BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

CARLOS LAURENZANO,

Claimant,

vs.

PANDA RESTAURANT GROUP, INC.,

Employer,

and

NEW HAMPSHIRE INSURANCE COMPANY,

Insurance Carrier,
Defendants.

File No. 5049656

ARBITRATION

DECISION

Head Note No.: 1803

STATEMENT OF THE CASE

Carlos Laurenzano, claimant, filed a petition for arbitration against Panda Restaurant Group, Inc., as the employer and New Hampshire Insurance Company as its worker's compensation insurance carrier. An in-person arbitration hearing occurred on April 6, 2016 in Des Moines, Iowa.

The evidentiary record includes joint exhibits 1 through 22 as well as defendants' exhibits A through E. All exhibits were received without objection. Claimant testified on his own behalf utilizing the services of a Spanish to English interpreter, Ernesto Niño-Murcia. Claimant's wife, Maria Laurenzano, also testified at the hearing. Defendants did not call any witnesses to testify.

The parties filed a hearing report in which the parties entered into numerous stipulations. Those stipulations were accepted and no factual or legal issues relative to the parties' stipulations will be made or discussed in either file. The parties are now bound by their stipulations.

ISSUES

The parties submitted the following disputed issues for resolution:

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

2. Whether claimant is entitled to reimbursement of the fee for his independent medical evaluation pursuant to Iowa Code section 85.39.

3. Whether claimant is entitled to an award of penalty benefits pursuant to Iowa Code section 86.13.

4. Whether claimant's costs should be assessed against defendants.

FINDINGS OF FACTS

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

Carlos Laurenzano is a 62 year old, right-hand dominant gentleman, who lives in Urbandale, Iowa. Mr. Laurenzano was born in Columbia and immigrated to the United States in 1991. He obtained extensive education in Columbia and holds a doctorate degree in economics. Unfortunately, since he does not speak English fluently, Mr. Laurenzano has not utilized his educational training since coming to the United States. (Claimant's testimony; Exhibit A, page 3)

Since his arrival in the United States, Mr. Laurenzano has worked as a cook, a painter and in janitorial type positions. All of his work experience in the United States has required some physical labor. (Claimant's testimony)

He was working for Panda on June 12, 2014. He was attempting to lower a box from a height. He caught the box with his right hand and had a feeling that something had broken in his right shoulder. (Claimant's testimony; Ex. 2, p. 5; Ex. 3, p. 10)

Mr. Laurenzano sought medical attention through a physician of his own choosing. Jose Angel, M.D., evaluated claimant initially on June 18, 2014. He did not believe claimant had sustained a rotator cuff tear and recommended against obtaining an MRI. (Ex. 3, pp. 10, 12) However, after conservative care failed to improve claimant's right shoulder condition, Dr. Angel recommended an MRI of the shoulder on October 3, 2014. (Ex. 3, p. 13)

There was some delay in obtaining the recommended MRI. By December 17, 2014, Dr. Angel diagnosed claimant with frozen shoulder. (Ex. 3, p. 24) Ultimately, on February 27, 2015, claimant obtained an MRI of the right shoulder. The MRI demonstrated a small full-thickness tear of the supraspinatus tendon. (Ex. 9, pp. 33-34) Dr. Angel reviewed the MRI report and recommended referral to an orthopaedic surgeon. (Ex. 10, p. 37)

Following the orthopaedic referral, defendants directed claimant's care and selected Timothy R. Vinyard, M.D. as the authorized treating orthopaedic surgeon. Dr. Vinyard evaluated claimant on March 9, 2015 and diagnosed claimant with tendinosis of the biceps tendon as well as a rotator cuff tear. (Ex. 10, p. 37) Dr. Vinyard recommended surgical intervention. (Ex. 10, p. 37)

Claimant submitted to surgery performed by Dr. Vinyard on March 31, 2015. Dr. Vinyard performed a right shoulder arthroscopic rotator cuff repair, a biceps tenodesis, a subacromial decompression and a distal clavicle excision during the surgical procedure. (Ex. 12)

Unfortunately, claimant's symptoms did not completely resolve after the surgical intervention. Despite conservative care attempts, Dr. Vinyard recommended a repeat MRI on September 14, 2015. (Ex. 14, p. 65) The second MRI of claimant's right shoulder demonstrated a complete rupture of the biceps tendon according to the interpretation of the radiologist. (Ex. 15, p. 68) Upon reevaluation, Dr. Vinyard opined that the MRI findings did not demonstrate the need for additional surgery. (Ex. 18, p. 71)

Dr. Vinyard declared maximum medical improvement on November 19, 2015 and recommended a functional capacity evaluation (FCE) for purposes of helping to assign permanent work restrictions. (Ex. 18, p. 83) Claimant participated in an FCE on November 30, 2015. The FCE was deemed valid and recommended a 30-pound occasional lift for claimant. (Ex. 19, p. 88)

Dr. Vinyard accepted the FCE as accurate and imposed the restrictions and limitations outlined therein. (Ex. 20, p. 102) In a report dated December 23, 2015, Dr. Vinyard opined that claimant sustained a one percent permanent impairment of the whole person as a result of his right shoulder injury at Panda. (Ex. 20, p. 104)

Claimant was not satisfied with the impairment rating offered by Dr. Vinyard and sought an independent medical evaluation (IME). The IME was performed by Jacqueline Stoken, D.O., on February 11, 2016. Dr. Stoken charged $3,000.00 for this fee. I find Dr. Stoken's fee to reasonable and consistent with other independent medical evaluation fees for similar evaluations.

Dr. Stoken concluded that claimant sustained a 12 percent permanent impairment of the whole person. (Ex. 21, p. 112) However, Dr. Stoken critiqued and ultimately rejected the FCE findings and recommendations regarding claimant's residual functional abilities. Instead, Dr. Stoken opined that claimant would be limited to a ten-pound lifting restriction on an occasional basis. She also opined that claimant should avoid work at or above shoulder height. (Ex. 21, p. 114)

When I review the opinions of Dr. Vinyard and Dr. Stoken, I note that Dr. Stoken rates claimants' shoulder more thoroughly and appropriately under the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition. Dr. Stoken acknowledges and rates claimant's resected distal clavicle, while Dr. Vinyard offers no impairment for that surgical resection. This is clearly ratable pursuant to Chapter 16, table 16-27 on page 506 of the AMA Guides, Fifth Edition.

On the other hand, Dr. Stoken critiques and ultimately rejects the valid FCE performed. She provides some rational for her rejection of the FCE but then offers permanent restrictions that have no objective bases supporting them. I find Dr. Stoken's rejection of the FCE findings and observations to be less convincing than Dr. Vinyard's acceptance of the FCE findings and recommendations pertaining to claimant's physical abilities. While the methodology of the FCE and ultimately conclusions of the FCE may arguably be challenged, there is some objective basis for the findings of the FCE. Certainly, the therapist performing the test observed claimant performing at levels consistent with the FCE.

By way of contrast, Dr. Stoken's permanent physical restrictions have no objective bases supporting them. Those restrictions are presumably based upon Dr. Stoken's medical judgment but are not supported by any testing, medical literature, or other basis. Dr. Stoken's critique of the FCE lacking objective bases certainly would also apply to her fashioning a set of permanent restrictions without any objective observations or bases. Therefore, I find the FCE findings and recommendations, as adopted by the treating orthopaedic surgeon, to be the best and most accurate measure of claimant's residual physical functional abilities.

Claimant has not worked at Panda since his injury. Given his permanent work restrictions from Dr. Vinyard, he would not be capable of performing his job duties at Panda. Similarly, it is probable that claimant would be precluded from returning to work as a painter that required work overhead with the right arm.

Claimant remains capable of performing some janitorial type positions. In fact, he has obtained employment performing light office cleaning for the Des Moines Area Regional Transit Authority (DART). He now works approximately 35-38 hours per week and earns $13.16 per hour at this job. He previously earned $12.00 per hour but worked 60-80 hours per week at Panda. Claimant testified that he is not certain how long the job at DART will continue, but he has been told by his supervisors that he does a good job in his janitorial role. (Claimant's testimony)

Mr. Laurenzano testified that he has ongoing symptoms as a result of the June 12, 2014 work injury. He testified that he is not happy with this surgical result and that he is not able to move his arm back or lift it. He testified that he has ongoing pain in the right shoulder and cannot do repetitive movements. Claimant testified that he has decreased strength in his right arm and that he cannot lay on his right side. He testified that he has difficulties with personal hygiene and a hard time turning on a faucet of a sink with his right arm.

Claimant's wife confirmed that he has residual symptoms and difficulties since the 2014 work injury. Mrs. Laurenzano testified that claimant now has difficulties tying his shoes, needs help putting on a shirt or sweater, and that he cannot use both hands to cook or to work on their car like he used to be able. It is certainly believable that claimant has some residual symptoms and limitations as a result of his right shoulder

injury, though he clearly remains capable of use of the right arm to perform light janitorial duties.

Considering claimant's age, educational background, employment history, ability to return to work in a new position, permanent impairment, permanent work restrictions, motivation, as well as all other relevant industrial disability factors, I find that Mr. Laurenzano has proven he sustained a 35 percent loss of future earning capacity as a result of the June 12, 2014 work injury.

Mr. Laurenzano testified that he had to retain the services of an attorney to obtain weekly benefit checks. He specifically testified that he did not receive any weekly benefit checks before he retained an attorney. Defendants introduce payment records at exhibit D. However, it is not clear from the payment records when benefits were paid, if there was actually a delay in payment, or the amounts of any delayed benefits. I cannot determine from this evidentiary record whether there was an actual delay sufficient to determine whether there was a reasonable basis for the delay or the amount of benefits delayed upon which a penalty could be imposed.

CONCLUSIONS OF LAW

The parties have stipulated that claimant sustained a work-related right shoulder injury on June 12, 2014 and that the injury caused permanent disability. The parties appropriately stipulate that the injuries should be compensated industrially pursuant to Iowa Code section 85.34(2)(u). (Hearing Reports) However, the parties dispute the extent of 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 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.

Upon consideration of all of the relevant factors of industrial disability, I found that claimant proved he sustained a 35 percent loss of future earning capacity. This is the equivalent of a 35 percent industrial disability. Therefore, I conclude claimant has proven entitlement to 175 weeks of permanent partial disability benefits. Iowa Code section 85.34(2)(u).

Claimant also seeks reimbursement of his independent medical evaluation fee. 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).

Defendants selected Dr. Vinyard. Dr. Vinyard rendered his impairment rating on December 23, 2015. Claimant subsequently selected and obtained an independent medical evaluation performed by Dr. Stoken on January 25, 2016. Claimant has established all of the prerequisites for reimbursement of Dr. Stoken's independent medical evaluation fee. Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 830 (Iowa 2015).

I found Dr. Stoken's fee to be reasonable. Therefore, I conclude that claimant is entitled to reimbursement of Dr. Stoken's fee totaling $3,000.00.

Claimant seeks an award of 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.

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."
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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.
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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.

(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).

The evidentiary record in this case is not well developed as it pertains to the penalty claim. Claimant testified that weekly benefits were initially delayed for approximately seven weeks after his injury. Defendants introduced payment records at exhibit D, but I am not clear from the evidentiary record whether the delay occurred or when the payments were issued. Claimant bore the burden to initially prove the delay in payment of benefits. I conclude that claimant has not proven a delay in benefits such that penalty benefits will be awarded.

Finally, claimant submitted a statement of costs and seeks assessment of those costs. Costs are assessed at the discretion of the agency. Iowa Code section 85.40.

Claimant's independent medical evaluation fee was already assessed pursuant to Iowa Code section 85.39. Therefore, it is not assessed as a cost.

Claimant seeks assessment of his filing fee as well as the cost of service on defendants. Both are permissible costs. 876 IAC 4.33(3), (7) I conclude that claimant's filing fee and service costs totaling $106.49 shall be assessed against defendants.

ORDER

THEREFORE, IT IS ORDERED:

Defendant shall pay claimant one hundred seventy-five (175) weeks of permanent partial disability benefits commencing on November 19, 2015 at the stipulated weekly rate of four hundred twenty and 48/100 dollars ($420.48).

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

Defendants shall reimburse claimant's independent medical evaluation fee totaling three thousand dollars ($3,000.00).

Defendants shall reimburse claimant's costs totaling one hundred six and 49/100 dollars ($106.49).

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 3rd day of June, 2016.

WILLIAM H. GRELL
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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WHG/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.