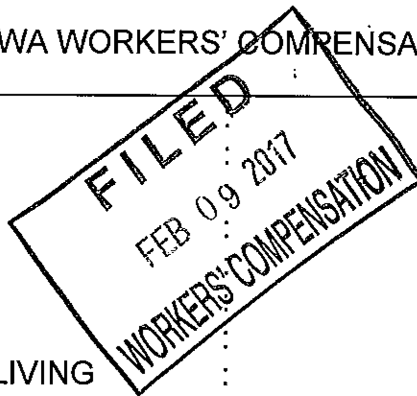
BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER



PAULA ACKLIE, Claimant, vs. BROOKEDALE SENIOR LIVING COMMUNITIES, INC., Employer, and AMERICAN CASUALTY CO. OF READING P.A., Insurance Carrier, Defendants.	File No. 5054542 ARBITRATION DECISION Head Note Nos.: 1803, 4000.2

STATEMENT OF THE CASE

Claimant, Paula Acklie, filed a petition in arbitration seeking workers' compensation benefits from Brookedale Senior Living Communities, Inc. (Brookedale), employer, and American Casualty Company of Reading, Pennsylvania, insurer, both as defendants. This case was heard in Cedar Rapids, Iowa on November 16, 2016 with a final submission date of December 30, 2016.

The record in this case consists of claimant's exhibits 1-13, defendants' exhibits A through C, and the testimony of claimant.

ISSUES

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

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

FINDINGS OF FACT

Claimant was 65 years old at the time of hearing. Claimant is a registered nurse with an associate's degree in nursing. Claimant also took classes in nursing home administration and director of nursing courses. (Exhibit C, pages 2-3; Ex. H, p. 2-3)

Claimant has worked as a critical care nurse. Most of claimant's career as a nurse has been working in long-term care or assisted living facilities with the elderly. (Ex. C, pp. 4-5, 7-8)

Claimant worked as a nursing director at Brookedale. Claimant testified that as a nursing director she still did some of the duties of a licensed nurse. Claimant said most of her duties involved scheduling staff, doing admissions, assessment of clients, hiring and disciplining staff, meeting with practitioners for care plans for clients, and other management duties.

On November 3, 2014 claimant tripped on a low cart left in the hallway by her office. Claimant said she landed on the floor on her hands. She testified she initially believed she was okay and completed her work that day. The next day claimant was sore and stiff.

On November 4, 2014 claimant was evaluated by Shirley Pospisil, M.D. for back, neck, and left shoulder pain after a fall at work. Claimant was treated with medication. (Ex. 3, p. 1)

Claimant continued to treat with Dr. Pospisil from November through December 2014 for left shoulder pain. Dr. Pospisil recommended an MRI for the left shoulder. (Ex. 3, pp. 3-10)

On January 15, 2015 claimant underwent an MRI arthrogram of the left shoulder. It showed less than a 50 percent partial tear of the rotator cuff. (Ex. 2, p. 3) Dr. Pospisil recommended physical therapy, gave claimant medication, and referred claimant to an orthopedic surgeon. (Ex. 2, p. 3; Ex. 3, pp. 11-12)

On January 27, 2015 claimant was evaluated by Matthew White, M.D., an orthopedic surgeon. He assessed claimant as having a partial-thickness rotator cuff tear on the left. Claimant was given a cortisone injection in the left shoulder. (Ex. 4, pp. 1-3)

When conservative care failed to significantly reduce claimant's symptoms, surgery was discussed and chosen as a treatment option. (Ex. 4, pp. 5-12) On June 25, 2015 claimant underwent a left shoulder rotator cuff repair. Surgery was performed by Dr. White. (Ex. 4, pp. 13-14)

Claimant was taken off work on June 25, 2015 and was off work for approximately 3-4 weeks. (Ex. 4, pp. 15-19) The first weekly benefit payment made to claimant occurred on June 15, 2015. (Ex. 12, p. 1)

Claimant was returned to work eventually with restrictions. Claimant testified she had difficulty performing her job given her left shoulder problems.

On August 14, 2015 claimant saw Dr. White in followup. Claimant was doing full-duty work and was going to physical therapy after work. Dr. White told claimant she was overdoing it at work. He recommended claimant "back off" from working full time and limited claimant to working 4 hours per week. He also limited claimant to desk work only and told claimant she should not be evaluating patients. (Ex. 4, pp. 22-24; Ex. 1, p. 2)

On August 26, 2014 claimant was terminated from her job for not doing service care plans for 3 residents. (Ex. 1, pp. 3-4) Claimant testified she received no first or second warnings regarding her termination.

Claimant returned in followup to Dr. White on September 15, 2015. Claimant reported improvement in her symptoms since her termination from work. (Ex. 4, pp. 25-26)

Dr. White found claimant had reached maximum medical improvement on January 19, 2016. He found claimant had limitations and restricted her to lifting 20 pounds above shoulder height on the left. (Ex. 4, pp. 33-34, 38)

In a February 16, 2016 letter, Dr. White found claimant had a 14 percent permanent impairment to the left upper extremity, converting to an 8 percent permanent impairment to the body as a whole, under the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition. (Ex. 4, p. 35)

In an August 1, 2016 report Farid Manshadi, M.D. gave his opinions of claimant's condition following an independent medical evaluation (IME). Claimant indicated use of the left arm aggravated her symptoms. Claimant used ibuprofen. Claimant had difficulty with sleeping. Dr. Manshadi found claimant had a 12 percent permanent impairment to the left upper extremity due to shoulder injury and a 2 percent permanent impairment as a result of weakening and loss of range of motion in the elbow. The combined values of both impairments resulted in a 14 percent permanent impairment to the left upper extremity. Dr. Manshadi agreed with Dr. White's permanent restrictions and also restricted claimant to avoid repetitive use of her left arm. (Ex. 6)

Since her termination from Brookedale claimant has applied for nearly 60 jobs. (Ex. 10, pp. 2-3) At the time of hearing claimant had not been offered a job. At the time of hearing, claimant was still actively seeking employment.

Claimant testified that given limitations in her shoulder and permanent restrictions, she could not return to work as an RN in a long-term care facility. She said

she could do some of the director of nursing duties, but she could not lift or care for residents.

Claimant testified she has limitations in range of motion and strength in her left arm and shoulder. She said her shoulder feels better than it did immediately after surgery. Claimant said overuse of the left arm aggravates her symptoms in her left shoulder. She said she takes over-the-counter medication for shoulder pain.

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.

Claimant was 64 years old at the time of hearing. Claimant is a registered nurse. Most of claimant's career as a nurse has been working in long-term care or assisted living facilities for the elderly. (Ex. C, pp. 4-5, 7-8)

Claimant underwent a rotator cuff repair to the left shoulder by Dr. White. Both Dr. White, the treating physician, and Dr. Manshadi, the IME physician, found claimant had a 14 percent permanent impairment to the upper extremity, converting to an 8 percent permanent impairment to the body as a whole. (Ex. 4, p. 35; Ex. 6) Claimant is limited to lifting 20 pounds above shoulder height. (Ex. 4, pp. 33-34)

Claimant initially returned to work full time. In August of 2015 Dr. White ordered claimant to back off of work and limited her to working 4 hours per day with restrictions. (Ex. 4, pp. 22-24) Shortly after claimant returned to work at 4 hours a day, claimant was terminated from her job at Brookedale for allegedly failing to complete service care plans for 3 residents. (Ex. 1, pp. 3-4)

Claimant's unrebutted testimony is she could not return to a nursing job in a long-term treatment facility given her restrictions and limitations to her left shoulder. She testified she could potentially work as a director of nursing for a facility if allowed to only perform administrative duties.

Claimant has applied to approximately 60 employers and has yet to find a job. She continues to actively look for employment. (Ex. 10, pp. 2-3)

When all relevant factors are considered, it is found claimant has a 50 percent loss of earning capacity or industrial disability.

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.

(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 contends defendants should be penalized, in this case, based on an alleged 20-day delay in the payment of temporary benefits from when claimant was off of work following surgery. (Claimant's post-hearing brief, p. 9)

Defendants do not dispute that there was a brief delay in the payment of temporary benefits following claimant's surgery. (Defendants' post-hearing brief, pp. 11-12) The record indicates defendants paid claimant at a rate of $685.74 per week for the period that claimant was off work after surgery. (Ex. A, pp. 4-5) The parties stipulated at hearing that claimant's actual rate was $677.26 per week.

Claimant seeks penalty for a brief delay of temporary benefits. Defendants were approximately 20 days late in payment of temporary benefits for the period after claimant's surgery. Defendants overpaid claimant for this period of temporary benefits. Given this record, a penalty is not appropriate in this case.

ORDER

THEREFORE IT IS ORDERED:

That defendants shall pay claimant two hundred fifty (250) weeks of permanent partial disability benefits at the rate of six hundred seventy-seven and 26/100 dollars ($677.26) per week commencing on January 20, 2016.

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

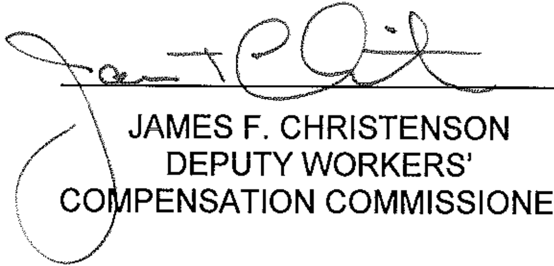
That defendants shall pay interest on unpaid weekly benefits as ordered above and as set forth in Iowa Code section 85.30.

That defendants shall receive credit for benefits previously paid.

That defendants shall pay costs.

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

Signed and filed this 9th day of February, 2017.



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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.