BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JEFF PAUL NOLTING,

Claimant,

vs.

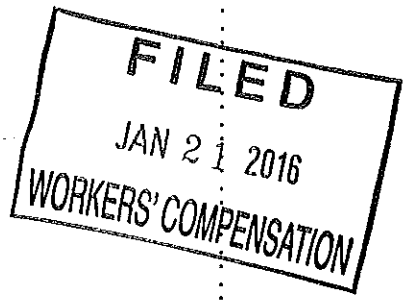
EXIDE TECHNOLOGIES,

Employer,

and

AMERICAN ZURICH INSURANCE CO.,

Insurance Carrier,
Defendants.



File No. 5052052

ARBITRATION

DECISION

Head Note Nos.: 1803; 4000.2

STATEMENT OF THE CASE

Claimant, Jeff Nolting, filed a petition in arbitration seeking workers' compensation benefits from Exide Technologies (Exide), employer and American Zurich Insurance Company, insurer, both as defendants. This case was heard in Waterloo, Iowa, on December 9, 2015.

The record in this case consists of claimant's exhibits 1 through 11, defendants exhibits A through C, and the testimony of claimant and Brenda Saunders.

ISSUES

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

2. Whether defendants are liable for penalty under Iowa Code section 86.13.

FINDINGS OF FACT

Claimant was 39 years old at the time of hearing. Claimant graduated from high school. Claimant attended but did not graduate from college. Claimant has worked in a factory that made glass. (Exhibit 8)

Claimant began employment with Exide in 1998. Exide is a battery manufacturer. Claimant testified Exide manufactures batteries for automobiles, for agriculture purposes, and for the government.

Claimant's prior medical history is relevant. In 2005 claimant sustained a work related back injury while at Exide. In 2006, claimant underwent an L5-S1 partial hemilaminectomy, and diskectomy. Surgery was performed by Chad Abernathey, M.D. (Ex. 4, pp. 1-3; Ex. 5, p. 1) In June 2006, claimant was found to have a 6 percent permanent impairment to the body as a whole. (Ex. 4, p. 4)

Claimant testified he returned to Exide following surgery with no permanent restrictions.

Claimant testified his job at Exide was as a wet form operator/material handler. A description of claimant's job is found at Exhibit 1. Claimant said his job in 2012 involved lifting batteries off a line, stacking them on a pallet, and then pushing the pallet to a conveyor. Claimant testified the batteries he worked with weighed between 20-25 pounds up to 110 to 130 pounds.

Claimant testified that in 2012 he began having back pain. He said he underwent an in-house physical therapy program to help with his back. He testified in the fall of 2012 his back pain increased. Claimant said that during this period of time he worked between 40-52 hours per week.

On October 17, 2012, claimant was evaluated by Robert Broghammer, M.D. Claimant was assessed as having lower back pain with bilateral radiculopathy. An MRI was recommended. (Ex. 2, pp. 1-2)

An MRI taken October 22, 2012 showed disc protrusions at the L5-S1 level. (Ex. 3, pp. 3-4) Dr. Broghammer referred claimant back to Dr. Abernathey. (Ex. 2, p. 3)

Claimant saw Dr. Abernathey on October 31, 2012. Surgery was discussed and chosen as a treatment option. (Ex. 4, p. 2)

On November 6, 2012, claimant underwent an L5-S1 partial hemilaminectomy and diskectomy. Surgery was performed by Dr. Abernathey. (Ex. 5, p. 2)

In a May 15, 2013 letter, Dr. Abernathey found claimant had a 7 percent permanent impairment to the body as a whole. He also opined claimant was at maximum medical improvement (MMI) as of May 15, 2013. (Ex. 4, p. 5)

In a June 28, 2013 hand written note, Dr. Abernathey indicated that the 7 percent permanent impairment resulted in a 1 percent permanent impairment for the 2012 injury added to the 6 percent permanent impairment for the 2006 injury. (Ex. A, p. 2)

Claimant was paid permanent partial disability benefits by a check dated August 12, 2013. (Ex. B, Ex. C)

Claimant testified that sometime in 2013, his employer redesigned the line where he worked. He said this change meant he no longer had to physically lift batteries off a line, and he no longer had to push the pallet onto a conveyor. He said the redesign of

the line made his job physically easier and resulted in less lifting. (Ex. 9, p. 5; Deposition page 20) Claimant testified at hearing he probably would not have been able to return to his job at Exide if his employer had not redesigned the line. Claimant testified in deposition that he would have needed assistance to work at his job had his employer not redesigned the line. (Ex. 9, p. 11; Dep. p. 44)

On September 4, 2013, claimant returned to Dr. Abernathey with complaints of lower back pain. Claimant was continued with conservative treatment. (Ex. 4, p. 3)

In a March 7, 2015 report, Farid Manshadi, M.D., gave his opinion of claimant's condition following an independent medical evaluation (IME). Claimant indicated his right leg pain had improved since his last surgery. Claimant still had occasional tingling and numbness in both legs and back pain. Dr. Manshadi opined claimant had a 10 percent permanent impairment to the body as a whole. This was based on use of Table 15-7 of the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition. Dr. Manshadi opined claimant had an 8 percent permanent impairment to the body as a whole for his first surgery, and a 2 percent permanent impairment to the body as a whole for his second surgery. (Ex. 6)

Claimant said that since his return to work he has good days and bad days. He said he is generally able to do his job.

Claimant said that since his second back surgery his family moved to a different home. He said because of limitations in his back, he had to limit his lifting to lighter objects. He said that due to limitations with his back he also had to have someone else do finishing work in his basement.

Claimant testified that since his return to work in 2013, he returned to his same job. He said he works between four to eight hours per week in overtime.

Brenda Saunders testified she is an occupational nurse at Exide. In that position she is familiar with claimant and his work injury. Ms. Saunders testified claimant returned to full duty work in approximately January 2013. She said she sees claimant every three months to test claimant for lead levels. She said during that period of time claimant has not complained regarding continued back problems. She said claimant is a good worker with a good attitude and does not complain.

CONCLUSIONS OF LAW

The first issue to be determined is the extent of claimant's entitlement to permanent partial disability benefits.

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

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.

Industrial disability can be equal to, less than, or greater than functional impairment. Taylor v. Hummel Insurance Agency, Inc., 2-2, Iowa Industrial Comm'r Dec. 736 (1985); Kroll v. Iowa Utilities, 1-4, Iowa Industrial Comm'r Dec. 937 (App. 1985); Birmingham v. Firestone Tire & Rubber Company, II, Iowa Industrial Comm'r Rep., 39, (App. 1981).

Claimant was 39 years old at the time of hearing. Claimant graduated from high school. He attended but did not graduate from college. Claimant has worked in a plant that made glass. He has been employed with Exide since 1998.

Two experts have opined regarding the extent of claimant's permanent impairment claimant sustained for his second injury. Dr. Abernathey performed both of claimant's lumbar surgeries. He treated claimant for an extended period of time. He opined claimant's second injury resulted in a one percent permanent impairment. (Ex. A, p. 2)

Dr. Manshadi evaluated claimant once for an IME. Dr. Manshadi opined claimant had a 2 percent permanent impairment following his second surgery. Dr. Manshadi based his opinions regarding permanent impairment on Table 15-7 of the AMA Guides.

I respect the opinions of Dr. Abernathey. However, there is no discussion in his opinion how he arrived at the figure of 1 percent permanent impairment regarding the 2012 injury. Dr. Manshadi relied on the Guides and tables for finding claimant had a 2 percent permanent impairment to the body. I am able to follow Dr. Manshadi's analysis. Given this record, it is found Dr. Manshadi's opinion, that claimant has a 2 percent permanent impairment due to the 2012 injury, is more convincing than the opinion of Dr. Abernathey.

Claimant has had two surgeries to his lumbar spine. He returned to work with no restrictions for his 2012 injury. The record indicates the claimant has continued to work at Exide with no restrictions. The record indicates that sometime in 2013 defendant employer retooled the line where claimant works, resulting in less lifting for Exide workers. Claimant's unrebutted testimony is that given his condition after the 2012 injury, he would have difficulty working his job, if Exide would not have redesigned the line. The record indicates claimant still works some overtime. Claimant has not had a reduction in earning, when comparing his earnings in 2012 to 2014.

When all relevant factors are considered, claimant has a 5 percent loss of earning capacity or industrial disability due to the 2012 injury. Claimant is due 25 weeks of permanent partial disability benefits (5 percent x 500 weeks).

The next issue to be determined is if defendants are liable for penalty under Iowa Code section 86.13.

In Christensen v. Snap-on Tools Corp., 554 N.W.2d 254 (Iowa 1996), and Robbennolt v. Snap-on Tools Corp., 555 N.W.2d 229 (Iowa 1996), the supreme court said:

> Based on the plain language of section 86.13, we hold an employee is entitled to penalty benefits if there has been a delay in payment unless the employer proves a reasonable cause or excuse. A reasonable cause or excuse exists if either (1) the delay was necessary for the insurer to investigate the claim or (2) the employer had a reasonable basis to contest the employee's entitlement to benefits. A "reasonable basis" for denial of the claim exists if the claim is "fairly debatable."
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> Christensen, 554 N.W.2d at 260.
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> The supreme court has stated:
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> (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).

Claimant seeks penalty based on underpayment of benefits, and a delayed payment of permanent partial disability benefits.

Defendants paid claimant benefits at the rate of $820.30 per week. (Ex. C) The parties stipulate that claimant's rate is actually $834.22 per week. Defendants offered no excuse for the underpayment of rate. A penalty is appropriate for the underpayment of rate.

The record indicates Dr. Abernathey issued a rating for claimant's 2012 injury on May 15, 2013. That rating was clarified by a June 28, 2013 note. (Ex. A, p. 2; Ex. 4, p. 5) It does not appear that defendants issued a check for claimant's permanent partial disability benefits until August 12, 2013. (Ex. B, C) Defendants provided no excuse as to why claimant's permanent partial disability benefits were delayed for approximately two to three months. A penalty is appropriate for delayed payment of permanent partial disability benefits.

Claimant's stipulated rate is $834.23 per week. Based on Dr. Abernathey's opinions, claimant should have been paid five weeks of benefits (1 percent x 500 weeks). A penalty of 50 percent is appropriate for both the underpayment and late payment of benefits. Defendants are liable for penalty of $2,085.55 for the late payment and underpayment of benefits. ($834.22 x 5 weeks x 50 percent)

ORDER

THEREFORE IT IS ORDERED:

That defendants shall pay claimant twenty-five (25) weeks of permanent partial disability benefits at the rate of eight hundred thirty-four and 22/100 dollars ($834.22) per week commencing on January 1, 2013.

That defendants shall pay all previous temporary and permanent partial disability benefits at the stipulated rate of eight hundred thirty-four and 22/100 dollars ($834.22) per week.

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

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

That defendants shall receive a credit for benefits previously paid.

That defendants shall pay claimant two thousand eighty-five and 55/100 dollars ($2,085.55) in penalty as detailed above.

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

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

Signed and filed this 21st day of January, 2016.

JAMES F. CHRISTENSON
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.