BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

KRYSTAL FOSTER,

Claimant,

vs.

EAST PENN MANUFACTURING CO. INC.,

Employer,

and

SENTINEL INS. CO.,

Insurance Carrier,
Defendants.

File No. 5061342

ARBITRATION

DECISION

Headnotes: 1402.30, 1801, 2501, 4000.2

STATEMENT OF THE CASE

Claimant, Krystal Foster, filed a petition in arbitration seeking workers' compensation benefits from East Penn Manufacturing Company, Inc. (East Penn), employer, and Sentinel Insurance Company, insurer, both as defendants. This matter was heard in Des Moines, Iowa on February 15, 2019 with a final submission date of March 15, 2019.

The record in this case consists of Joint Exhibits 1-9, Claimant's Exhibits 1-9, Defendants' Exhibits A through J, and the testimony of claimant.

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. Whether claimant's second shoulder surgery is related to her November 26, 2016 date of injury.

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

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

FINDINGS OF FACT

Claimant was 26 years old at the time of hearing. She began working for East Penn in 2014. East Penn is a battery manufacturing company.

Claimant testified she worked as a "finish floater" with East Penn. As a finish floater, claimant worked multiple jobs on an assembly line.

Claimant's prior medical history is relevant. Claimant treated for left shoulder pain in 2009. (Joint Exhibit 1) Claimant also treated for left shoulder pain in 2010 when she was 18. (Jt. Ex. 1) There is no evidence claimant had any permanent restrictions or permanent impairments to her left shoulder prior to November of 2016.

Claimant testified that, on November 21, 2016, she was offloading batteries at the end of the line, when she pushed batteries across a pallet. Claimant said she felt her left shoulder pop.

Claimant was evaluated by Nicole Ruble, PA-C for left shoulder pain. Physician's Assistant Ruble recommended claimant be seen by an orthopedic specialist. (Jt. Ex. 3)

Claimant was evaluated by Richard Goding, M.D. an orthopedic surgeon, on December 6, 2016 for left shoulder pain. Dr. Goding thought claimant had a superior labral anterior to posterior (SLAP) tear. Claimant was prescribed physical therapy. (Jt. Ex. 4, p. 6)

Claimant returned to Dr. Goding on January 10, 2017. Claimant had no improvement. An MRI was recommended. (Jt. Ex. 4, pp. 8-9) On January 19, 2017 claimant had an MRI of the left shoulder. It showed a significant partial to full thickness rotator cuff tear and a biceps tendon tear. Surgery was recommended by Dr. Goding. (Jt. Ex. 6, pp. 63-64; Jt. Ex. 4, p. 9)

On January 25, 2017 claimant tendered her resignation to East Penn. She indicated her last day of work would be February 10, 2017. (Ex. D)

Claimant returned to Dr. Goding on February 2, 2017 complaining of pain going down the arm. Claimant was referred to a neurologist. (Jt. Ex. 4, p. 10)

On February 20, 2017 claimant underwent a left shoulder surgery consisting of a subacromial decompression, and a mini rotator cuff repair. Surgery was performed by Dr. Goding. (Jt. Ex. 4, pp. 11-12)

Claimant returned in follow up with Dr. Goding in March through May 2017. On May 25, 2017 claimant complained of some left shoulder problems. Claimant was given a cortisone shot in the left shoulder. (Jt. Ex. 4, pp. 12-14)

Claimant returned to Dr. Goding on July 27, 2017 with continued complaints of pain and significant left shoulder symptoms. Claimant was kept off work for another month and continued on physical therapy. (Jt. Ex. 4, p. 15)

On August 9, 2017 claimant was evaluated by Mark Kirkland, D.O. Claimant told Dr. Kirkland that Dr. Goding indicated she could return to work on August 27, 2017 or August 28, 2017 with no restrictions. Claimant had occasional popping and pain in the left shoulder. On exam, claimant had some popping in the left AC joint area. Dr. Kirkland recommended claimant continue with physical therapy two to three times a week. He did not find claimant at maximum medical improvement (MMI). He believed claimant might be at MMI as of August of 2017. Dr. Kirkland recommended claimant could do modified work. (Jt. Ex. 7, pp. 67-72)

On October 26, 2017 claimant was evaluated by Dr. Goding with complaints of shoulder pain and popping in the anterior area of the shoulder. Claimant was given an AC joint injection. (Jt. Ex. 4, pp. 16-18)

Claimant returned to Dr. Goding on January 10, 2018 with problems with range of motion and chronic clavicular joint pain. Claimant was given a cortisone injection. (Jt. Ex. 4, p. 18)

Claimant saw Dr. Goding in follow up with continued complaints of AC joint pain. An MRI was recommended. (Jt. Ex. 4, p. 21)

On February 5, 2018 claimant underwent a second MRI to the left shoulder. It showed a recurrent SLAP tear and significant AC joint inflammation. A second shoulder surgery was recommended. Claimant was kept off work. (Jt. Ex. 4, pp. 23-25)

In a March 19, 2018 note, written by claimant's attorney, Dr. Goding agreed that the February of 2018 recommendation for the left shoulder and biceps surgery was causally related to claimant's November 21, 2016 work injury. Dr. Goding also indicated he requested authorization for the surgery from the worker's compensation insurer, but the worker's compensation carrier refused to authorize surgery. (Jt. Ex. 4, pp. 28-34)

On April 3, 2018 claimant underwent a Mumford distal clavicle resection and a biceps tenodesis. Surgery was performed by Dr. Goding. (Jt. Ex. 4, p. 30)

Claimant returned in follow up with Dr. Goding on April 12, 2018. Claimant was returned to work with restrictions. (Jt. Ex. 4, pp. 32-33) Claimant was eventually returned to work with no restrictions on May 24, 2018. (Jt. Ex. 4, pp. 34-36)

In a June 1, 2018 letter, William Boulden, M.D., gave his opinions of claimant's condition in response to questions raised by defendants' counsel. It is unclear what, if any records, Dr. Boulden reviewed regarding the June 1, 2018 letter. Dr. Boulden opined he found no evidence of a SLAP tear. He also opined the tenodesis, performed in the second surgery, was not related to the original work injury. Dr. Boulden opined he could not relate claimant's second surgery to the original work injury. (Ex. E, pp. 1-2)

Claimant returned to Dr. Goding on August 16, 2016. She had good range of motion. Claimant was released from care and returned to work with no restrictions. (Jt. Ex. 4, pp. 37-38)

On September 14, 2017 claimant was sent an Auxier notice, indicating that, based on Dr. Goding's notes, temporary benefits would be terminated as of October 14, 2017. (Ex. H)

In a December 21, 2018 letter, Dr. Kirkland gave his response to questions raised by claimant's counsel. He opined the April 3, 2018 surgery was causally related to the November 21, 2016 work injury. Based on his review of the records, he believed claimant had symptoms of AC joint internal derangement prior to her first surgery. (Jt. Ex. 7, pp. 73-74)

In a January 4, 2019 letter, Dr. Boulden again opined he did not believe claimant's second surgery was related to the November 21, 2016 accident. He also opined claimant had no permanent restrictions. (Ex. E, pp. 3-4)

On January 7, 2019 claimant was evaluated by Mark Fish, D.O. Claimant was still unable to lift her left arm following her second surgery. Claimant had anterior shoulder pain. An MR arthrogram was recommended. (Ex. F, pp. 1-3)

In a January 10, 2019 letter, written by claimant's counsel, Dr. Goding indicated claimant was off work from January 25, 2018 through April 12, 2018 due to the April 3, 2018 surgery. He again opined the April 3, 2018 surgery was causally related to the November of 2016 work injury. He indicated claimant required ongoing and future medical care for the November 21, 2016 work injury. (Jt. Ex. 4, pp. 40-41)

In a January 19, 2019 report, Sunil Bansal, M.D., gave his opinions of claimant's condition following an IME. Claimant had continued left shoulder pain. Claimant had difficulty lifting 10 pounds from floor to table height, and could not lift anything overhead on the left. Dr. Bansal assessed claimant as having a SLAP tear, a biceps tendon tear, and a partial to full-thickness rotator cuff repair. He did not find claimant at MMI. Dr. Bansal suggested, given claimant's ongoing symptoms, another MRI was necessary. He opined the need for both of claimant's surgeries was related to her January 16, 2016 injury. (Jt. Ex. 9)

In a January 15, 2019 note, Dr. Kirkland again opined claimant's April 3, 2018 surgery was causally related to the November 21, 2016 work injury. (Jt. Ex. 7, p. 77)

In a January 29, 2019 note, written by defendants' counsel, Dr. Boulden indicated the left shoulder rotator cuff repair, recommended by Dr. Fish, was related to claimant's November 21, 2016 work injury. (Ex. E, p. 5)

In a February 11, 2019 questionnaire, written by defendants' counsel, Dr. Fish indicated he was unable to indicate if claimant's current need for surgery was related to her original injury. (Ex. F, pp. 4-5)

Claimant testified she was off work, before her second surgery, from January 25, 2018 through April 12, 2018. During that time, she did not receive any temporary benefits. Claimant indicated defendants did not communicate to her why benefits were not provided during this period.

Claimant testified she has difficulty with reaching overhead on the left. (Ex. I; Deposition pp. 16-17)

Claimant said she and her husband have a lawn care and snow removal business, known as Foster Lawn Care. She said she does bookkeeping, billing, and assists with mowing in the business. (Ex. I; Depo. pp. 21-22)

Claimant testified that prior to her injury, she and her husband were able to do most of the work for the lawn care service. After her injury and surgery, claimant was restricted in mowing. As a result, Foster Lawn Care had to hire three subcontractors to do work. (Ex. I; Depo. Pp. 26-28)

As of her October 2018 deposition, claimant said she and her husband would mow approximately 30 lawns in a week and would mow these together. (Ex. I; Depo. pp. 29-30) Claimant testified she and her husband mowed between 30-40 lawns per week. (Tr. p. 26) Claimant used a riding mower. Claimant said she also operated a self-propelled snowblower for Foster to clean snow for customers. (Ex. I; Depo. pp. 34-35)

CONCLUSIONS OF LAW

The first issue to be determined is whether claimant's second shoulder surgery was causally related to her November 21, 2016 work 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 R. App. P. 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 Electric 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.

The claimant has the burden of proving by a preponderance of the evidence that the injury is a proximate cause of the disability on which the claim is based. A cause is proximate if it is a substantial factor in bringing about the result; it need not be the only cause. A preponderance of the evidence exists when the causal connection is probable rather than merely possible. George A. Hormel & Co. v. Jordan, 569 N.W.2d 148 (Iowa 1997); Frye v. Smith-Doyle Contractors, 569 N.W.2d 154 (Iowa App. 1997); Sanchez v. Blue Bird Midwest, 554 N.W.2d 283 (Iowa App. 1996).

The question of causal connection is essentially within the domain of expert testimony. The expert medical evidence must be considered with all other evidence introduced bearing on the causal connection between the injury and the disability. Supportive lay testimony may be used to buttress the expert testimony and, therefore, is also relevant and material to the causation question. The weight to be given to an expert opinion is determined by the finder of fact and may be affected by the accuracy of the facts the expert relied upon as well as other surrounding circumstances. The expert opinion may be accepted or rejected, in whole or in part. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); IBP, Inc. v. Harpole, 621 N.W.2d 410 (Iowa 2001); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995). Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417 (Iowa 1994). Unrebutted expert medical testimony cannot be summarily rejected. Poula v. Siouxland Wall & Ceiling, Inc., 516 N.W.2d 910 (Iowa App. 1994).

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 1975).

The parties agree the surgery Dr. Goding performed on claimant on February 20, 2017 was causally connected to the November 21, 2016 work injury. (Def. Post-Hearing Brief, p. 8) The parties dispute the need for claimant's second shoulder surgery of April 3, 2018 was causally related to her November 21, 2016 work injury.

Four experts have opined regarding the causal connection between the April 3, 2018 surgery and the accepted work injury.

Dr. Goding was an authorized provider. He treated claimant from approximately December 6, 2016 through January 14, 2019, or slightly over two years. (Ex. 4) During that period of time, he evaluated claimant on over 20 occasions. He performed both surgeries on claimant. Dr. Goding opined claimant's need for surgery was related to her November 21, 2016 work injury. (Ex. 4, pp. 28, 40-41)

Dr. Kirkland was authorized by defendants to evaluate claimant for an IME. On three different occasions Dr. Kirkland opined claimant's need for her second surgery was related to her November 21, 2016 injury. (Jt. Ex. 7)

Dr. Bansal saw claimant on one occasion for an IME. He also found claimant's need for her second surgery was causally connected to the November 21, 2016 injury. (Jt. Ex. 9, pp. 88-89)

Dr. Boulden performed a records review. Dr. Boulden did not evaluate or treat claimant. Dr. Boulden opined claimant's second surgery was not causally related to her January of 2016 work injury. The record suggests Dr. Boulden did review some of claimant's medical records. It is unclear in either his June 1, 2018 or his January 4, 2019 letter what specific records Dr. Boulden reviewed. Regarding his report of June 1, 2018, Dr. Boulden only references a May 31, 2018 letter from defendants' counsel. It is unclear if Dr. Boulden reviewed any records for the June 1, 2018 opinion or if he merely relied upon a recitation of the record provided by defendants' counsel. (Ex. E)

Given these discrepancies, it is found the opinions of Dr. Boulden, regarding causation, are found not convincing.

Dr. Goding treated claimant for over two years. He saw claimant on over 20 occasions. He provided both of claimant's surgeries. Dr. Goding has, by far, the greatest experience with claimant's history and her medical presentation. Dr. Kirkland was authorized by defendants to provide an IME on claimant. Dr. Bansal also performed an IME on claimant. All three of these experts opined claimant's second surgery was related to her November 21, 2016 work injury. It is unclear from Dr. Boulden's opinions what records he reviewed to come to his conclusions regarding causation. Dr. Boulden did not evaluate or treat claimant. His opinions regarding causation are found not convincing. Given this record, claimant has carried her burden of proof her second shoulder surgery was causally related to her November 21, 2016 work injury. Given these finding of facts and conclusions of law, it is found defendants are liable for all medical expenses related to claimant's second shoulder surgery.

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

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.

When an injured worker has been unable to work during a period of recuperation from an injury that did not produce permanent disability, the worker is entitled to temporary total disability benefits during the time the worker is disabled by the injury. Those benefits are payable until the employee has returned to work, or is medically capable of returning to work substantially similar to the work performed at the time of injury. Section 85.33(1).

The authorized physician, Dr. Goding, took claimant off work from January 25, 2018. (Jt. Ex. 4, pp. 21-22; Tr. 17) Claimant was returned to work with restrictions on April 12, 2018. (Jt. Ex. 4, pp. 32, 40-41; Tr. pp. 17-18) Claimant was not paid benefits during this time. Claimant is due temporary total disability benefits from January 25, 2018 through April 12, 2018.

Defendants suggest even if claimant is due temporary total disability benefits from January 25, 2018 through April 12, 2018, they owe claimant nothing. Defendants contend this is because claimant was paid 50 weeks of permanent partial disability benefits on or about June 20, 2018. It appears this payment of permanent partial disability benefits was based, in part, on Dr. Kirkland's rating. (Ex. B; Jt. Ex. 7, p. 72)

It is commendable that defendants paid claimant permanent partial disability benefits based on Dr. Kirkland's rating. However, the parties stipulated at hearing claimant was not at MMI and permanent partial disability benefits were not at issue in this case.

Defendants contend they paid permanent partial disability benefits and should receive a credit towards any temporary total disability benefits owed for the period of January 25, 2018 through April 12, 2018. Defendants cite no legal authority to support this proposition.

Iowa Code section 85.34 governs the recovery of overpayments. The legislature made a number of changes to Iowa Code section 85.34 in 2017. 2017 Iowa Acts chapter 23. Iowa Code section 85.34(5), now provides:

> 5. Recovery of employee overpayment. If an employee is paid any weekly benefits in excess of that required by this chapter and chapters 85A, 85B, and 86, the excess paid by the employer shall be credited against the liability of the employer for any future weekly benefits due pursuant to subsection 2, for any current or subsequent injury to the same employee.

As noted above, changes to Iowa Code section 85.34 are tied to the claimant's date of injury. 2017 Iowa Acts ch. 23, § 24. The new provisions enacted in 2017 do not apply to the alleged overpayment claim in this case.

At the time of claimant's work injury, Iowa Code section 85.34(5), provided:

> 5. *Recovery of employee overpayment.* If an employee is paid any weekly benefits in excess of that required by this chapter and chapters 85A, 85B, and 86, the excess paid by the employer shall be credited against the liability of the employer for any future weekly benefits due pursuant to subsection 2, for a subsequent injury to the same employee. An overpayment can be established only when the overpayment is recognized in a settlement agreement approved under section 86.13, pursuant to final agency action in a contested case which was commenced within three years from the date that weekly benefits were last paid for the claim for which the benefits were overpaid, or pursuant to final agency action in a contested case for a prior injury to the same employee. The credit shall remain available for eight years after the date the overpayment was established. If an overpayment is established pursuant to this subsection, the employee and employer may enter into a written settlement agreement providing for the repayment by the employee of the overpayment. The agreement is subject to the approval of the workers' compensation commissioner. The employer shall not take any adverse action against the employee for failing to agree to such a written settlement agreement.

In Swiss Colony, Inc. v. Deutmeyer, 789 N.W.2d 129 (Iowa 2010), Swiss Colony paid Deutmeyer weekly compensation benefits at a rate in excess of the weekly benefits awarded by the commissioner, and sought a credit for the overpaid benefits. The Iowa Supreme Court held,

> [t]he plain language of section 85.34(5) directs that the overpayment of any weekly benefits be credited to payments for subsequent injuries. "Any" is commonly understood to have broad application. See Merriam-Webster's Collegiate Dictionary 53 (10th ed. 2002) (defining "any" as "every" or "used to indicate one selected without restriction"); see also State v. Owens, 635 N.W.2d 478, 486 (Iowa 2001) (reading "any state or federal statute" broadly); Fisher Controls Int'l, Inc. v. Marrone, 524 N.W.2d 148, 149 (Iowa 1994) (holding phrase "any legal action" broader than "an action"); Iowa Realty Co. v. Jochims, 503 N.W.2d 385, 386 (Iowa 1993) (interpreting "antennas of any kind" not to create an ambiguity and to include satellite dishes). By using a word with an expansive import, we conclude that section 85.34(5) must be interpreted to apply to *all* overpayments of benefits, including an overpayment of weekly benefits and not simply an overpayment of the entire benefit award. As a result, Swiss Colony is only entitled to a credit for the overpayments against future benefits for a subsequent injury and not against future benefits for this injury.

Deutmeyer, 789 N.W.2d at 136-37. Thus, under Deutmeyer, defendants are only allowed a credit for the overpayments against future benefits for a subsequent injury and not with respect to the injuries in this case

Defendants are not due a credit for temporary total disability benefits based on permanent partial disability benefits paid on June 20, 2018.

The final issue to be determined is 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).

(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).

On January 25, 2018, Dr. Goding, the authorized treating physician, took claimant off work. Defendants were still authorizing treatment with Dr. Goding. Dr. Goding did not return claimant to work until April 12, 2018.

Defendants contend they required time to investigate claimant's claim for a second shoulder surgery. There is no evidence in the record defendants contacted Dr. Goding regarding claimant's need for surgery. There is no evidence defendants contacted Dr. Kirkland, the expert they previously hired to provide an IME. Defendants continued to not pay claimant any temporary benefits even after receiving a letter from Dr. Goding indicating the need for claimant's second surgery was caused by the November of 2016 work accident. (Jt. Ex. 4, pp. 28-34) The only evidence of any investigation is a May 31, 2018 letter sent to Dr. Boulden asking for a causation opinion. (Ex E, p. 1) It was not until June 11, 2018, when defendants actually communicated to claimant they were denying claimant temporary benefits. (Ex. H, p. 2)

The authorized treating physician took claimant off work from January 25, 2018 through April 12, 2018. The authorized treating physician indicated claimant's need for surgery was related to the November 2016 work injury. There is little evidence defendants performed any investigation to determine if the claim for temporary benefits was compensable. The only record of any investigation is Dr. Boulden's IME based on defense counsel's letter of May 31, 2018. Defendants did not communicate any reason for the denial of temporary benefits until June 11, 2018, or approximately six months when benefits should have commenced. Given this record, it is found defendants did not have a reasonable cause or excuse in not paying temporary benefits. A penalty is appropriate.

The period of time from January 25, 2018 through April 3, 2018 is approximately 11 weeks. Defendants are liable for a penalty of $2,390.41 (11 weeks x 50% x $434.62).

ORDER

Therefore, it is ordered:

That defendants shall pay claimant temporary total disability benefits at the rate of four hundred thirty-four and 62/100 dollars ($434.62) from January 25, 2018 through April 12, 2018.

That defendants shall pay accrued benefits in a lump sum.

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).

That defendants shall pay all medical costs relating to claimant's second shoulder surgery.

That defendants shall pay claimant a penalty of two thousand three hundred ninety and 41/100 dollars ($2,390.41).

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 19th day of April, 2019.

JAMES F. CHRISTENSON
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.