following.

> As a result of his work related injury I do recommend permanent restrictions. I believe that the findings of the functional capacity evaluation are valid and reasonable to use in formulating these restrictions. These restrictions include a lifting restriction from waist to floor of 45 lbs on a rare basis, 40 lbs on an occasional basis, and 20 lbs on a frequent basis; waist to overhead lifting (bilateral) 20 lbs on a rare basis, 15 lbs on an occasional basis and no overhead lifting on a frequent basis; waist to overhead lifting with the left arm alone of 8 lbs on a rare basis, 5 lbs on an occasional basis, and no frequent overhead lifting with the left arm; waist to shoulder lifting limit of 35 lbs on a rare basis, 30 lbs on an occasional basis, and 15 lbs on a frequent basis (bilateral), and bilateral carry of 55 lbs on a rare basis, 50 lbs on an occasional basis, and 25 lbs on a frequent basis. In addition, I would assign him push pull limitations of no more than 30 lbs on a frequent basis, 60 lbs on an occasional basis, and 80 lbs on a rare basis (bilateral).

(Cl. Ex. 5, p. 7)

After being provided the functional capacity evaluation and the IME report of Dr. Tearse, Dr. Switzer modified his opinions and agreed that Mr. Postell should have work restrictions in a "checkoff report" on claimant's counsel letterhead. (Cl. Ex. 3, p. 18) Defendants retained Theron Jameson, D.O., who prepared a report with expert opinions on March 21, 2015. (Def. Ex. B) He opined that Mr. Postell had a one percent whole person functional impairment, no permanent restrictions and no need for any additional treatment. (Def. Ex. B, p. 7)

It is noted that the claimant had previously suffered an insignificant injury to his left shoulder, while working for this employer, in January 2014. He had no treatment for this injury and he did not report it. I find that this previous, unreported injury, has no impact on Mr. Postell's February 3, 2014, work injury claim.

Mr. Postell incurred medical expenses as a result of his work injury. Those expenses are outlined in detail in claimant's exhibit 7, although it is not entirely clear whether the bills remain unpaid.

CONCLUSIONS OF LAW

The first question is whether the claimant has proven that he suffered an injury which arose out of and in the course of his employment on February 3, 2014.

The claimant has the burden of proving by a preponderance of the evidence that the alleged injury actually occurred and that it both arose out of and in the course of the employment. Quaker Oats Co. v. Ciha, 552 N.W.2d 143 (Iowa 1996); Miedema v. Dial

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

By a preponderance of evidence, I find that Mr. Postell did suffer an injury which arose out of and in the course of employment on February 3, 2014. This is primarily based upon the fact that I find his sworn testimony to be credible. There was nothing about his demeanor which was cause for concern. His testimony is generally consistent with the Supervisor Incident Report, dated February 5, 2014. His testimony is consistent with a contemporaneous medical report on February 6, 2014. His testimony is consistent with the statement he provided to the insurance carrier on February 10, 2014. His testimony is consistent with his prior sworn testimony at deposition.

The defendants produced numerous statements from Weitz employees who swore that (1) he never reported a work injury and (2) they had no idea he claimed he had suffered an injury at work. (Defendant's Exhibits C through F) Kenneth LaRue and Jerry Junge both testified live at hearing as well.

At the heart of the dispute is the fact that Mr. Postell did not wish to hurt his reputation with the employer by reporting a recordable injury. Mr. Postell subjectively believed that if he reported a work injury which required treatment, it would cost the employer money and it would hurt his personal standing. When the claimant experienced the injury to his left shoulder, he believed and hoped that it was just a minor pain and it would resolve quickly. Over the next two days, however, the pain worsened and he began having difficulty sleeping at night. Based upon the record before the agency, Mr. Postell still did not wish to make it a "recordable" injury. Therefore, when he called in on February 5, 2014, he told Mr. Junge that he was going to see a physician but that he did not want to "turn it in to a recordable." (Cl. Ex. 9, p. 23) It is likely that Mr. Junge understood that Mr. Postell was really injured at work but simply did not wish to turn it in to the workers' compensation carrier as a recordable injury. This is a plausible and believable explanation for why Mr. Postell did not report the injury in the time and manner required by the employer.

I find that the claimant has proven that he suffered an injury to his left shoulder which arose out of and in the course of his employment on February 3, 2014.

The defendants also dispute medical causation.

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).

The only medical causation dispute revolves around the issue of the injury itself. All of the medical experts have confirmed that, assuming the injury happened the way Mr. Postell claimed it happened, it caused some degree of both permanent and temporary disability. (Cl. Ex. 3, p. 7; Cl. Ex. 5, p. 7) The defendants own physician did not provide an adverse causal connection opinion.

I find that the claimant has suffered both temporary and permanent disability as a result of his February 3, 2014, work injury.

The next issue is the extent of claimant's entitlement to healing period benefits.

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, 312N.W.2d 60 (Iowa App. 1981). Healing period benefits can be interrupted or intermittent. Teel v. McCord, 394 N.W.2d 405 (Iowa 1986).

The claimant is seeking healing period from February 3, 2014, through September 4, 2014. The parties have stipulated that if "the defendants are liable for the alleged injury claimant is entitled to benefits for this period of time." (Hearing Report) Since I have found that the defendants are liable for the injury, benefits are owed during

that period of time. I do, however, find that the parties' stipulation contained a scrivener's error. The parties mistakenly listed the commencement date as February 3, 2014, when, based upon the facts submitted, the appropriate commencement date is February 5, 2014. I find Mr. Postell is entitled to healing period from February 5, 2014, through September 3, 2014.

The next issue is claimant's entitlement to permanent partial disability benefits.

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

Since the claimant's disability is located in his left shoulder, his disability is evaluated industrially.

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.

Based upon the record before me, and utilizing the appropriate factors set forth above, I find that the claimant has suffered a 40 percent loss of earning capacity as a result of the February 3, 2014, work injury.

Mr. Postell is 53 years old. He has a GED from Scott Community College. He is a union millwright in his prime earnings years. His diagnosis is "Status post left shoulder rotator cuff repair, with persistent pain, limited motion, and weakness." (Cl. Ex. 5, p. 6) This has resulted in a 7 percent whole body impairment with substantial restrictions, including the following:

> As a result of his work related injury I do recommend permanent restrictions. I believe that the findings of the functional capacity evaluation are valid and reasonable to use in formulating these restrictions. These restrictions include a lifting restriction from waist to floor of 45 lbs on a rare basis, 40 lbs on an occasional basis, and 20 lbs on a frequent basis; waist to overhead lifting (bilateral) 20 lbs on a rare basis, 15 lbs on an occasional basis and no overhead lifting on a frequent basis; waist to overhead lifting with the left arm alone of 8 lbs on a rare basis, 5 lbs on an occasional basis, and no frequent overhead lifting with the left arm; waist to shoulder lifting limit of 35 lbs on a rare basis, 30 lbs on an occasional basis, and 15 lbs on a frequent basis (bilateral), and bilateral carry of 55 lbs on a rare basis, 50 lbs on an occasional basis, and 25 lbs on a frequent basis. In addition, I would assign him push pull limitations of no more than 30 lbs on a frequent basis, 60 lbs on an occasional basis, and 80 lbs on a rare basis (bilateral).

(Cl. Ex. 5, p. 7) I find the opinions of Dr. Tearse and Dr. Switzer to be the most convincing opinions regarding Mr. Postell's medical condition following surgery. These restrictions are severely disabling for a person with claimant's skills in heavy manual labor, such as millwright, mechanic and machinist. The primary factors considered in assessing his substantial loss of earning capacity, are the foregoing restrictions and claimant's inability to perform past employment.

Mr. Postell was off work for approximately 6 months recuperating from this injury. He does not take any prescription medications but he does perform home exercises to keep his shoulder healthy. (Tr., p. 61) Immediately upon his release to return to work, Mr. Postell returned to work as assigned through his union hall and has not reported any formal restrictions to his employers. (Tr., p. 58) There is no evidence in the record that Mr. Postell has actually lost any specific jobs as a result of his left shoulder condition since his recuperation. He did testify that he believes Weitz has refused to rehire him as a result of his claim for work injury.

He worked for Blahnik Construction from September 2014 through January 2015. He has worked for two other employers as well without officially utilizing any apparent medical restrictions. (Def. Ex. G; Def. Ex. M) He is still able to work as a union millwright. He has substantial demand skills which he can still utilize. Because of his physical limitations, however, his earning capacity has been substantially impaired. Mr. Postell has not worked nearly as consistently since being released from his injury and his medical restrictions impair his ability to perform heavy millrwright work.

I find that Mr. Postell is highly motivated as evidenced by his efforts to return to work right away in September 2014 upon being released. At this time, it does appear that he will be able to work as a union millwright in the future, assuming he can work through the pain and symptoms of disability. At the time of hearing, he is still an active union member and willing to accept assignments as provided. (Tr., p. 60)

When considering all of the appropriate factors to assess an injured worker's present loss of earning capacity in the competitive job market, I find the claimant has suffered a 40 percent loss. Forty percent of 500 weeks is 200 weeks of benefits. I therefore find that the claimant is entitled to 200 weeks of benefits at the stipulated rate of compensation, beginning on September 5, 2014.

The next issue is 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).

Claimant is entitled to an order of reimbursement only if he has paid treatment costs; otherwise, to an order directing the responsible defendants to make payments directly to the provider. See, Krohn v. State, 420 N.W.2d 463 (Iowa 1988). Defendants should also pay any lawful late payment fees imposed by providers. Laughlin v. IBP, Inc., File No. 1020226 (App., February 27, 1995).

The claimant is entitled to payment of the medical expenses as outlined in claimant's exhibit 7. If the bills are unpaid, the defendants should make payment directly to the provider. For amounts paid by the claimant, reimbursement should be made directly to the claimant.

The next issue is whether claimant is entitled to reimbursement for the 85.39 IME of Dr. Tearse.

Mr. Postell seeks reimbursement of his independent medical evaluation fee from Dr. Tearse.

Section 85.39 permits an employee to be reimbursed for subsequent examination by a physician of the employee's choice where an employer-retained physician has previously evaluated "permanent disability" and the employee believes that the initial evaluation is too low. The section also permits reimbursement for reasonably necessary transportation expenses incurred and for any wage loss occasioned by the employee attending the subsequent examination.

Defendants are responsible only for reasonable fees associated with claimant's independent medical examination. Claimant has the burden of proving the reasonableness of the expenses incurred for the examination. See Schintgen v. Economy Fire & Casualty Co., File No. 855298 (App. April 26, 1991). Claimant need not ultimately prove the injury arose out of and in the course of employment to qualify

for reimbursement under section 85.39. See Dodd v. Fleetguard, Inc., 759 N.W.2d 133, 140 (Iowa App. 2008).

In this instance, the employer did not retain a physician or obtain a permanent impairment rating from any physician. Claimant cannot establish the necessary prerequisites of Iowa Code section 85.39 to qualify for reimbursement of his independent medical evaluation. Therefore, I conclude that claimant's request for reimbursement of his independent medical evaluation fee is denied. Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839, 844 (Iowa 2015).

The final issue is whether the claimant is entitled to penalty 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."
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> 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).

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).

The claimant argues that there was no reasonable basis for the denial of benefits. The defendants argue that the claim is not compensable at all, and therefore it is fairly debatable.

The employer in this case has a rule that every injury, no matter how small or seemingly insignificant, must be reported. (Def. Ex. F) Mr. Postell understood this. And he violated the rule, not once, but twice. He did not report a minor, insignificant injury to his left shoulder in January 2014, when working at a different job site for this employer. And then, he did not immediately report the February 3, 2014, work injury until February 5, 2014. The legal question is whether his failure to follow a company policy in reporting the work injury provides a reasonable basis to deny the claim.

I find that it does not. I find that Mr. Postell is entitled to penalty benefits on the healing period and a portion of the permanency benefits.

This would undoubtedly be a cleaner case had the claimant simply reported the injury such as it was on February 3, 2014. But that is not what happened. My specific factual findings as related to the claim for penalty benefits are summarized as follows:

- Mr. Postell had a minor injury in January 2014 to his left shoulder while working for Weitz.
- He never reported that injury before being laid off.
- He also never needed any medical treatment for that injury because it was minor.
- He returned to work for Weitz and suffered another minor injury to his left shoulder as described above.
- As with his earlier injury, Mr. Postell initially believed it would not require any treatment.
- Unlike the earlier injury, however, the pain actually worsened over the next day to the point he had difficulty sleeping on February 4, 2014.
- Mr. Postell decided to seek treatment for the condition on February 5, 2014.
- He called his supervisor, Jerry Junge, that morning at 5:50 a.m. and provided enough information that Mr. Junge was reasonably aware Mr. Postell had been injured at work.
- Mr. Postell told Mr. Junge that he did not want to turn it in as a "recordable."

- Mr. Junge did not request any further details despite the fact that he knew or should have known that Mr. Postell was claiming a work injury.

- Mr. Junge reported the claimant's vague report to the company's safety director.

- Mr. Postell went to a medical provider on February 5, 2014, and recited the history of the injury to his provider, including the January 2014, injury.

- The insurance carrier took Mr. Postell's recorded statement on February 10, 2014. The record is not entirely clear why this occurred or how the information came to the carrier's attention.

- The claimant provided a statement to the carrier which was entirely consistent with what he had reported to the medical provider on February 5, 2014. (Compare Cl. Ex. 1, p. 4 with Cl. Ex. 10, p. 2)

- On February 13, 2014, Mr. Postell filled out an employee incident report, which was, again, consistent with his other reports. (Cl. Ex. 10, p. 3)

- On March 10, 2014, the defendants denied the claim for the following reasons: "We have reviewed medical records as regards this case and note that there are discrepancies between what the medical records history is stating and what was told as the history of injury to the employer." (Cl. Ex. 9, p. 22)

- To the extent the investigation was ongoing, the defendants later took statements from several management officials who all testified that they knew nothing about the alleged injuries and nothing was ever reported.

- No statement, however, was ever produced from a co-worker named "Randy", who claimant identified on February 13, 2014, as having knowledge of the injury.

Based upon these factual findings, I find that the defendants did not have a reasonable basis for denying the claim in March 2014. There were no inconsistent statements between the medical records and the history provided to the employer. In reality, no history was provided to the employer because when Mr. Postell told Mr. Junge he was injured, Mr. Junge did not ask him for any details of the injury. Mr. Junge testified at hearing. He testified that the call was short and he never asked him what had occurred. (Tr., pp. 105-06) Based upon the facts in evidence, it appears that the claimant called in to report that he had been injured at work, but specifically told his supervisor that he did not wish to report it as a work injury. Mr. Junge apparently understood this by documenting it as such and sending it to the safety director.

In any event, while the waters may have been muddied with this phone call, it seems the matter should have been entirely cleared up entirely when the claimant provided the statement to the insurance carrier five days later. There was nothing inconsistent between claimant's statement to the employer on February 5, 2014, compared with the statement to the carrier on February 10, 2014. In fact, it would be nearly impossible to have an inconsistency for the simple reason that Mr. Junge obtained essentially no valuable information in the February 5, 2014, short phone call. While the claims adjustor did not testify at hearing to explain her denial, it appears the defendants now claim that the claimant's vague statement that he did not wish the injury to be "a recordable" is inconsistent with his claim that he slipped on February 3, 2014.

Having stated all of this, I can understand why an employer might be suspicious in these circumstances. An employee who failed to report two work injuries to his left shoulder claimed he was injured on the job on his first day back from a brief layoff. It was reasonable for the employer to be suspicious and perform a diligent investigation to determine if there were any factors which do not add up. The ultimate basis for the denial, however, claimed there were factual inconsistencies between what the claimant told the employer and what he told the medical provider. There is simply no basis for this in the record. It appears the real basis for denying the claim is that the employer was upset that Mr. Postell had violated their work rule to report an injury no matter how minor.

There is very little information in the record to assess the extent of the penalty which should be awarded. There is no evidence this employer is a repeat violator. The length of the delay, however, has been long and undoubtedly damaging to the claimant. Therefore, I find a penalty of $12,000.00 is appropriate to deter the defendants from engaging in this type of unreasonable denial in the future.

ORDER

THEREFORE IT IS ORDERED:

Defendants shall pay healing period benefits from February 5, 2014, through September 3, 2014, at the rate of eight hundred and ninety-three and 10/100 ($893.10) per week.

Defendants shall pay the claimant two hundred (200) weeks of permanent partial disability benefits at the rate of eight hundred and ninety-three and 10/100 ($893.10) per week from September 4, 2014.

Defendant shall pay accrued weekly benefits in a lump sum.

Defendant shall pay interest on unpaid weekly benefits awarded herein as set forth in Iowa Code section 85.30.

Defendants shall pay medical expenses as outlined in claimant's exhibit 7 in a

manner consistent with this decision.

Defendants shall pay a penalty in the amount of twelve thousand and no/100 dollars ($12,000.00).

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

Costs in the amount of one thousand five hundred seventy-nine and 82/100 dollars ($1,579.82) are taxed to defendant.

Signed and filed this 7th day of April, 2016.

JOSEPH L. WALSH
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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JLW/kjw

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.