BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

ELIZABETH HAMMOND,

Claimant,

vs.

QUALITY CONTROLLED STAFFING, INC.,

Employer,

and

ARCH INSURANCE COMPANY,

Insurance Carrier,
Defendants.

File No. 5052987

ARBITRATION DECISION

Head Note No.: 1803

STATEMENT OF THE CASE

Claimant, Elizabeth Hammond, has filed a petition in arbitration and seeks workers' compensation benefits from Quality Controlled Staffing, Inc., employer, and Arch Insurance Company, insurance carrier, defendants. Deputy workers' compensation commissioner, Stan McElderry, heard this matter 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.

ISSUES

The parties have submitted the following issues for determination:

1. Whether the injury arising out of and in the course of employment on January 30, 2015 is the cause of any permanency/impairment;

2. Medical benefits; and

3. Penalty.

FINDINGS OF FACT

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

The claimant was 30 years old at the time of hearing. She is not a high school graduate, but has earned a GED. She also has 8 trade certifications, including MSHA and OSHA.

On January 30, 2015 the claimant was working a contract job to remove an old dryer. When removing sheet metal and debris she felt an instant pain in her lower back which continued down her left leg. The claimant was immediately taken to Quad City Occupational health where she was examined. When conservative measures of mediations and physical therapy did not improve the claimant an MRI was ordered. The MRI showed the L2-3 disc was bulging and with annular tear, L3-4 with broad based bulging, and a large L4-5 disc bulging/herniation deforming the right paracentral thecal sac. (Exhibit 1, page 22) Pain management with injections were ordered. (Ex. 1, p. 26) When the injections did not resolve the pain issues the claimant was referred to Scott Collins, M.D., for a surgical consult. Dr. Collins recommended a bilateral L4-5 decompression and performed the surgery on June 24, 2015. (Ex. 2, pp. 33-34) On July 8, 2015, Dr. Collins noted that future fusion surgery would probably be needed sooner rather than later. (Ex. 2, p. 44)

On August 22, 2015, Kerry Panozzo, M.D., performed bilateral sacroiliac injections. (Ex. 2, pp. 57-58) On September 21, 2015, Dr. Panozzo walked out of an appointment with the claimant when the claimant expressed her frustration at ongoing pain. The claimant continued to attend every medical appointment. On November 3, 2015, Dr. Collins recommended anterior fusion or disk replacement of the L4-5. (Ex. 2, p. 75) Defendants ignored the recommendation until the claimant filed an alternate care petition. On February 16, 2016, Dr. Collins performed a posterior spinal fusion at L4-5. (Ex. 4, pp. 102-103) On August 7, 2016, Dr. Collins placed the claimant at maximum medial improvement (MMI). (Ex. 2, p. 88) He also ordered a functional capacity evaluation (FCE), which was canceled by the therapist and never rescheduled. The claimant moved to Virginia on September 13, 2016 to live with her mother for reasons including financial concerns caused by unpaid and late workers' compensation benefits.

The claimant made and scheduled her own FCE, which defendants would not agree to schedule. The FCE was valid and recommended sedentary or light employment with lifting limited to 10 pounds. (Ex. 5, p. 105) The FCE also found significant physical deficits and limitations. (Ex. 5, p. 105) Dr. Collins adopted the FCE report's recommendations and opined a 23 percent of the body as a whole impairment. (Ex. 2, pp. 88A-88B)

The claimant is unemployed post-injury. The defendant employer was unable or unwilling to find work within her restrictions. Her restrictions for a worker with only a GED are very significant. Sedentary or light work generally requires a higher level of

education. Her certifications are in physically demanding fields. She is unable to return to any relevant past employment. But that loss of industrial capacity is not total (yet). Considering the claimant's medical impairments, training, permanent restrictions, as well as all other factors of industrial disability, the claimant has suffered a 70 percent loss of earning capacity.

On the date of injury the claimant was single and entitled to 1 exemption (S1). The benefit rate for S1 and $600.00 per week is $373.40. The commencement date for permanent disability is August 17, 2016. The claimant seeks medical expenses as detailed in Exhibit 10. Those expenses were reasonable and necessary for diagnosis and treatment of the work injury. Claimant also seeks the FCE fee of $1,680.00. The FCE was reasonable and necessary for the impairment rating, and for Dr. Collins to properly place permanent restrictions.

REASONING AND CONCLUSIONS OF LAW

The first issue is extent of permanent disability for the injury.

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 Rule of Appellate Procedure 6.14(6).

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

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.

While a claimant is not entitled to compensation for the results of a preexisting injury or disease, its mere existence at the time of a subsequent injury is not a defense. Rose v. John Deere Ottumwa Works, 247 Iowa 900, 76 N.W.2d 756 (1956). If the claimant had a preexisting condition or disability that is materially aggravated, accelerated, worsened or lighted up so that it results in disability, claimant is entitled to recover. Nicks v. Davenport Produce Co., 254 Iowa 130, 115 N.W.2d 812 (1962); Yeager v. Firestone Tire & Rubber Co., 253 Iowa 369, 112 N.W.2d 299 (1961). Total disability does not mean a state of absolute helplessness. Permanent total disability occurs where the injury wholly disables the employee from performing work that the employee's experience, training, education, intelligence, and physical capacities would otherwise permit the employee to perform. See McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Diederich v. Tri-City R. Co., 219 Iowa 587, 258 N.W. 899 (1935).

Based on the finding that the claimant has suffered a 70 percent loss of earning capacity, she has sustained a 70 percent permanent partial industrial disability entitling her to 350 weeks of permanent partial disability pursuant to Iowa Code section 85.34(2)(u).

Medical

The employer shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance, and hospital services and supplies for all conditions compensable under the workers' compensation law. The employer shall also allow reasonable and necessary transportation expenses incurred for those services. The employer has the right to choose the provider of care, except where the employer has denied liability for the injury. Section 85.27. Holbert v. Townsend Engineering Co., Thirty-second Biennial Report of the Industrial Commissioner 78 (Review-Reopening October 16, 1975).

The medical expenses detailed in Exhibit 10 were reasonable and necessary to diagnose and treat the work injury. They are the responsibility of the defendants. The FCE fee of $1,680.00 is detailed in Exhibit 12. The FCE was reasonable and necessary for the impairment rating, and for Dr. Collins to properly place permanent restrictions. It

is the responsibility of the defendants to pay/reimburse whether treated as a medical bill or as part of the Dr. Collins report.

Penalty

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.
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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).
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> (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 defendants appear to have gone out of their way to earn a penalty. They, at hearing, still had not paid temporary total benefits that they stipulated were due at least in part for over a year. They paid no benefits for 6 months. The defendants admitted at hearing that the benefits were owed and should have been paid. At the time of hearing the claimant had not received any benefit checks for over 3 weeks, and old benefits were not caught up and were not being paid. Nor was a notice ever sent that benefits were being stopped. The claimant lost her home due to the defendants' failure to pay owed benefits in a timely manner. A penalty of up to 50 percent of benefits paid late or not paid is allowable. That is the appropriate range here. At least 29 weeks of benefits at $373.40 for a total of $10,828.60 were so affected. Defendants shall pay a penalty of $5,000.00, all of which is accrued.

ORDER

THEREFORE, IT IS ORDERED:

That the defendants pay claimant three hundred fifty (350) weeks of permanent partial disability at the weekly rate of three hundred seventy-three and 40/100 dollars ($373.40) commencing August 17, 2016.

Defendants shall pay/reimburse as appropriate the medical expenses and FCE expense as detailed above.

Defendants shall pay a penalty of five thousand and 00/100 dollars ($5,000.00); all of which is accrued.

Costs are taxed to the defendants pursuant to 876 IAC 4.33.

Accrued benefits shall be paid in lump sum together with interest pursuant to Iowa Code section 85.30 with subsequent reports of injury pursuant to rule 876 IAC 3.1.

Signed and filed this 24th day of March, 2017.

STAN MCELDERRY
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.