

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

CINDY FREIBURGER,

Claimant,

vs.

JOHN DEERE DUBUQUE WORKS,

Employer,
Self-Insured,
Defendant.

File No. 5066626.01

REMAND DECISION

Head Notes: 1803; 1808; 4000.2

STATEMENT OF THE CASE

This matter is before the Iowa Workers' Compensation Commissioner on remand from the Iowa District Court for Polk County.

This matter was originally heard on November 24, 2020. An arbitration decision was filed on July 15, 2021. That decision found, in part, that claimant was due eleven weeks of permanent partial disability benefits based on a five percent permanent impairment rating of the lower extremity. That decision also found defendant was liable for a penalty of \$1,042.03 for delay in payment of permanent partial disability benefits, but was not liable for a delay in payment of temporary benefits.

On February 7, 2022, an appeal decision was filed. That decision affirmed the arbitration decision in part and reversed it in part. The appeal decision found defendant was liable for a penalty of \$1,300.00 for a delay in payment of permanent partial disability benefits and temporary benefits.

Claimant filed an application for judicial review. In the ruling on the application for judicial review, the district court, in part, remanded this case back to the agency to revisit the opinion of Arnold Delbridge, M.D., regarding permanent impairment. The district court also ordered this agency to clarify the award of penalty benefits regarding the payment of temporary benefits.

ISSUES

1. The extent of claimant's entitlement to permanent partial disability benefits.
2. What is the correct award for penalty regarding delayed payment of temporary benefits.

FINDINGS OF FACT

The findings of fact in the arbitration and appeal decisions adequately detail the record of this case. The findings of fact for this remand decision will only address facts relevant to the issues on remand.

Claimant began working for defendant John Deere Dubuque Works (Deere) in 2011. On April 1, 2015, claimant used a hoist to move a track frame. The frame pinned claimant against a worktable and injured her left ankle and right leg. (Hearing Transcript, pages 18-20)

Claimant was assessed as having a left ankle dislocation and a right distal tibia and fibula fracture. (Joint Exhibit 1, page 1)

Claimant underwent a closed reduction and casting of the left dislocated ankle. She also had placement of an intramedullary (IM) rod of the right tibia, and open reduction and internal fixation plating of the right distal fibula. (JE 1, p. 2) Claimant's treating physician was Stephen Pierotti, M.D. (JE 1) In an April 14, 2017, note, Dr. Pierotti indicated claimant had no permanent impairment of the left or right lower extremity. (JE 1, p. 7)

In a July 5, 2017, report, David Field, M.D., gave his opinions of claimant's condition. Dr. Field found claimant had no permanent impairment of the left ankle, and five percent permanent impairment of the right lower extremity. (Defendant's Exhibit B)

In a March 13, 2019, report, Dr. Delbridge gave his opinion of claimant's condition following an independent medical evaluation (IME). Claimant complained of pain in the left buttock radiating to the knee. Claimant had right leg numbness and a burning sensation in the right leg. (Claimant's Exhibit 1, pages 1-4)

Claimant had initially returned to work after the injury for four hours on light duty. She then later returned to six hours of work per day on light duty. Eventually, claimant returned to work at eight hours per day on regular duty. (Ex. 1, p. 3)

Dr. Delbridge opined, in part:

It is apparent from my evaluation that Cindy Freiburger has limited range of motion of her left ankle. She has, at most, 10 degrees dorsiflexion, and on page 537 in Guides to the Evaluation of Permanent Impairment, fifth edition, Table 17-11, that is an impairment of 7% of the lower extremity. Converted to a whole person impairment, that would be a 2% whole person impairment. On the right she has 0 degrees dorsiflexion and would have the same impairment. Her impairment, however, on that side would not be included, according to Table 17-2 in Guides to the Evaluation of Permanent Impairment, fifth edition, page 526. Having a gait derangement precludes inclusion of such impairment. She has obvious gait derangement which is addressed on Table 17-5 on page 529 in the Guides to the Evaluation of Permanent Impairment. After my examination and review of her x-rays, my conclusion is that she qualifies under lower limb impairment due to gait

derangement, as mild, which is a. in the chart and as such, a 7% whole person impairment.

(Ex. 1, pp. 5-6)

Dr. Delbridge also opined claimant had a seven percent permanent impairment of the left lower extremity. (Ex. 1, p. 7)

In the ruling on the petition for judicial review, the district court found the record does not support Dr. Delbridge's conclusion that claimant had a gait derangement. (Ruling on Petition for Judicial Review, p. 10)

Claimant was paid 77 weeks of temporary total disability benefits and temporary partial disability benefits. All 77 weeks of temporary total disability benefits and temporary partial disability benefits were delayed. (Ex. 5) During this period of time, claimant was paid \$13,735.85 in temporary total disability benefits. Claimant was also paid \$6,151.99 in temporary partial disability benefits. (Ex. 5, pp. 5-9)

Claimant testified that at the time of hearing she had continued pain in her right leg. Claimant testified she still had hardware in her right leg. (Tr. pp. 22-23) Claimant said she had stiffness and loss of range of motion in her left leg. (Tr., pp. 23-24) At the time of hearing, claimant testified she had an authorized pain injection for her right leg scheduled for December 7, 2020. (Tr. pp. 21-22)

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. 6.904(3).

Under the Iowa Workers' Compensation Act, permanent partial disability is compensated either for a loss or loss of use of a scheduled member under Iowa Code section 85.34(2)(a)-(t) or for loss of earning capacity under section 85.34(2)(u). The extent of scheduled member disability benefits to which an injured worker is entitled is determined by using the functional method. Functional disability is "limited to the loss of the physiological capacity of the body or body part." Mortimer v. Fruehauf Corp., 502 N.W.2d 12, 15 (Iowa 1993); Sherman v. Pella Corp., 576 N.W.2d 312 (Iowa 1998).

Benefits for permanent partial disability of two members caused by a single accident is a scheduled benefit under section 85.34(2)(s); the degree of disability must be computed on a functional basis with a maximum benefit entitlement of 500 weeks. Simbro v. DeLong's Sportswear, 332 N.W.2d 886 (Iowa 1983).

Claimant sustained a permanent disability involving two members caused by a single accident. As a result, her injury is compensated as a scheduled member benefit under Iowa Code section 85.34(2)(s).

As detailed in the arbitration and appeal decisions, claimant received treatment from Dr. Pierotti for the injuries to both lower extremities. Dr. Pierotti found claimant had no permanent impairment of either lower extremity. (JE 1, pp. 6-7) There is no analysis from Dr. Pierotti as to how he reached his opinion of no permanent impairment. Because of this, Dr. Pierotti's opinion regarding permanent impairment is found not convincing.

In a 2017 opinion, Dr. Field found claimant had no permanent impairment of the left ankle, and a five percent permanent impairment of the right lower extremity. (Ex. B)

In a 2019 opinion, Dr. Delbridge gave his opinions regarding claimant's condition. Dr. Delbridge's opinion regarding permanent impairment is slightly ambiguous. It appears Dr. Delbridge opined claimant had seven percent permanent impairment of both lower extremities. (Ex. 1) Claimant credibly testified she continues to have pain, discomfort, and loss of range of motion in her lower extremities. (Tr. pp. 22-23) The record indicates that as of September 2019, claimant was still being treated for pain in her lower extremities. (JE 6) Dr. Pierotti assessed claimant as having chronic pain in the left and right leg. (JE 1, p. 6) At the time of hearing, claimant was to receive continued authorized treatment for the right leg. (Tr. pp. 21-22)

Dr. Delbridge found claimant had seven percent permanent impairment of both lower extremities. Dr. Delbridge's findings of permanent impairment were issued closer to the time of hearing. The medical records indicate claimant was still receiving treatment for her lower extremities as of 2019. At the time of hearing, claimant was still receiving authorized treatment for pain in the right lower extremity. Claimant credibly testified she continues to have pain and loss of range of motion in both lower extremities. Given this record, it is found that the opinions of Dr. Delbridge are more convincing than those of Dr. Field.

Claimant has seven percent permanent impairment of the right and left lower extremities. Seven percent lower extremity impairment converts to three percent permanent impairment of the body as a whole under the Guides. (Guides, Table 17-3, p. 527) According to the combined values chart in the Guides, three percent permanent impairment of the body as a whole combined with another three percent permanent impairment of the body as a whole, results in six percent permanent impairment of the body as a whole. Claimant is due 30 weeks of permanent partial disability benefits under Iowa Code section 85.34(2)(s) (six percent x 500 weeks).

The next issue to be determined is whether defendant is liable for a penalty for the late payment of temporary total disability benefits and temporary partial disability 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.

(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 Custom 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, 594 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 record in this case indicates claimant was paid \$13,735.85 in temporary total disability benefits. (Ex. 5, pp. 5-6) All payments made during this time were late. Defendant offered no reasonable excuse for the delay. A 50 percent penalty is appropriate. Defendant is liable for \$6,867.93 in penalty for the late payment of temporary total disability benefits (\$13,735.85 x 50 percent).

Claimant was also paid \$6,151.99 in temporary partial disability benefits. (Ex. 5, pp. 7-9) All payments made during this time were late. Defendant offered no reasonable excuse for the delay. A 50 percent penalty is appropriate. Defendant is liable for \$3,076.00 in penalty for the late payment of temporary partial disability benefits (\$6,151.99 x 50 percent).

ORDER

THEREFORE IT IS ORDERED:

Defendant shall pay claimant thirty (30) weeks of permanent partial disability benefits at the weekly rate of four hundred seventy-three and 65/100 dollars (\$473.65) commencing on January 7, 2017.

Defendant 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 Gamble v. AG Leader Technology File No. 5054686 (App. Apr. 24, 2018)

Defendant shall receive credit for all benefits previously paid.

Defendant shall pay claimant six thousand eight hundred sixty-seven and 93/100 dollars (\$6,867.93) in penalty for the delay in payment of temporary total disability benefits.

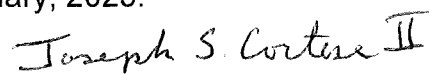
Defendant shall pay claimant three thousand seventy-six and 00/100 dollars (\$3,076.00) in penalty for the delay in payment of temporary partial disability benefits.

Defendant shall pay a penalty of one thousand one hundred and 00/100 dollars (\$1,100.00) for the delay in payment of permanent partial disability benefits.

The appeal decision remains the same in all other respects.

Pursuant to rule 876 IAC 3.1(2), defendant shall file subsequent reports of injury as required by this agency.

Signed and filed on this 24th day of February, 2023.



JOSEPH S. CORTESE II
WORKERS' COMPENSATION
COMMISSIONER

The parties have been served as follows:

Thomas Wertz (via WCES)

Arthur Gilloon (via WCES)