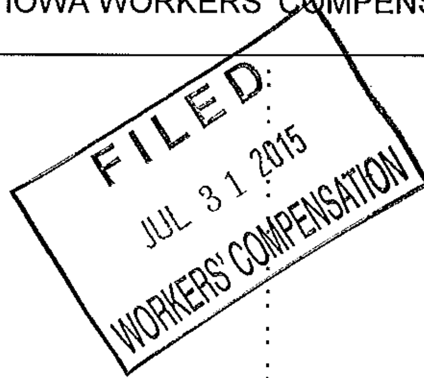
BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER



CHAD NELSEN, Claimant, vs. CITY OF AMES, Employer, and EMC, Insurance Carrier, Defendants.	File No. 5048541 ARBITRATION DECISION Head Note No.: 1803

STATEMENT OF THE CASE

Claimant, Chad Nelsen, has filed a petition in arbitration and seeks workers' compensation benefits from City of Ames, employer, and EMC, insurance carrier defendants.

This matter was heard by Deputy Workers' Compensation Commissioner Ron Pohlman on June 17, 2015 at Des Moines, Iowa. The record in the case consists of claimant's exhibits 1-7; defendants' exhibits A through H as well as the testimony of the claimant.

ISSUES

Parties submitted the following issues for determination:

1. The extent of claimant's entitlement to permanent partial disability benefits pursuant to Iowa Code section 85.34(2)(u);

2. The commencement date for payment of permanent partial disability benefits;

3. Whether the claimant is entitled to reimbursement for an independent medical evaluation pursuant to Iowa Code section 85.39; and

4. Whether the claimant is entitled to penalties pursuant to Iowa Code section 86.13.

FINDINGS OF FACT

The claimant at the time of the hearing was 41 years old. He is right-hand dominant. He has a Bachelor of Science Degree in Industrial Technology and two Associate Degrees. However, his work history consists of construction, concrete work, iron work, house framing, and electrical work.

He began working at the City of Ames in 2009 as a lineman apprentice. His job involved installing and maintaining electric lines. He was paid approximately $28.00 per hour. He quit this employment in July of 2012 because he did not like the union. In September of 2012 he began working for Kurrent Electric, which is owned by some friends of his. This job pays $23.50 per hour.

On September 19, 2011 the claimant was injured when he was pulling on a cable and felt a pop in his left shoulder and felt immediate pain.

On May 5, 2012 Kyle Galles, M.D. performed surgery on the claimant's left shoulder and bicep. The claimant treated with Dr. Galles until September 11, 2012 and has not seen Dr. Galles since. At his last visit claimant was noted to have a loss of range of motion and pain. See Exhibit 4, pages 28-29. On October 5, 2012 Dr. Galles opined that the claimant had a 3 percent permanent impairment rating for the left upper extremity and assigned no restrictions. The claimant testified that he requested Dr. Galles assign no restrictions because he did not want restrictions to prevent him from being able to find another job. On October 15, 2012 the defendants sent the claimant a letter and a check for payment for the rating of impairment. There was no indication in the letter regarding industrial disability.

On May 1, 2015 the claimant had an independent medical evaluation with Sunil Bansal, M.D. Dr. Bansal opined that the claimant had a 5 percent left upper extremity impairment or 3 percent of the body as a whole. Claimant asked that Dr. Bansal not give him any restrictions, but Dr. Bansal opined that the claimant should have restrictions of lifting no greater than 50 pounds occasionally; 25 pounds frequently; no lifting 10 pounds above shoulder and no pushing or pulling over 50 pounds with the left arm. The claimant believes that those restrictions are fairly consistent with his abilities. The bill for Dr. Bansal's independent medical evaluation was $2,495.00.

Claimant has difficulty performing overhead work and experiences pain with weather changes. He also has difficulty holding a cordless drill and needs to take frequent breaks. He has difficulty reaching behind his back to put on or take off his tool belt and cannot grab his toolbox with his left hand. He has also noticed that his shoulder pops when he swims and that on his current job he needs help driving ground rods into the ground.

REASONING AND CONCLUSIONS OF LAW

The first issue in this case is the extent of claimant's entitlement to permanent partial disability benefits pursuant to Iowa Code section 85.34(2)(u).

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.

The claimant has significant permanent impairment, and the restrictions proposed by Dr. Bansal are credible and the best medical indication of the physical limits for the claimant after this work injury. The claimant chose to leave a job that paid more money because he did not like the union. This has nothing to do with his work injury. However, the claimant's experience on his current job reflects that his injury has affected his ability to do work at the level he performed before the injury. The claimant has sustained an industrial loss. Considering these and all factors of industrial disability it is concluded that the claimant has sustained a 30 percent industrial loss entitling him to 150 weeks of permanent partial disability benefits pursuant to Iowa Code section 85.34(2)(u). The commencement date for payment of permanent partial disability benefits is September 11, 2012, the date that the claimant's treating physician determined the claimant had reached maximum medical improvement. This is also near the time that the claimant returned to full-time work in his occupation.

The next issue is whether the claimant is entitled to payment of the independent medical evaluation with Dr. Bansal.

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).

The defendants had obtained an evaluation of the claimant's permanent impairment from Dr. Galles with which the claimant did not agree. The claimant is entitled to an independent medical evaluation pursuant to Iowa Code section 85.39. The charges from Dr. Bansal are well within the typical charges for an independent medical evaluation, and the claimant is entitled to reimbursement of $2,495.00 for his independent medical evaluation with Dr. Bansal.

The last issue is whether the claimant is entitled to penalties.

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.

(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 claimant argues that the defendants did not evaluate the claimant's industrial disability and did not communicate the basis for their denial of industrial disability timely.

Iowa Code section 86.13(4)(c)(3) provides:

> The employer insurance carrier contemporaneously conveyed the basis for the denial, delay in payment, or termination of benefits to the employee at the time of the denial, delay, or termination of benefits.

The commissioner has previously ruled that in a case of body as a whole the permanent impairment rating is normally considered to be the minimum entitlement. The letter the claimant received makes no mention of industrial disability and clearly indicates that the claimant was only being paid an impairment rating. If the defendants had a reason why the claimant was not industrially disabled, that was not communicated by that letter. There are certainly arguments that might have been made as to why the claimant was not industrially disabled. He had returned to work in the same occupation; his reason for leaving the job with the City of Ames was unrelated to his work injury, and his treating physician had imposed no restrictions. All of those things could have been communicated by simply indicating that the insurance company did not believe that the claimant had sustained any disability beyond the impairment rating, which is what is required by the penalty statute. Since that did not occur the claimant is entitled to penalties. See Iowa Code section 86.13(4). The undersigned concludes that the claimant is entitled to a penalty of 5 percent of the benefits due in this case. Therefore, a penalty of $7,000.00 is imposed pursuant to Iowa Code section 86.13.

ORDER

THEREFORE IT IS ORDERED:

That defendants shall pay claimant one hundred fifty (150) weeks of permanent partial disability benefits commencing September 11, 2012 at the weekly rate of nine hundred forty-two and 46/100 dollars ($942.46). Defendants shall receive credit for ten (10) weeks of permanent partial disability benefits paid at the weekly rate of nine hundred forty-two and 46/100 dollars ($942.46).

Accrued benefits shall be paid in lump sum together with interest pursuant to Iowa Code section 85.30 with subsequent reports of injury filed as directed by the agency.

Defendants shall reimburse the claimant for an independent medical evaluation with Dr. Bansal in the amount of two thousand four hundred ninety-five and 00/100 dollars ($2,495.00).

Defendants shall pay claimant a penalty of seven thousand and 00/100 dollars ($7,000.00) pursuant to Iowa Code section 86.13.

Costs of this action are taxed to the defendants pursuant to rule 876 IAC 4.33.

Signed and filed this 31st day of July, 2015.

RON POHLMAN
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.