BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

NANCY CAPION,

Claimant,

vs.

CONIFER HEALTH SOLUTIONS,

Employer,

and

NEW HAMPSHIRE INS. CO.

Insurance Carrier,
Defendants.

File No. 5061884

ARBITRATION

DECISION

Head Notes: 1402.40, 1803, 2502, 2907, 4000.2

STATEMENT OF THE CASE

Nancy Capion, claimant, filed a petition in arbitration seeking workers' compensation benefits from Conifer Health Solutions, employer, and New Hampshire Insurance Company, insurance carrier, as defendants. Hearing was held on June 4, 2019 in Des Moines, Iowa.

The parties filed a hearing report at the commencement of the arbitration hearing. On the hearing report, the parties entered into various stipulations. All of those stipulations were accepted and are hereby incorporated into this arbitration decision and no factual or legal issues relative to the parties' stipulations will be raised or discussed in this decision. The parties are now bound by their stipulations.

Claimant, Nancy Capion was the only witness to testify live at trial. The evidentiary record also includes joint exhibits JE1-JE4, claimant's exhibits 1-7, and defendants' exhibits A-F. Defendants objected to claimant's exhibit 2, a supplemental report from Sunil Bansal, M.D., dated May 31, 2019. Defendants objected to the timing of the exhibit on the basis that they did not have time to respond to the report prior to the hearing. The report was admitted into evidence and defendants were given additional time to obtain rebuttal evidence. Defendants obtained the rebuttal evidence which is in evidence at defendants' exhibit F.

The parties submitted post-hearing briefs on July 1, 2019, at which time the case was fully submitted to the undersigned.

ISSUES

The parties submitted the following issues for resolution:

1. The extent of permanent disability claimant sustained as a result of the stipulated June 12, 2017 work injury.

2. Whether defendants are responsible for past medical expenses.

3. Whether claimant is entitled to be reimbursed pursuant to Iowa Code section 85.39 for the independent medical examination (IME).

4. Whether penalty benefits are appropriate.

5. Assessment of costs.

FINDINGS OF FACT

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

Claimant, Nancy Capion, sustained an injury to her right ankle which arose out of and in the course of her employment on June 12, 2017. She was taken to Mercy Medical Center and diagnosed with a trimalleolar fracture of the left ankle. On June 14, 2017 she saw Chinedu C. Nwosa, M.D. at Iowa Ortho. On June 15, 2017, Dr. Nwosa performed surgery consisting of open reduction and internal fixation of left ankle fracture with fixation of tibia-fibula syndesmotic disruption. (Joint Exhibit 1, pages 1-8; JE2, pp. 1-3)

Ms. Capion followed up with Dr. Nwosa at the Iowa Clinic. She arrived at the October 4, 2017 appointment on a motorized wheelchair. Ms. Capion told Dr. Nwosa that she felt she needed to take the motorized scooter to work. The doctor noted there was routine healing of her fracture. He released her to work five hours a day at a sedentary job. He also provided her with orders to allow her to use the motorized scooter at work. (JE2, pp. 4-6)

At her December 27, 2017 appointment with Dr. Nwosa, Ms. Capion arrived using a walker. X-rays revealed that her fracture was healed. She was to continue with physical therapy to work on her strength, range of motion, and gait. On February 7, 2018, Dr. Nwosa noted that Ms. Capion was using crutches. She reported that she had tried to walk with one crutch at physical therapy, but that was very difficult for her. Dr. Nwosa noted routine healing. She continued to have some nerve pain down her leg. Dr. Nwosa referred her to Kurt Smith, D.O., a rehab specialist. He also ordered a functional capacity evaluation (FCE). (JE2, pp. 8-13)

At the request of the defendants, Ms. Capion saw William Boulden, M.D. for an IME on February 13, 2018. Dr. Boulden noted that she used two crutches for

ambulation. Ms. Capion stated she used the crutches more for balance than for pain. She was continuing to go to therapy two times per week. Dr. Boulden did not have the most recent treatment and physical therapy notes. He also did not have access to the films from Iowa Orthopaedic, but he did take x-rays of his own. Dr. Boulden's working diagnosis was loss of motion and balance issues with a well-healed trimalleolar-fractured ankle. Dr. Boulden noted she had physical restrictions based on the fact that she was not independently ambulatory at this time. He recommended a better compression stocking. Dr. Boulden felt she did have permanent impairment but needed more information before he could rate her impairment. (Def. Ex. A, pp. 1-5)

Ms. Capion saw Dr. Smith, on February 27, 2018. She reported that her pain was aggravated by walking and standing. She continued to have pain in her left ankle and was using crutches for mobility. Dr. Smith's assessment included chronic pain of the left ankle and impaired functional mobility, balance, gait, and endurance. She was to continue with physical therapy and follow-up in 2 weeks. (JE2, p. 14)

In March and May of 2018, Dr. Smith noted that Ms. Capion continued to utilize crutches. At the May 1, 2018 visit, Dr. Smith noted that she was no longer taking medications for pain. It was his opinion that there would not be any additional functional gains. Due to gait derangement, he wrote her a prescription for a cane, if she was able to tolerate using one. He placed her at maximum medical improvement (MMI) and completed a handicap parking form. He released her to return to work with no restrictions for her job. (JE2, pp. 15-23)

On March 5, 2018, Dr. Boulden issued a missive to the defendants. Since his initial report, he had the opportunity to review additional notes from physical therapy, Dr. Nwosa, and Dr. Smith. Dr. Boulden also spoke with the physical therapist and learned that Ms. Capion had not gained any functional return over the last several months. Thus, Dr. Boulden placed her at MMI on February 7, 2018; this was the date of her last appointment with Dr. Nwosa. Dr. Boulden felt further care and treatment was a waste of time and money. Based on Ms. Capion's last physical therapy evaluation and range of motion, Dr. Boulden assigned 10 percent impairment of the lower extremity. (Def. Ex. B)

On May 17, 2018, Dr. Smith authored a letter to defendants. Dr. Smith placed Ms. Capion at MMI for the left ankle injury as of May 1, 2018. He did not anticipate any permanent restrictions as it related to her job duty requirements. However, he felt that she may have limitations with prolonged periods of ambulation and prolonged stair climbing activities. At that time, he was not recommending any further medical treatment. Dr. Smith noted she could continue her home exercise program, range of motion, and ambulation activities. (Ex. D)

Ms. Capion returned to Dr. Nwosa on May 30, 2018, concerned about the amount of swelling and pain in her ankle. Ms. Capion wondered if she was allergic to the metal in her ankle. The doctor felt the chances of her reacting to the metal were

extremely rare. Dr. Nwosa noted she was using a cane and was working from home. Ms. Capion was to return as needed. (JE2, pp. 24-27)

On June 22, 2018 Dr. Smith responded to a May 18, 2018 inquiry from the defendants regarding permanent impairment. Dr. Smith noted that Ms. Capion had gone through an extensive physical therapy course and that her progress had plateaued. According to Dr. Smith, Ms. Capion continued to use an adaptive aid cane for ambulation for longer distances. Dr. Smith opined that she had sustained 15 percent whole person impairment. He noted that she had an antalgic gait, intermittently used a cane for distance ambulation but did not usually use a cane at home. He assigned the rating pursuant to the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, page 529, Table 17-5. (Cl. Ex. 1)

At the request of her attorney, Ms. Capion underwent an IME on October 31, 2018 with Dr. Bansal. As a result of the October IME, Dr. Bansal issued a report dated January 10, 2019. He noted that Ms. Capion continued to have pain in her left ankle with swelling of her foot when she was on her feet too long. She experienced numbness and tingling of her foot when she sat for a while. She continued to wear a boot for more stability and used crutches or a cane for support when her ankle was particularly painful. She continued to work a sedentary desk job. Dr. Bansal's diagnosis was closed trimalleolar fracture of the left ankle. He placed Ms. Capion at MMI as of May 30, 2018. Dr. Bansal assigned 15 percent whole person impairment as the result of the work injury. Like Dr. Smith, Dr. Bansal utilized Table 17-5 of the AMA Guides to assign the impairment rating. Dr. Bansal permanently restricted Ms. Capion to use a cane or crutches for ambulation. (Cl. Ex. 2, pp. 1-8)

On May 31, 2019, Dr. Bansal revised his impairment rating. The revision was based on one of Ms. Capion's last medical treatment records, an April 7, 2018 physical therapy record, which stated that she used crutches for household and work ambulation and intermittently used a motorized scooter for long distances. The revised rating was also based on Dr. Bansal's understanding that Ms. Capion was still utilizing two crutches on a routine basis and that she also wore a boot/brace on her ankle. Ms. Capion confirmed that she used a motorized scooter for prolonged ambulation. Based on this information, Dr. Bansal assigned 40 percent whole person impairment and cited Table 17-5 of the AMA Guides. (Cl. Ex. 2, pp. 9-10)

Dr. Boulden issued another missive to defendants on July 3, 2018. After reviewing additional records from Dr. Smith, Dr. Boulden indicated that he did not agree with the use of the gait derangement section of the AMA Guides for Ms. Capion's rating. (Def. Ex. C)

On June 6, 2019, Dr. Boulden authored a letter to defendants regarding Dr. Bansal's opinions on impairment. Dr. Boulden noted that Dr. Bansal assigned Ms. Capion's impairment rating based on gait abnormalities. However, according to page 529 of the AMA Guides, whenever possible the evaluator should use a more specific method rather than using gait derangement. Dr. Boulden also noted that section 17.2 of

the AMA Guides is based only on subjective factors, like pain and suddenly giving way, not based on pathological processes. Additionally, Dr. Boulden noted that Dr. Bansal referenced an April 7, 2018 physical therapy statement, which was over a year old. For these reasons he disagreed with Dr. Bansal's rating. Dr. Boulden also noted that Dr. Bansal indicated that Dr. Smith had given the same impairment rating; however, Dr. Boulden was not aware of any such rating from Dr. Smith. (Def. Ex. F)

The first issue that must be addressed is the extent of permanent disability Ms. Capion sustained to her left lower extremity as the result of the June 12, 2017 work injury. As noted above, several medical experts have assigned permanent functional impairment ratings. Defendants rely on the opinion of Dr. Boulden; however, the impairment rating of Dr. Boulden is troubling to the undersigned. Unfortunately, Dr. Boulden does not state what Table in the AMA Guides he utilized to reach his impairment rating. Additionally, he does not use the same terms as those used in the AMA Guides. For example, the AMA Guides refer to plantar flexion capability, flexion contracture, and extension. Dr. Boulden refers to dorsiflexion and eversion. Even if I were to try to extrapolate his rating using eversion, it appears the impairment would be two percent, not three percent of the lower extremity. For these reasons, I find Dr. Boulden's impairment rating is not persuasive.

Both Dr. Smith and Dr. Bansal cited section 17.2C of the AMA Guides, gait derangement, in their impairment ratings. The AMA Guides state that whenever possible the evaluator should use a more specific method of rating than gait derangement. In this case, no medical expert offered a more specific method that complies with the AMA Guides. Thus, I find the use of section 17.2C is a persuasive rating methodology in this case. Both Dr. Smith and Dr. Bansal used this section. Initially, both doctors assigned 15 percent impairment of the whole person. The doctors' rationale for the rating is consistent with the information contained in the record. (Cl. Ex. 1, p. 2; Cl. Ex. 2, p. 7)

Dr. Bansal later revised his impairment rating from 15 to 40 percent of the whole person. As noted above, this revision was based on additional information provided by claimant's counsel. Dr. Bansal assigned 40 percent whole person impairment, pursuant to Table 17-5 of the AMA Guides. (Cl. Ex. 2, pp. 9-10) I do not find this rating to be persuasive because it creates an absurd result. A review of page 545 of the AMA Guides demonstrates that a total amputation below the knee results in 28-32 percent body as a whole impairment. Certainly, Ms. Capion, who sustained a closed trimalleolar fracture of her left ankle, is not entitled to greater permanent partial disability than an amputee. I do not give great weight to the revised 40 percent impairment rating from Dr. Bansal.

For the above stated reasons, I find Ms. Capion sustained 15 percent whole person functional impairment as the result of her work injury. According to the AMA Guides, 15 percent whole person impairment is the equivalent of 37 percent impairment of the lower extremity.

Next, we turn to the issue of temporary disability. The parties could not reach an agreement on the appropriate commencement date for the payment of permanency benefits. Ms. Capion was off work after her surgery. She returned to work on October 12, 2017. Ms. Capion contends that permanency benefits should commence on October 12, 2017. Defendants take the position that the healing period continued once Ms. Capion returned to work and did not terminate until May 2, 2018. Thus, defendants argue claimant is entitled to permanent partial disability benefits commencing on May 1, 2018, when she was medically capable to return to work and was placed at MMI. Defendants' position is not persuasive. I find claimant's healing period ended when she returned to work in October of 2017.

Claimant is seeking payment of medical expenses, including medical mileage, as set forth in claimant's exhibit 6. A review of the medical bills and claimant's submitted mileage reveals that the expenses were incurred in connection with treatment of Ms. Capion's work injury. Defendants do not argue that the expenses were not reasonable or necessary because of the work injury. I find defendants are responsible for the past medical expenses, including mileage, as set forth in claimant's exhibit 6 which total one thousand ninety-five and 61/100 dollars ($1,095.61).

Claimant is seeking reimbursement for her IME pursuant to Iowa Code section 85.39. Dr. Bansal performed an IME on October 31, 2018. Prior to that time, the defendants had obtained an impairment rating from an employer-retained physician, Dr. Boulden. I find that the prerequisites of section 85.39 were met. Thus, I conclude defendants shall reimburse claimant for the IME of Dr. Bansal in the amount of two thousand four hundred eighty-seven and no/100 dollars ($2,487.00). (Cl. Ex. 7; Def. Ex. B)

Claimant contends that penalty benefits are appropriate in this case. First, claimant seeks penalty benefits for delay in commencement of PPD benefits. The appropriate commencement date for permanency benefits in this case is October 12, 2017. Defendants did not issue permanency benefits until April 5, 2018. (Cl. Ex. 5, p.1) I find that defendants delayed payment of permanency benefits for 25 weeks. Defendants argue Ms. Capion's healing period did not end until May 1, 2018 when "she was medically capable to return to work, and was placed at Maximum Medical Improvement." (Def. Br., p. 2) Defendants' position is contrary to Iowa law as explained by the Iowa Supreme Court. Defendants failed to prove that they had a reasonable basis for the delay of benefits from October 12, 2017 through April 4, 2018. Therefore, I find defendants' delay in commencement of permanency benefits is unreasonable. I find defendants unreasonably delayed payment of approximately 24 weeks of permanent partial disability benefits to Ms. Capion. At the stipulated rate of $493.42 this resulted in an unreasonable delay of over $11,800.00 in weekly benefits. Considering the purpose of the penalty benefits statute I find a penalty in the amount of $5,400.00 is sufficient to achieve the statutory goals of deterrence and punishment under these particular facts.

Second, claimant contends that defendants failed to pay an appropriate amount of PPD. Claimant contends penalty benefits are appropriate because when paying permanent partial disability benefits defendants relied on the rating of Dr. Boulden, even after Dr. Smith and Dr. Bansal issued higher impairment ratings. I do not find claimant's argument to be persuasive. Although I did not rely on the opinion of Dr. Boulden, I find it was reasonable for the defendants to rely on his opinion as the basis for the amount of permanent partial disability benefits that they voluntarily paid to Ms. Capion. I find the defendants were reasonable in the amount of permanent partial disability benefits they voluntarily paid.

Third, claimant seeks penalty benefits for underpayment of the rate. The parties stipulated that the appropriate weekly workers' compensation rate for the claimant is $493.42. However, defendants paid weekly benefits at the rate of $477.97, $479.68, and $480.00. Defendants voluntarily paid the difference in the rate on March 20, 2019. At that time defendants issued a check in the amount of $241.56 for temporary total disability benefits from June 13, 2017 through October 11, 2017. (Def. Ex. E, pp. 1-2; Cl. Ex. 5, pp. 2-3) I find that defendants unreasonably delayed payment of $241.56 in weekly benefits to Ms. Capion. The record is void of any documentation regarding why defendants paid the weekly benefits at a lower rate. Defendants do not offer any argument in their post-hearing brief as to why the underpayment of the rate was reasonable. Thus, I find that defendants failed to prove that their underpayment of the weekly rate was reasonable. Considering the purpose of the penalty benefits statute, I find a penalty in the amount of $100.00 is sufficient to achieve the statutory goals of deterrence and punishment under these particular facts.

CONCLUSIONS OF LAW

The party who would suffer loss if an issue were not established ordinarily has the burden of proving that issue by a preponderance of the evidence. Iowa R. App. P. 6.14(6)(e).

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).

Where an injury is limited to scheduled member the loss is measured functionally, not industrially. Graves v. Eagle Iron Works, 331 N.W.2d 116 (Iowa 1983).

The courts have repeatedly stated that for those injuries limited to the schedules in Iowa Code section 85.34(2)(a-t), this agency must only consider the functional loss of the particular scheduled member involved and not the other factors which constitute an "industrial disability." Iowa Supreme Court decisions over the years have repeatedly cited favorably the following language in the 66-year-old case of Soukup v. Shores Co., 222 Iowa 272, 277; 268 N.W. 598, 601 (1936):

> The legislature has definitely fixed the amount of compensation that shall be paid for specific injuries . . . and that, regardless of the education or qualifications or nature of the particular individual, or of his inability . . . to engage in employment . . . the compensation payable . . . is limited to the amount therein fixed.

Our court has even specifically upheld the constitutionality of the scheduled member compensation scheme. Gilleland v. Armstrong Rubber Co., 524 N.W.2d 404 (Iowa 1994). Permanent partial disabilities are classified as either scheduled or unscheduled. A specific scheduled disability is evaluated by the functional method; the industrial method is used to evaluate an unscheduled disability. Graves, 331 N.W.2d 116; Simbro v. DeLong's Sportswear 332 N.W.2d 886, 887 (Iowa 1983); Martin v. Skelly Oil Co., 252 Iowa 128, 133, 106 N.W.2d 95, 98 (1960).

When the result of an injury is loss to a scheduled member, the compensation payable is limited to that set forth in the appropriate subdivision of Code section 85.34(2). Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961). "Loss of use" of a member is equivalent to "loss" of the member. Moses v. National Union C. M. Co., 194 Iowa 819, 184 N.W. 746 (1921). Pursuant to Iowa Code section 85.34(2)(u) the workers' compensation commissioner may equitably prorate compensation payable in those cases wherein the loss is something less than that provided for in the schedule. Blizek v. Eagle Signal Co., 164 N.W.2d 84 (Iowa 1969).

The right of a worker to receive compensation for injuries sustained which arose out of and in the course of employment is statutory. The statute conferring this right can also fix the amount of compensation to be paid for different specific injuries, and the employee is not entitled to compensation except as provided by statute. Soukup, 222 Iowa 272, 268 N.W. 598.

Compensation for permanent partial disability shall begin at the termination of the healing period. Compensation shall be paid in relation to 220 weeks as the disability bears to the lower extremity. Section 85.34(2)(o).

Based on the above findings of fact, I conclude claimant sustained 37 percent functional impairment to her left lower extremity as the result of the June 12, 2017 work injury. As such, she is entitled to 81.4 weeks of permanent partial disability benefits at the stipulated weekly workers' compensation rate.

We must now determine the appropriate commencement date for those permanency 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, 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).

Permanent partial disability benefits commence upon the termination of the healing period. The factors that terminate a healing period are a return to work, ability to perform substantially similar employment, or achieving maximum medical improvement. Iowa Code section 85.34(1). Permanent disability benefits commence upon the earliest of the three factors. Evenson v. Winnebago Industries, Inc., 881 N.W.2d 360 (Iowa 2016).

In the present case, Ms. Capion was off work after her injury and surgery. She returned to work on October 12, 2017. Based on the above findings of fact, I conclude her healing period ended on October 11, 2017 and that her permanency benefits shall commence on October 12, 2017. Defendants took the position that the healing period continued once Ms. Capion returned to work and did not terminate until May 2, 2018. Thus, defendants argue claimant is entitled to permanent partial disability benefits commencing on May 1, 2018, when she was medically capable to return to work and was placed at MMI. I did not find the defendants' position to be persuasive because it is in direct conflict with the Evenson case. Defendants offered no explanation as to why the Evenson case should not apply in this situation.

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

Based on the above findings of fact, I conclude defendants are responsible for the past medical expenses, including mileage, as set forth in claimant's exhibit 6 which total one thousand ninety-five and 61/100 dollars ($1,095.61).

Claimant is seeking reimbursement for the IME of Dr. Bansal. 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.

Dr. Bansal performed an IME on October 31, 2018. Prior to that time the defendants had obtained an impairment rating from an employer-retained physician, Dr. Boulden. I find that the prerequisites of section 85.39 were met. Thus, I conclude defendants shall reimburse claimant for the IME of Dr. Bansal in the amount of two thousand four hundred eighty-seven and no/100 dollars ($2,487.00).

Claimant asserts that defendants unreasonably delayed or denied weekly benefits in this case. Claimant asserts that defendants should be ordered to pay penalty benefits pursuant to Iowa Code section 86.13.

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.
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> 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.
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> (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.
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> (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).

I found that claimant has clearly proven a delay in payment of weekly permanent partial disability benefits in this case. Therefore, the burden of proof shifted to the defendants to establish the requirements of Iowa Code section 86.13(4)(c). Having found that the employer failed to comply with current Iowa law and having found that the

employer failed to prove it had a reasonable basis for delaying weekly benefits between October 12, 2017 and April 4, 2018, I conclude that the employer failed to carry its burden of proof to establish the requirements of Iowa Code section 86.13(4)(c). Therefore, I conclude that penalty benefits should be awarded in some amount for the period from October 12, 2017 to April 4, 2018. After that point, defendants voluntarily paid permanent partial disability benefits in an amount that I found was reasonable.

I further found that claimant has clearly proven a delay in payment of the weekly workers' compensation benefits during the time period that the employer initially underpaid the weekly workers' compensation rate. Therefore, the burden of proof shifted to the defendants to establish the requirements of Iowa Code section 86.13(4)(c). Having found that the employer failed to offer any evidence or argument to show that the delay was reasonable, I conclude that penalty benefits are appropriate for the period of the underpayment.

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).

Having considered the relevant factors and the purposes of the penalty statute, I conclude that a section 86.13 penalty in the amount of $5,500.00 is appropriate in this case. Such an amount is appropriate to punish the employer for delays in payment of benefits under these facts 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 is seeking an assessment of costs in the amount of one-hundred six and 88/100 dollars ($106.88). Costs are to be assessed at the discretion of the deputy commissioner or workers' compensation commissioner hearing the case. Iowa Code section 86.40. Claimant was generally successful in her case; therefore, I exercise my discretion and find that an assessment of costs is appropriate. Specifically, claimant is seeking the certified service fee of $6.88. I find this is an appropriate cost pursuant to 876 IAC 4.33(3). Claimant is also seeking $100.00 for the filing fee. I find that this is an appropriate cost under 876 IAC 4.33(7). Defendants are assessed costs totaling one-hundred six and 88/100 dollars ($106.88).

ORDER

THEREFORE, IT IS ORDERED:

All weekly benefits shall be paid at the stipulated rate of four hundred ninety-three and 42/100 dollars ($493.42).

Defendants shall pay eighty-one point four (81.4) weeks of permanent partial disability benefits commencing on October 12, 2017.

Defendants shall be entitled to credit for all weekly benefits paid to date.

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 Deciga Sanchez v. Tyson Fresh Meats, Inc., File No. 5052008 (App. Apr. 23, 2018) (Ruling on Defendants' Motion to Enlarge, Reconsider or Amend Appeal Decision re: Interest Rate Issue).

Defendants are responsible for the past medical expenses, including mileage, as set forth in claimant's exhibit 6 which total one thousand ninety-five and 61/100 dollars ($1,095.61).

Defendants shall reimburse claimant for the IME of Dr. Bansal in the amount of two thousand four hundred eighty-seven and no/100 dollars ($2,487.00).

Defendants shall pay penalty benefits in the amount of five thousand five hundred and no/100 dollars ($5,500.00).

Defendants shall reimburse claimant costs as set forth above.

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 16th day of August, 2019.

ERIN Q. PALS
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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