BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

WILLARD HEAD, Claimant, vs. PRESTAGE FOODS OF IOWA, LLC, Employer, and AAU INSURANCE CO., Insurance Carrier, Defendants.	File No. 22003131.01 ARBITRATION DECISION Headnote Nos: 1802, 1803, 3003, 4000.2

STATEMENT OF THE CASE

Claimant, Willard Head, filed a petition in arbitration seeking workers' compensation benefits from Prestage Foods of Iowa, LLC (Prestage), employer, and AAU Insurance Co., insurer, both as defendants. This matter was heard on June 21, 2023, with a final submission date of July 19, 2023.

The record in this case consists of Joint Exhibits 1 through 11, Claimant's Exhibits 1 through 4, Defendants' Exhibits A through K, 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 is entitled to temporary benefits.

2. Whether the injury resulted in a permanent disability; and if so,

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

4. The commencement date of permanent partial disability benefits.

5. Rate.

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

FINDINGS OF FACT

Claimant was 69 years old at the time of hearing. Claimant has a GED. Claimant testified the majority of his work life has been spent working in ammonia refrigeration, utilities and around boilers. (Hearing Transcript, pages 9-13)

Claimant began with Prestage in October 2019. Prestage is a pork producing plant. At the time of the injury, claimant was a department head over the utility section. Claimant supervised approximately 16 other employees. (Tr., pp. 13-14, 31; Defendants' Exhibit G, page 30)

Claimant testified that, as a part of his job as a supervisor, he held "cross-over meetings" in the control room between the changes of the day and night shifts. (Tr., p. 16)

At an October 5, 2021, cross-over meeting, claimant learned there had been a problem with an equalization cooler that was not immediately detected on the night shift. Claimant asked the person on the night shift who was responsible for monitoring the equalization cooler, Floyd Beadle, why it took approximately three hours to locate this problem. (Tr., pp. 16-17; Ex. D, pp. 11-19)

The argument became heated. Mr. Beadle swore at claimant. Claimant told Mr. Beadle they were going to human resources (HR). Mr. Beadle left the control room first with the claimant following. The door closed behind Mr. Beadle. As claimant went through the door, Mr. Beadle attacked him, pushing him backwards through the door into the control room. (Tr., pp. 16-17) The statement written by the claimant indicates that claimant punched Mr. Beadle back. (Ex. D, p. 11) Claimant testified at hearing that Mr. Beadle was trying to gouge his eyes out, and claimant fought back to protect himself. (Tr., pp. 17-18, 36-37)

Other employees separated claimant and Mr. Beadle. Two witness statements indicate that as the men were being separated, claimant punched at Mr. Beadle's left cheek. (Ex. D, pp. 13, 17) One statement indicates a last punch was thrown, but does not note who threw the punch. (Ex. D, p. 15) The remaining statements make no mention of a punch by claimant after the parties were separated. Claimant testified at hearing that he and Mr. Beadle were not separated, that Mr. Beadle was trying to scratch his eyes, and that claimant struck in self-defense. (Ex. D, pp. 13-19; Tr., pp. 35-37)

Written statements made by nine other employees at Prestage generally follow the facts of this brief fight. (Ex. D, pp. 11-19) As noted above, two of the seven statements indicate claimant hit or tried to hit Mr. Beadle after the men were separated. (Ex. D, pp. 13-17) All statements, except for Mr. Beadle's, indicate Mr. Beadle first attacked claimant and knocked him backwards through the door. (Ex. D)

On the same date, claimant was sent to Iowa Specialty Hospitals & Clinics. Claimant complained of right shoulder and bicep, neck and back pain. Claimant indicated he was taking an employee to HR when the employee shoved him through a door. Claimant was restricted regarding lifting, pulling, pushing and overhead lifting. (Joint Exhibit 4, pages 1-5)

Claimant testified that on the next day following the fight, October 6, 2021, he was contacted by the HR director, Sarah Adams. Claimant said he was given the option of the company firing him or resigning. In an email dated October 6, 2021, claimant resigned from Prestage. (Tr., pp. 18-19; Ex. G, p. 30)

In an affidavit, Sarah Adams indicated she was the HR director at Prestage. Ms. Adams indicated that claimant and Mr. Beadle were involved in an altercation at work. Ms. Adams indicated that Mr. Beadle first attacked claimant. Ms. Adams noted that the investigation of the incident discovered that claimant ". . . was the person who threw the last punch." Ms. Adams testified that claimant was given the option of termination or voluntarily resigning. (Ex. C)

On November 22, 2021, claimant was evaluated by Charles Mooney, M.D. Claimant had a 40 percent improvement in symptoms, but still had neck and bilateral shoulder pain. Claimant was assessed as having a right shoulder strain, neck pain and cervical radicular pain. An MRI was recommended. (JE 4, pp. 14-17)

Claimant returned to Dr. Mooney on December 14, 2021. Claimant had numbness in both arms bilaterally. Based on the MRI, Dr. Mooney assessed claimant as having central stenosis of the spinal canal, hypertrophy of the ligamentum flavum and radicular syndrome of the upper extremities. He referred claimant to an orthopedic specialist regarding the spine. (JE 4, pp. 21-23)

Claimant testified he applied for approximately 10 jobs after leaving Prestage. He was offered one job with Burke Foods (Burke), which he took. Claimant began working at Burke on December 20, 2021. He said Burke processes meats for pizza toppings. Claimant is the maintenance supervisor on the night shift. He testified that he earned approximately $105,000.00 a year with Prestage. At the time of hearing, claimant was earning $88,800.00 with Burke. (Tr., pp. 25-27, 64) Claimant testified that the crew he works with at Burke knows he has difficulties with lifting more than 25 pounds and helps him out when he needs help. (Tr., p. 56)

On January 21, 2022, claimant was evaluated by Trevor Schmitz, M.D., an orthopedic specialist. Claimant had neck and bilateral arm pain. Claimant was assessed as having cervical radiculopathy and foraminal stenosis of the cervical region. A cervical epidural steroid injection (ESI) was recommended. (JE 6, pp. 1-3)

On March 21, 2022, claimant had a cervical ESI performed by Thomas Klein, M.D. (JE 7, p. 1)

Claimant returned to Dr. Schmitz on April 22, 2022. Claimant indicated the ESI helped with symptoms, but he continued to have neck and bilateral arm pain. Claimant

requested a second injection. A second ESI and physical therapy were recommended. (JE 6, pp. 5-7)

On May 9, 2022, claimant had a second cervical ESI with Dr. Klein. (JE 7, p. 3)

Claimant returned in follow up with Dr. Schmitz on June 24, 2022. Claimant indicated the second injection provided some relief for a few weeks. A third ESI and physical therapy were recommended. (JE 6, pp. 9-11)

Claimant had a third ESI on October 31, 2022. It provided some relief, but less than the first ESI. (JE 6, p. 12)

Claimant returned to Dr. Schmitz on November 30, 2022. Claimant had continued neck pain with intermittent symptoms. Claimant thought he could live with his current symptoms. He was told to return for care if needed. (JE 6, pp. 12-13)

In a December 23, 2022, letter, Dr. Schmitz found claimant was at MMI as of November 30, 2022. He found claimant had no permanent impairment. He did not recommend any permanent restrictions for claimant. (Ex. A)

On March 7, 2023, claimant underwent a functional capacity evaluation (FCE). Claimant was found to have given consistent effort. Claimant was found to fall in the lower medium category of physical demand level. He was limited to lifting up to 25 pounds occasionally. He was recommended to limit reaching at shoulder height occasionally. (JE 10)

Claimant returned to Dr. Schmitz on March 17, 2023. Claimant's symptoms had worsened. Claimant was assessed as having cervical radiculopathy. He was recommended to have physical therapy and another ESI. Claimant was told that his final option would be to have a two-level cervical fusion. (JE 6, pp. 14-15)

In a March 20, 2023, report, Sunil Bansal, M.D., gave his opinions of claimant's condition following an independent medical evaluation (IME). Claimant had continued neck pain radiating to the shoulder blades and down the left arm. Claimant had difficulty lifting a gallon of milk with his left arm. (JE 9, pp. 11-12)

Dr. Bansal opined claimant aggravated his cervical facet arthropathy with the work injury. He found that claimant had a 7 percent permanent impairment to the body as a whole using the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition. He agreed with restrictions in claimant's FCE. He recommended claimant have intermittent cervical ESIs. (JE 9, pp. 14-15)

On April 18, 2023, claimant was evaluated by Dr. Klein. A fourth ESI was recommended and chosen as a treatment option. (JE 7, pp. 5-7)

Claimant testified that since leaving Prestage, the company has not offered him a job. He testified that since leaving Prestage, he has not applied for re-employment at Prestage. He testified he would have returned to work at Prestage following the work injury if given the opportunity. (Tr., pp. 18-19)

Claimant testified that he was scheduled for more physical therapy at the time of hearing. He said he had a cervical ESI two days prior to the hearing. (Tr., pp. 20-21)

Claimant testified that he has severe headaches. He said he has shooting pain down his neck into his left arm and wrist with physical exertion. (Tr., p. 29)

CONCLUSIONS OF LAW

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

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).

Iowa Code 85.33(3)(a) provides in pertinent part:

> If an employee is temporarily, partially disabled and the employer for whom the employee was working at the time of the injury offers to the employee suitable work consistent with the employee's disability the employee shall accept the suitable work, and be compensated with temporary partial benefits. If the employee refuses to accept the suitable work with the same employer, the employee shall not be compensated with temporary partial, temporary total, or healing period benefits during the period of the refusal.

The Iowa Supreme Court held that there is a two-part test to determine eligibility under Iowa Code 85.33(3): "(1) whether the employee was offered suitable work, (2) which the employee refused. If so, benefits cannot be awarded, as provided in section 85.33(3)." Schutjer v. Algona Manor Care Center, 780 N.W.2d 549, 559 (Iowa

2010). "If the employer fails to offer suitable work, the employee will not be disqualified from receiving benefits regardless of the employee's motive for refusing the unsuitable work." Neal v. Annett Holdings, Inc., 814 N.W.2d 512, 519 (Iowa 2012).

An employer's acceptance of an employee's voluntary quit from suitable employment is a rejection of suitable work on that date and any future date. Schutjer, 780 N.W.2d at 559. However, an injured worker will not be considered to have refused suitable work where the employee was unable to work as a result of a disciplinary action such as a suspension or termination based upon misconduct or a violation of a work rule unless the conduct is "serious and the type of conduct that would cause any employer to terminate any employee" and "have a serious adverse impact on the employer." Reynolds v. Hy-Vee, Inc., File No. 5046203 (App. Oct. 31, 2017). The burden of proof to show a refusal of suitable work is on the employer. Koehler v. American Color Graphics, File No. 1248489 (App. February 25, 2005).

"Not every act of misconduct justifies disqualifying an employee from workers' compensation benefits even though the employer may be justified in taking disciplinary action." Reynolds v. Hy-Vee, Inc., File No. 5046203 (App. October 31, 2017). For termination to disqualify an employee from compensation it must be for misconduct so extreme it is "tantamount to refusal to perform the offered work" because it is the type of conduct that would cause any employer to terminate any employee" due to the "serious adverse impact on the employer." Id.

For misconduct to disqualify a person from compensation, the misconduct must be tantamount to refusal to perform the offered work. The misconduct must be serious and the type of conduct that would cause any employer to terminate any employee. The misconduct must have a serious adverse impact on the employer. The misconduct must be more than the type of inconsequential misconduct that employers typically overlook or tolerate. Brodigan v. Nutri-Ject Systems, Inc., File No. 5001106 (App. April 13, 2004); Wortley v. Lowe's Home Centers, Inc., File No. 1298582 (App. December 22, 2006). An employee working with restrictions is not entitled to act with impunity toward the employer and the employer's interests. Nevertheless, not every act of misconduct justifies disqualifying an employee from workers' compensation benefits even though the employer may be justified in taking disciplinary action. Franco v. IBP, Inc., File No. 5004766 (App. February 28, 2005).

Examples of misconduct so extreme that it constitutes a refusal of suitable work under section 85.33(3) include theft from the employer or threatening to kill coworkers. Id.; Black v. John Deere Des Moines Works, File No. 5010502 (App. March 29, 2006). This agency has found some acts of misconduct insufficiently severe to disqualify a claimant from temporary benefits. They include, but are not limited to:

- Taking a piece of paper with customer personal information on it from employer premises, Wortley v. Lowe's Home Centers, Inc., File No. 1298582 (App., December 22, 2006);

- The claimant leaving work before the end of a scheduled shift in violation of work rules and without supervisor permission for the third time, Franco v. IBP, No. 5004766 (App. February 28, 2005);

- The claimant leaving work to be with his sick mother despite his supervisor informing him his leave of absence had not been approved because he had only made an oral request for a leave of absence and not filled out the appropriate form, Alonzo v. IBP, Inc., File No. 5009878 (App. October 31, 2006).

In their post-hearing brief defendants give their rationale why they believe claimant is not entitled to any temporary benefits:

Prestage is not asserting horseplay or an Iowa Code § 85.16 affirmative defense when claimant initially injured his neck. Prestage is also not alleging claimant "voluntarily quit" and is not entitled to temporary disability benefits due to his refusal of suitable work.

Prestage is asserting as both an employee and supervisor of Prestage (and supervisor at many other companies prior to working at Prestage), Mr. Head was well aware of the zero tolerance of no fighting in the workplace at the time of the October 5, 2021 incident. ". . . Mr. Head knew he should not have started the second alternation [*sic*]. Mr. Head knew he should not have thrown the last punch after both parties had been restrained by other Prestage employees." (Defendants' Post-Hearing Brief, page 10)

In brief, defendants do not argue that claimant is not entitled to temporary benefits due to his involuntary resignation. Defendants do not argue that claimant engaged in misconduct when he initially defended himself from the attack by Mr. Beadle. Defendants contend claimant is not due temporary benefits because he allegedly engaged in misconduct after he allegedly threw a punch at Mr. Beadle when the fight was broken up.

As noted above, defendants have the burden of proof to prove that claimant engaged in misconduct.

Nine statements were taken regarding the attack of claimant by Mr. Beadle. Only two of those statements allege that claimant struck Mr. Beadle after the fight was broken up. (Ex. D, pp. 13, 17) Claimant consistently testified he struck Mr. Beadle as the fight was not broken up and he was still protecting himself from Mr. Beadle. (Ex. K, depo pp. 29-30; Tr., pp. 36-37) The other six statements regarding the investigation of the fight say nothing about claimant attacking Mr. Beadle after the fight was allegedly broken up. (Ex. D, pp. 11-12, 14-16, 18-19) Even Mr. Beadle's own statement does not indicate that claimant attacked him after the fight was broken up. (Ex. D, p. 12)

The record suggests that the fight between claimant and Mr. Beadle occurred for less than a minute. Defendants do not believe claimant engaged in misconduct for

protecting himself. Claimant's consistent testimony is that he believed he was still protecting himself when he was struck by Mr. Beadle.

Seven of the nine statements in the investigation do not mention claimant striking Mr. Beadle after the fight was broken up. The record suggests the fight at issue occurred for less than a minute. Claimant's consistent testimony is that he believed he was protecting himself from Mr. Beadle. Even Mr. Beadle did not indicate claimant struck him after the men were separated. Given this record, and the other facts as detailed above, defendants have failed to carry their burden of proof that claimant engaged in misconduct tantamount to a refusal to work.

Claimant was terminated from Prestage on October 5, 2021. Defendants contend that claimant was paid for the week of October 5, 2021, through October 9, 2021, and cite to pay records from Exhibit F, page 27, to support this argument. (Defendants' Post-Hearing Brief, page 14) I am unable to tell from Exhibit F, page 27, if claimant was actually paid for the period of October 5, 2021, through October 9, 2021. Given this record, defendants have failed to carry their burden of proof that claimant was paid for the period of October 5, 2021, through October 9, 2021.

Claimant was released to return to work at full duty on November 22, 2021. (JE 4, pp. 13-14) Given this record, claimant is due healing period benefits from October 5, 2021, through November 22, 2021.

The next issue to be determined is whether claimant's injury resulted in a permanent disability. Claimant sustained a cervical injury after the work accident. Claimant has consistently testified, that at the time of hearing, he still has neck pain and pain radiating into his left arm. Claimant has severe headaches. He has undergone four cervical epidural steroid injections. He has a valid FCE that limits him to lifting 25 pounds occasionally. There is no evidence in the record that claimant had any permanent restrictions prior to the work injury.

Two experts have opined regarding claimant's permanent impairment. Dr. Bansal evaluated claimant once for an IME. He opined that claimant's work injury permanently aggravated a pre-existing cervical condition. (JE 9, pp. 14-15)

Dr. Schmitz opined that claimant had no permanent impairment from the October 5, 2021, work injury. (Ex. A) Dr. Schmitz's opinion regarding permanent impairment is problematic. As noted, claimant has had four epidural steroid injections for his condition, all at the instruction of Dr. Schmitz. Dr. Schmitz has assessed claimant as having cervical radiculopathy. At his last visit with claimant, Dr. Schmitz recommended claimant consider a cervical fusion for his condition. (JE 6, pp. 14-15) There is no evidence that claimant had any prior permanent restrictions or symptoms of radiculopathy prior to the work injury. Given this record, the opinions of Dr. Schmitz regarding permanent impairment are found not convincing.

Since the work injury, claimant has routinely been assessed as having cervical radiculopathy. He consistently testified that he continues to have neck pain and pain in his left upper extremity for two years after the date of injury. Claimant had no permanent restrictions prior to his work injury. After the work injury, claimant has lifting restrictions. Given this record, the opinions of Dr. Bansal regarding permanent impairment are found convincing. Dr. Schmitz's opinions regarding permanent impairment are found not convincing. Claimant has carried his burden of proof he sustained a permanent impairment as a result of the October 5, 2021, work injury.

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

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 was 69 years old at the time of hearing. He testified he did not plan to retire. (Tr., p. 11) Claimant has a GED. For the last 30 years claimant has worked mostly in maintenance and refrigeration.

As noted, Dr. Bansal found that claimant had a permanent impairment for his cervical injury and assessed claimant as having a 7 percent permanent impairment to the body as a whole. (JE 9, pp. 14-15)

A valid FCE limited claimant to the lower medium physical demand category, and limited claimant to lifting of 25 pounds occasionally. (JE 10, p. 3)

At Prestage claimant earned approximately $105,800.00 per year. (Ex. F, pp. 25, 27) At Burke at the time of hearing, claimant earned approximately $88,800.00 a year. (Tr., p. 64)

At the time of hearing claimant was still undergoing physical therapy and had a recent cervical ESI. When all relevant factors are considered, it is found that claimant has a 20 percent industrial disability.

Claimant is due healing period benefits up to November 22, 2021. Given this record, the commencement date for permanent partial disability benefits is November 23, 2021.

The next issue to be determined is rate.

Section 85.36 states the basis of compensation is the weekly earnings of the employee at the time of the injury. The section defines weekly earnings as the gross salary, wages, or earnings to which an employee would have been entitled had the employee worked the customary hours for the full pay period in which the employee was injured as the employer regularly required for the work or employment. The various subsections of section 85.36 set forth methods of computing weekly earnings depending upon the type of earnings and employment.

If the employee is paid on a daily or hourly basis or by output, weekly earnings are computed by dividing by 13 the earnings over the 13-week period immediately preceding the injury. Any week that does not fairly reflect the employee's customary earnings is excluded, however. Section 85.36(6).

Claimant earned $105,800 at the time of injury. (Tr., pp. 14-15; Ex. F)

In determining rate, claimant used Iowa Code section 85.36(6) in determining his gross weekly wages. (Ex. 4, p. 1) Iowa Code section 85.36(6) applies to employees who are paid on a daily or an hourly basis. As detailed above, claimant was paid a salary and was paid $2,034.62 per week, or $105,800.00 per year. Iowa Code section 85.36(5) indicates that the gross weekly earnings of an employee who is paid on a yearly basis is the yearly earnings divided by 52 weeks. Claimant's salary of $105,800.00 a year divided by 52 weeks results in an average weekly wage of $2,034.62 per week. Claimant was single with one exemption. Claimant's rate is $1,153.57.

The next 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."

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.
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> (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 the defendants are liable for a penalty as Prestage refused to pay claimant temporary benefits for the period of time he was terminated until he began work at Burke. (Claimant's Post-Hearing Brief, page 11)

Defendants' rationale of terminating claimant and for not paying temporary benefits is that claimant was engaged in misconduct. Specifically, defendants contend claimant was not paid temporary benefits because of a punch he allegedly threw at Mr. Beadle after the fight between the two men was broken up. Even though defendants have failed to carry their burden of proof regarding the issue of misconduct and not paying claimant temporary benefits, given the facts involved in this case, defendants' denial of temporary benefits was not unreasonable. Based on this, a penalty is not appropriate in this case.

ORDER

THEREFORE IT IS ORDERED:

That defendants shall pay claimant healing period benefits from October 5, 2021, through November 22, 2021, at the rate of one thousand one hundred fifty-three and 57/100 dollars ($1,153.57) per week.

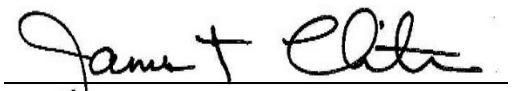
That defendants shall pay claimant one hundred (100) weeks of permanent partial disability benefits at the rate of one thousand one hundred fifty-three and 57/100 dollars ($1,153.57) per week commencing on November 23, 2021.

That defendants shall pay accrued weekly benefits in a lump sum together with interest 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.

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 ___20th___ day of November, 2023.



JAMES F. CHRISTENSON
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Randall Schueller (via WCES)

Jennifer Clendenin (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.