BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

CATALINA RAMOS-GONZALEZ, Claimant, vs. DUBUQUE GOLF & COUNTRY CLUB, Employer, and NATIONWIDE MUTUAL INS. CO., Insurance Carrier, Defendants.	File No. 1614386.01 ARBITRATION DECISION Headnotes: 1802, 1803, 2907, 4000.2

STATEMENT OF THE CASE

Claimant, Catalina Ramos-Gonzalez, filed a petition in arbitration seeking workers' compensation benefits from Dubuque Golf and Country Club (DCC), employer, and Nationwide Insurance Company, insurer, both as defendants. This matter was heard on August 27, 2021, with a final submission date of October 22, 2021.

The record in this case consists of Joint Exhibits 1 through 9, Claimant's Exhibits 1 through 6, Defendants' Exhibits A through G, and the testimony of claimant and Lance Marting.

Serving as interpreter for the hearing was Carmela Cordero.

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

1. The extent of claimant's entitlement to temporary benefits.

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

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

4. Costs.

FINDINGS OF FACT

Claimant was 54 years old at the time of hearing. Claimant was born in Mexico. Claimant went up to the 6th grade in Mexico. Claimant does not have a GED. (Transcript pages 12-13)

Claimant came to the United States approximately 22 years ago. Claimant does not write or read English. Claimant can speak a little English. (TR p. 13)

Claimant has worked as a dishwasher and a waitress. She has cleaned offices. Claimant also cleaned the office at Dubuque City Hall. (TR pp. 13-17)

Claimant began working for ServiceMaster in approximately 2000. While with ServiceMaster, claimant did cleaning at DCC. In 2009 claimant began working as an employee for DCC. (TR pp. 16-17) In 2010 through 2012, claimant was let go from DCC due to immigration issues. (TR p. 59) In 2012, claimant returned to both DCC and ServiceMaster. (TR p. 17) Claimant testified she worked approximately 60-80 hours per week. She earned $9.25 an hour for ServiceMaster and $11.75 an hour for DCC. (TR pp. 18-19) Claimant testified that along with doing her jobs for ServiceMaster and DCC, she occasionally cleaned houses. (TR p. 19)

Claimant's prior medical history is relevant. In May of 2011 claimant was treated for a shoulder injury and lower back pain. (Joint Exhibit 1, page 1; TR p. 20)

In 2014, claimant underwent treatment for a hip injury. (TR p. 21)

On January 4, 2016, claimant was vacuuming at DCC when her foot became tangled in a vacuum cord and she fell. (TR p. 22) Claimant said she had immediate pain in the left foot.

On the same day, claimant was evaluated by Julie Muenster, ARNP, for pain in the left foot, ankle and right hip. Nurse Practitioner Muenster put claimant in a boot and restricted her to sedentary work. (JE 2, pp. 4-5)

Claimant saw Nurse Practitioner Muenster three times for follow-up appointments in January 2016. Claimant was referred to physical therapy during that period of time. (JE 2, pp. 9-11)

Claimant returned to Nurse Practitioner Muenster on February 26, 2016. Claimant had little to no progress in her symptoms. Claimant had pain with weight bearing. Claimant was referred to a podiatrist. (JE 2, pp. 12-13)

Claimant was evaluated by Jason Keppler, DPM, on March 3, 2016. He recommended an MRI. Claimant underwent an MRI of the left foot on March 17, 2016. The MRI showed tenosynovitis along the peroneus longus and brevis corresponding to the area of claimant's symptoms. (JE 3, p. 31; JE 6, p. 172)

Claimant returned to Dr. Keppler on March 22, 2016. Claimant was given an injection in the tendon sheath. She was told to continue with the walking boot. (JE 3, p. 33)

Claimant returned to Dr. Keppler on May 6, 2016. Claimant had continued ankle and foot pain. Surgery was discussed and chosen as a treatment option. (JE 3, p. 36)

On June 1, 2016, claimant underwent surgery consisting of a tendon repair on the left lower extremity. Surgery was performed by Dr. Keppler. (JE 4, pp. 43-47)

Claimant saw Dr. Keppler from August 2016 through September 2016. On September 22, 2016, claimant returned to Dr. Keppler with continued complaints of foot and ankle pain. Claimant indicated little improvement in symptoms following surgery. She was recommended to have a second opinion. (JE 3, pp. 40-41)

On October 13, 2016, claimant was evaluated by Phinit Phisitkul, M.D., at the University of Iowa Hospitals and Clinics (UIHC). Dr. Phisitkul prescribed gabapentin and desensitization therapy. (JE 5, pp. 48-51)

The record indicates defendants put claimant under surveillance six times in October 2016. The video of the surveillance apparently shows claimant walking up and down small sets of stairs at her home and carrying items to her car. Claimant is said to have an antalgic gait. (JE 2, p. 21)

The video was sent by defendants to Erin Kennedy, M.D., asking for an opinion of claimant's activities in the video, and if they exceeded claimant's restrictions. (JE 2, p. 21) Dr. Kennedy indicated claimant could be ambulatory, to some degree, at work. She opined that claimant had not reached maximal medical improvement (MMI). Dr. Kennedy returned claimant at half time and referred her to the UIHC. (JE 2, pp. 21-25, 29)

Claimant was evaluated by Eric Aschenbrenner, M.D., on February 21, 2017. Claimant was assessed as having trochanteric bursitis in the right hip. Dr. Aschenbrenner gave claimant an injection in the right hip. (JE 5, pp. 52-53)

Claimant testified at hearing that the injection did not resolve her symptoms in her hip. (TR p. 25)

Claimant saw Dr. Phisitkul on June 8, 2017, and June 22, 2017, for left ankle pain. Claimant said she could not walk normally and felt like something was stuck in her ankle. Claimant had an MRI that showed a complete rupture of the peroneus longus tendon and a split peroneus brevis tendon. Surgery was discussed and chosen as a treatment option. (JE 5, pp. 54-58)

On September 22, 2017, claimant underwent surgery consisting of a peroneal tendon repair. Surgery was performed by John Femino, M.D. (JE 5, pp. 65-68)

Claimant saw Dr. Femino on October 24, 2017. Claimant was using a scooter to move. Dr. Femino recommended physical therapy. (JE 5, pp. 78-79)

Claimant returned to Dr. Femino on January 5, 2018. Claimant complained of pain and constant swelling. Claimant was not working. Claimant was told to have testing performed to rule out deep vein thrombosis. (JE 5, pp. 85-86)

On February 15, 2018, claimant's daughter called UIHC indicating that defendant-employer was pressuring claimant to return to work and claimant was unable to return to work. Claimant was given restrictions of 15 minutes on her feet with 45 minutes of rest. (JE 5, p. 89)

Claimant returned to Dr. Femino on June 7, 2018. Claimant had tenderness on the peroneal tendon. Claimant had difficulties with weight bearing while wearing shoes. Claimant was restricted to standing 55 minutes with 5 minutes of rest every hour. (JE 5, pp. 96-97)

Claimant saw Dr. Femino on August 10, 2018. Claimant still had pain while walking. Dr. Femino noted that claimant had an altered gait. Claimant was referred to a specialist regarding plantar fascia problems. (JE 5, p. 98)

Claimant was referred to Mederic Hall, M.D. An ultrasound showed left plantar fascia thickening and tarsal tunnel syndrome. (JE 5, p. 102) Claimant was given an injection in the left fibular tendon sheath on September 27, 2018. (JE 5, pp. 106-107)

Claimant returned to Dr. Femino on November 9, 2018. Claimant had returned to work at 4 hours per day. Claimant had pain aggravated by walking. Claimant indicated the September 27, 2018 injection provided relief for two days. Dr. Femino recommended a second injection. (JE 5, pp. 108-110)

On November 22, 2018, claimant had an injection in the tarsometatarsal joint. (JE 5, pp. 111-112)

Claimant saw Dr. Femino on December 11, 2018. Claimant still had pain aggravated by standing or walking. Dr. Femino recommended a CT scan. (JE 5, pp. 113-114)

Claimant underwent a weight bearing CT scan that showed evidence of degenerative disease in the calcaneocuboid joint. Surgery was recommended. (JE 5, pp. 119-120)

On May 29, 2019, claimant underwent a calcaneocuboid arthrodesis, a proximal tibial bone graft, and a dorsal excision of the fourth and fifth metatarsals. Surgery was performed by Dr. Femino. (JE 5, pp. 124-125)

Claimant was seen on July 15, 2019, by Rhonda Dunn, ARNP, at the UIHC. Claimant had continued left lateral foot pain. Claimant was told to continue non-weight bearing on crutches. (JE 5, p. 135)

Claimant returned to Dr. Femino on November 26, 2019. Claimant still had pain that limited her to walking only a few minutes at a time. Dr. Femino believed hardware from the prior surgery was causing the pain and recommended surgery to remove the hardware. (JE 5, pp. 143-146)

On February 5, 2020, claimant underwent surgery to remove hardware. (JE 5, pp. 150-151)

Claimant returned to Nurse Practitioner Dunn on February 14, 2020. Claimant had pain in the lateral left ankle. Claimant indicated the most recent surgery was the most painful. Claimant was not working. Claimant was non-weight bearing and was wearing a boot and using crutches. (JE 5, p. 153)

Claimant saw Dr. Femino on May 12, 2020. Claimant was full weight bearing and doing household chores. Claimant was limited to standing 30 minutes with a 5-minute break between. She was restricted to no use of ladders or stairs. (JE 5, p. 158)

Claimant returned to Dr. Femino on July 2, 2020. Claimant was progressing slowly and experiencing more pain with more activity. Claimant was not working. Dr. Femino recommended physical therapy and custom shoes. (JE 5, pp. 159-160)

Claimant testified, at that time, custom shoes did not help and she was still using a walker boot and crutches. (TR p. 29)

On September 15, 2020, claimant returned to Dr. Femino. Claimant was still experiencing pain that was aggravated by walking. Claimant also had an antalgic gait. (JE 5, pp. 162-165)

Claimant returned to Dr. Femino on November 10, 2020. Claimant still had ankle pain aggravated by prolonged walking. Claimant had not returned to work due to right knee pain. Dr. Femino recommended against further surgery. He found that claimant was at MMI. He opined claimant had a 20 percent permanent impairment to the left lower extremity. (JE 5, p. 169)

Claimant testified that when she was released to return to work per Dr. Femino, she still had foot, ankle, hip and lower back pain. She said she did not return to work until the end of 2020. (TR pp. 29, 32)

Lance Marting testified that he is the chief operating officer and general manager of DCC. In that capacity, he is familiar with claimant, her job and her work injury. (TR pp. 56-59)

Mr. Marting testified claimant gave him a letter indicating she was resigning effective December 9, 2020. (TR p. 66) Mr. Marting said that because claimant was a "wonderful employee," DCC worked with claimant regarding restrictions, allowing her to return to work. Mr. Marting said claimant returned to work on December 10, 2020, and has been working part-time since. (TR pp. 66-67)

In a July 26, 2021 report, Robin Sassman, M.D., gave her opinions of claimant's condition following an independent medical evaluation (IME). Claimant had pain in the lateral aspect of the foot and ankle. Claimant also had low back and right hip pain. (Ex. 3, p. 29)

Dr. Sassman opined that claimant's left lower extremity injury caused claimant's gait change, which, in turn, was a substantially aggravating factor in claimant's right hip

trochanteric bursitis. Dr. Sassman found claimant at MMI as of November 10, 2020. (Ex. 3, p. 34)

Dr. Sassman found that claimant had a 17 percent permanent impairment to the left lower extremity, converting to a 6 percent permanent impairment to the body as a whole. She also opined that claimant had a 10 percent permanent impairment to the body as a whole for right hip bursitis and a 10 percent permanent impairment to the low back. Combining the lower extremity, the right hip and lower back impairments resulted in a 24 percent permanent impairment to the body as a whole. (Ex. 3, pp. 35-36)

Dr. Sassman restricted claimant's standing and walking on an occasional basis. She also recommended claimant not use ladders, squat or kneel. (Ex. 3, p. 36)

Claimant testified she still has pain in the left foot and ankle. She said that she also has pain in her right hip and right lower back. (TR p. 33) Claimant said walking aggravates her leg and ankle pain. (TR p. 34)

Claimant says that she has frequent hip pain aggravated by walking. (TR p. 34) She says her current right hip pain is different from pain she had in 2014. (TR p. 35)

Claimant says she has difficulty doing household chores due to problems with standing for extended periods of time. (TR p. 37)

Claimant says that because of pain in her lower extremity, back and hip, she works less hours than she did prior to her injury in 2016. (TR p. 38)

Between April 20, 2021, and April 23, 2021, claimant was put under surveillance by defendants on four occasions. Exhibit F contains four short videos of the days claimant was put under surveillance.

On April 20, 2021, surveillance shows claimant walking to her car, driving, sitting in her car and walking children to the car. The video also shows claimant getting children out of her car and walking with children. It shows claimant shopping and pushing a cart. The video also shows claimant putting items in a car.

Video from April 21, 2021, shows claimant walking to her car, driving, sitting in her car, walking children in and out of the car, moving a garbage barrel, shopping and pushing kids in a cart, and putting items in a car.

Video from April 22, 2021, shows claimant going to a yard sale and carrying items from the yard sale. It also shows claimant putting kids in and out of the car.

Video from April 23, 2021, shows claimant putting children in the car, going shopping, putting groceries in the car, and getting kids and groceries out of the car.

In all videos, claimant walks very slowly.

An agreement titled "Light Duty Agreement," signed on September 29, 2020, indicates that claimant will be allowed to stand 30 minutes with 5-minute breaks and will not use a ladder or stairs. The agreement also indicates that claimant will work 8 hours a day, 5 days a week. (Defendants' Exhibit B)

Mr. Marting testified at hearing that he speaks a few times every week with claimant and in English. He said that claimant is limited in her ability to speak in English. (TR pp. 58, 70)

Mr. Marting said that claimant is working part-time at her request. He said claimant usually works from 5:00 A.M. to 9:00 A.M. doing housekeeping. At the time of hearing claimant was earning $11.75 per hour. (TR p. 68)

Mr. Marting said claimant's main limitation is time on her feet. He said that the employer has tried to limit claimant's use of stairs. (TR p. 71)

CONCLUSION OF LAW

The first issue to be determined is whether claimant is entitled to additional temporary 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).

An employee is entitled to appropriate temporary partial disability benefits during those periods in which the employee is temporarily, partially disabled. An employee is temporarily, partially disabled when the employee is not capable medically of returning to employment substantially similar to the employment in which the employee was engaged at the time of the injury, but is able to perform other work consistent with the employee's disability. Temporary partial benefits are not payable upon termination of temporary disability, healing period, or permanent partial disability simply because the employee is not able to secure work paying weekly earnings equal to the employee's weekly earnings at the time of the injury. Section 85.33(2).

Healing period compensation describes temporary workers' compensation weekly benefits that precede an allowance of permanent partial disability benefits. Ellingson v. Fleetguard, Inc., 599 N.W.2d 440 (Iowa 1999). Section 85.34(1) provides that healing period benefits are payable to an injured worker who has suffered permanent partial disability until the first to occur of three events. These are: (1) the worker has returned to work; (2) the worker medically is capable of returning to substantially similar employment; or (3) the worker has achieved maximum medical recovery. Maximum medical recovery is achieved when healing is complete and the extent of permanent disability can be determined. Armstrong Tire & Rubber Co. v. Kubli, Iowa App., 312 N.W.2d 60 (Iowa 1981). Neither maintenance medical care nor an employee's continuing to have pain or other symptoms necessarily prolongs the healing period.

Claimant contends she is due additional temporary partial disability benefits and healing period benefits for the periods detailed in Exhibit 5.

Regarding temporary partial disability benefits, claimant contends she is due temporary partial disability benefits for periods from July 29, 2018, through June 2, 2019. (Ex. 5, pp. 46-47)

On June 7, 2018, claimant was restricted by Dr. Femino to walking up to 55 minutes each hour with a 5-minute break. Claimant also had a 25-pound lifting restriction. Claimant did not have restrictions on the number of hours she could work. (JE 5, p. 97)

Dr. Femino did not change his restrictions on the August 10, 2018 visit. (JE 5, p. 98)

On November 9, 2018, and December 11, 2018, claimant was seen by Dr. Femino, who did not change claimant's restrictions. (JE 5, pp. 110, 113)

Claimant returned to Dr. Femino on February 8, 2019. No changes were made to claimant's restrictions. (JE 5, p. 120)

Claimant was taken off work on May 29, 2019, for her surgery. (JE 5, pp. 124-126)

I recognize that claimant was working less hours for the periods of time between July 29, 2018, through June 2, 2019. Claimant did have restrictions during that period regarding resting times, lifting, and use of ladders and stairs. However, no doctor limited claimant in the number of hours she could work during that same period. For this reason, claimant is not due temporary partial disability benefits during these periods of time. For the reasons detailed above, claimant has failed to carry her burden of proof she is due temporary partial disability benefits from July 29, 2018, through June 2, 2019.

Claimant also contends she is due healing period benefits from May 14, 2020, through November 10, 2020. (Ex. 5, p. 49)

On May 12, 2020, claimant saw Dr. Femino. At that time, under the section titled "Work Restrictions," claimant was limited to standing up to 30 minutes with a 5-minute break. Claimant was also told not to use stairs or ladders and to use a CAM boot or crutches as needed. (JE 5, p. 158) At that visit, claimant was doing household chores and trying to stand as long as she could. (JE 5, p. 157)

Mr. Marting testified that claimant was to return to work in May of 2020, but about midnight the night before claimant was to begin to work, claimant's daughter called, indicating claimant could not return to work due to a knee injury. (TR. p. 63; JE 5, p. 169)

There is nothing in Dr. Femino's records from May 12, 2020, indicating claimant could not return to work. On that date Dr. Femino gave claimant work restrictions. Mr. Marting testified that in May of 2020, the night before claimant was to return to work, defendant-employer received a call indicating claimant could not return to work due to a knee injury. Claimant's knee injury is not an issue in this matter. Given this record, claimant has failed to carry her burden of proof she is due healing period benefits from May 14, 2020, through November 10, 2020.

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

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). The fact finder must consider both medical and lay evidence relating to the extent of the functional loss in determining permanent disability resulting from an injury to a scheduled member. Terwilliger v. Snap-On Tools Corp., 529 N.W.2d 267, 272-273 (Iowa 1995); Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417, 420 (Iowa 1994).

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 Ry. Co. of Iowa, 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 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 contends her January 4, 2016, injury resulted in an injury to the body as a whole. Defendants content that claimant's January 4, 2016, injury is limited to her lower extremity.

Claimant testified that she injured her hip and lower back in her fall at work. She testified she continues to experience pain in the right hip and lower back. (TR pp. 32-33) Claimant testified her pain following her 2016 injury was different from her right hip pain from 2014. (TR p. 35)

In her initial visit to Nurse Practitioner Muenster, notes indicated that claimant had worsening pain in her right hip. (JE 2, p. 4)

In February 2017, claimant was assessed by Dr. Aschenbrenner as having trochanteric bursitis in the right hip. Claimant was given an injection in the right hip at that time. (JE 5, pp. 52-53)

Claimant treated with Dr. Femino for an extended period of time. Dr. Femino's records make several references that claimant had an altered gait. (JE 5, pp. 98, 137, 162-165)

Claimant saw Dr. Sassman on one occasion for an IME. Dr. Sassman opined that claimant's right hip and lower back pain was due to her altered gait. (Ex. 3, p. 33) No expert has opined that claimant's low back and right hip condition was not causally or materially aggravated by her fall at work in 2016.

Claimant credibly testified she injured her hip and low back in her fall in 2016 at work. She has been assessed as having hip pain after her fall. Claimant has been assessed as having altered gait. Dr. Sassman opined claimant's right hip and low back conditions are causally related or materially aggravated by her fall at work. No expert opines that claimant's low back and hip pain are not caused by the 2016 injury. Given this record, claimant has carried her burden of proof that her right hip and low back conditions are causally related to the 2016 fall at work while working for defendant-employer.

Dr. Femino found claimant had a 20 percent permanent impairment to the left lower extremity. (JE 5, p. 169) According to the AMA Guides to the Evaluation of Permanent Impairment, 5th Edition, a 20 percent permanent impairment to the lower extremity converts to an 8 percent permanent impairment to the body as a whole. (Guides, p. 527, table 17-3)

Dr. Sassman found claimant had a 10 percent permanent impairment to the body as a whole for her hip and a 10 percent permanent impairment to the body as a whole for her low back condition. (Ex. 3, pp. 35-36)

According to the Guides, the combined values for the lower extremity, the hip and back conditions result in a 24 percent permanent impairment to the body as a whole. (Guides, p. 604)

Claimant was 54 years old at the time of hearing. Claimant went up to the 6th grade in Mexico. Claimant does not have a GED. She can speak some English. Claimant does not write or read English. Claimant has worked as a dishwasher and a waitress. Since approximately 2000 claimant has worked primarily as a housekeeper.

As noted in the Findings of Fact, defendants put claimant under surveillance on approximately ten different occasions. A video of four of those surveillances are found in Exhibit F. As noted, in the Findings of Fact, the surveillance shows claimant doing tasks such as walking, pushing a shopping cart, helping children in and out of a car and loading and unloading groceries and other items out of a car. As noted, on all surveillances in the record, claimant is seen walking slowly. The surveillance in this record does not show claimant exceeded her work restrictions. The surveillance videos do not contradict claimant's testimony. Surveillance in the record shows claimant trying to do normal tasks to take care of herself and her grandchildren. Given this record, it is found that the surveillance does nothing to impact claimant's testimony or her medical records.

Mr. Marting testified the defendant-employer finds claimant to be a valuable employee and has attempted to accommodate claimant's restrictions. He testified claimant usually moves slowly at work. (TR p. 68)

Claimant has a 24 percent permanent impairment of the body as a whole. She has restrictions that limit her to standing for 55 minutes an hour and resting for the remaining 5 minutes. Claimant's employer had tried to accommodate claimant's restrictions. Claimant is still employed with DCC. The medical records indicate claimant now works part-time. However, no doctor or expert has opined that claimant cannot return to work at full-time hours. Given this record, claimant is found to have a 30 percent loss of earning capacity or industrial disability.

The next issue to be determined is whether 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.

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.

(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).

Claimant contends defendants are liable for a penalty. Claimant argues that a penalty is appropriate in this case as defendants failed to pay claimant temporary partial disability benefits and healing period benefits. (Claimant's Post-Hearing Brief, pp. 24-25) As noted, claimant has failed to carry her burden of proof she is due additional temporary partial disability benefits or healing period benefits. Given this record, defendants are not liable for a penalty.

The final issue to be determined are costs. Costs are granted at the discretion of this agency. Claimant failed to carry her burden of proof she was entitled to additional temporary benefits. As claimant carried her burden of proof regarding permanent partial disability benefits, costs are awarded to claimant.

ORDER

THEREFORE IT IS ORDERED:

Defendants shall pay claimant one hundred fifty (150) weeks of permanent partial disability benefits at the rate of three hundred forty-three and 08/100 dollars ($343.08) per week commencing on November 10, 2020.

Defendants 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)

Defendants shall pay costs.

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

Signed and filed this 31st day of January, 2022.

JAMES F. CHRISTENSON
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Zeke McCartney (via WCES)

Anne Clark (via WCES)

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 filed via Workers' Compensation Electronic System (WCES) unless the filing party has been granted permission by the Division of Workers' Compensation to file documents in paper form. If such permission has been granted, the notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 150 Des Moines Street, Des Moines, Iowa 50309-1836. The notice of appeal must be received by the Division of Workers' Compensation 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 legal holiday.