BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JAMES MEIER,

Claimant,

vs.

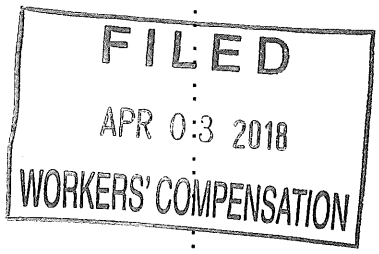
GD TRUCKING EXPRESS, INC.,

Employer,

and

UNKNOWN,

Insurance Carrier,
Defendants.



File No. 5048853

ARBITRATION

DECISION

Head Note Nos.: 1802; 1803; 4000

STATEMENT OF THE CASE

Claimant, James Meier, filed a petition in arbitration seeking workers' compensation benefits from GD Trucking Express, Inc., defendant employer, insurer unknown, as a result of injuries he sustained on July 27, 2012, that arose out of and in the course of employment.

A hearing was scheduled for June 20, 2017. The day prior, on June 19, 2017, claimant filed an entry of default against defendant for failure to timely answer the petition. The hearing took place. Defendants did not appear and default was entered against the defendants.

As defendant failed to answer and was found to be in default, hearing on this petition was conducted by submission of exhibits and an affidavit of testimony by claimant. Thus, the record in this case consists of the deposition of the claimant, exhibit 1, claimant's sworn affidavit, and exhibit 2, claimant's medical expenses related to his injury.

ISSUES

1. The extent of claimant's entitlement to healing period benefits.

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

3. Whether claimant is entitled to reimbursement or payment of medical expenses.

4. Whether the defendant is liable for a penalty under Iowa Code section 86.13.

FINDINGS OF FACT

Claimant was a 51 year-old person at the time of the submission of this case before the undersigned. He has a high school diploma and has attended some post-secondary courses through Minneapolis Community College and the University of Minnesota. He received a culinary arts certificate from Minneapolis Community College.

At all material times, claimant was single with no dependents. (Deposition Transcript, page 7)

In 2007 or 2008, he began driving a truck. For the 25 years preceding his truck driving, claimant worked in the food industry, cooking, as a chef, corporate training for restaurants, and the like. He became dissatisfied with that line of work and went to truck driving school and embarked on a career of driving truck.

He began working for defendant employer around May 2012. He drove their truck, picked up the cargo they directed him to, and delivered it to the destination given to him by defendant employer.

At the time of his injury, he was single with no dependents. He averaged 3600 miles per week, earning 42 cents per mile or approximately $1,512.00. The weekly benefit rate based on those foregoing numbers is $860.13.

On July 27, 2012, claimant presented to Clarke County Emergency Department reporting severe and radiating pain down the buttock and into the thigh on the right. (Ex. 1) He testified that his pain was so great it took four men to ease him out of his vehicle and into the emergency room. Claimant attributed the pain to his rig which he described as "old, bad seat with rods sticking out." Id. He was diagnosed with sciatica in the lumbar region. Id. For treatment, claimant was prescribed rest, medications, heat, and to follow up with is family doctor. Id. at 2

In the meantime, claimant was let go from his employer over an issue with the truck. (See Depo.; Ex. 2)

On August 6, 2012, he was seen at the Iowa Clinic by Jamey Joe Hawk, M.D. (Ex. 2) Because of claimant's radicular symptoms, he underwent an MRI which was conducted on August 9, 2012. (Ex. 2:2) The MRI revealed normal alignment of the lumbar spine but desiccation of the intervertebral disc at L5-S1. There was a small posterior central disc protrusion but no evidence of nerve root impingement. (Ex. 2:2)

Dr. Hawk restricted claimant to the following:

> WORK RESTRICTIONS: As a result of some injuries/illnesses, employee activity may need to be restricted to reduce further injury or complication. IF [sic] this employee has restrictions that we need to be aware of in scheduling their work activities, please complete the following:
>
> Limited Duty with the following restrictions:
> Limit pushing/pulling to 5 pounds 4 hours a day
> Limit lifting greater than 5 pounds 4 hours a day
> Limit climbing ladders/stairs to 0 hours a day
> Limit kneeling/squatting to 0 hours a day
> Limit bending/twisting to 2 times per hour 4 hours a day.

(Ex. 2:4, 5) Claimant was sent to Accelerated Rehabilitation for physical therapy. (Ex. 2: 9) He reported significant low back pain due to a seat that was "very hard and uncomfortable and was pressing against his back." Id. He reported difficulty with all activities of daily living including housekeeping, lifting, driving, shopping, reaching, dressing, cooking, navigating stairs, caring for his child, bending, moving, and yard work. Id. During therapy, claimant exhibited limited lumbar flexion, side bending, and increased symptoms with right lower extremity hip flexion. (Ex. 2:9)

As therapy progressed in September, claimant was able to achieve some relief and greater range of motion with better posture and exercise. Id. at 11. His last visit in the record was as of September 28, 2012. During the assessment, the therapist noted:

> Patient has put forth maximum effort in skilled physical therapy and is demonstrating significantly improved functional activities in therapy. Patient has been able to return to some lifting activities and all transfers without an increase in symptomatology. Patient will benefit from continued skilled physical therapy in order to progress his lumbar stabilization allowing for him to return to sitting activities without an increase in symptoms, and all prior functional activities. Rehabilitation potential is good.

(Ex. 2:11) No other care was sought due to the cost of medical care. He moved to Florida where he lost weight. Once his back was better, he returned to trucking.

CONCLUSIONS OF LAW

Because this was a default entry against the defendants, no issues of liability or causation will be addressed.

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 Rule of Appellate Procedure 6.14(6).

The first issue to be determined is the extent of claimant's entitlement to healing period 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.

Claimant was off work from July 27, 2012, until he was released to return to work with restrictions by Dr. Hawk on August 7, 2012. Claimant was not able to return to truck driving until some period after the release although the record is not clear on when he returned to truck driving. Claimant testified only that he returned to truck driving after his back was better.

Claimant was not medically capable of returning to truck driving nor had he returned to his employment with defendant employer due to an unrelated termination. The physical therapy records indicated that he needed an additional four weeks of therapy from September 28, 2012. Therefore, based on the therapy records, the date of maximum medical improvement (MMI) is determined to be October 28, 2012. Claimant is entitled to healing period benefits from July 27, 2012, until October 28, 2012.

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

Claimant did not provide any evidence that he sustained a permanent disability. There are no medical records or medical opinions on this subject. Claimant testified that he lost weight and returned to the job of truck driving, the same position he held prior to the injury. He did not testify that he currently has impairment due to the work injury.

Therefore, the greater weight of the evidence does not support a finding of any permanent disability.

The next issue to be determined is if there is a causal connection between the injury and the claimed medical expenses.

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).

There is no evidence in the record of unpaid medical bills other than the claimant's testimony that medical bill issues drove him away from pursuing treatment. To the extent there are unpaid bills associated with the low back, past medical bills are awarded. Future medical care for the claimant's low back injury are the responsibility of the defendant employer and the defendant employer is ordered to provide for reasonable medical care associated with claimant's work-related injury.

The final issue to be determined is whether defendant is liable for a 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."

Christensen, 554 N.W.2d at 260.

The supreme court has stated:

(1) If the employer has a reason for the delay and conveys that reason to the employee contemporaneously with the beginning of the delay, no penalty will be imposed if the reason is of such character that a reasonable fact-finder could conclude that it is a "reasonable or probable cause or excuse" under Iowa Code section 86.13. In that case, we will defer to the decision of the commissioner. See Christensen, 554 N.W.2d at 260 (substantial evidence found to support commissioner's finding of legitimate reason for delay pending receipt of medical report); Robbennolt, 555 N.W.2d at 236.

(2) If no reason is given for the delay or if the "reason" is not one that a reasonable fact-finder could accept, we will hold that no such cause or excuse exists and remand to the commissioner for the sole purpose of assessing penalties under section 86.13. See Christensen, 554 N.W.2d at 261.

(3) Reasonable causes or excuses include (a) a delay for the employer to investigate the claim, Christensen, 554 N.W.2d at 260; Kiesecker v. Webster City Meats, Inc., 528 N.W.2d at 109, 111 (Iowa 1995); or (b) the employer had a reasonable basis to contest the claim—the "fairly debatable" basis for delay. See Christensen, 554 N.W.2d at 260 (holding two-month delay to obtain employer's own medical report reasonable under the circumstances).

(4) For the purpose of applying section 86.13, the benefits that are underpaid as well as late-paid benefits are subject to penalties, unless the employer establishes reasonable and probable cause or excuse. Robbennolt, 555 N.W.2d at 237 (underpayment resulting from application of wrong wage base; in absence of excuse, commissioner required to apply penalty).

> If we were to construe [section 86.13] to permit the avoidance of penalty if any amount of compensation benefits are paid, the purpose of the penalty statute would be frustrated. For these reasons, we conclude section 86.13 is applicable when payment of compensation is not timely . . . or when the full amount of compensation is not paid.

Id.

(5) For purposes of determining whether there has been a delay, payments are "made" when (a) the check addressed to a claimant is mailed (Robbennolt, 555 N.W.2d at 236; Kiesecker, 528 N.W.2d at 112), or (b) the check is delivered personally to the claimant by the employer or its workers' compensation insurer. Robbennolt, 555 N.W.2d at 235.

(6) In determining the amount of penalty, the commissioner is to consider factors such as the length of the delay, the number of delays, the information available to the employer regarding the employee's injury and wages, and the employer's past record of penalties. Robbennolt, 555 N.W.2d at 238.

(7) An employer's bare assertion that a claim is "fairly debatable" does not make it so. A fair reading of Christensen and Robbennolt, makes it clear that the employer must assert facts upon which the commissioner could reasonably find that the claim was "fairly debatable." See Christensen, 554 N.W.2d at 260.

Meyers v. Holiday Express Corp., 557 N.W.2d 502 (Iowa 1996).

Weekly compensation payments are due at the end of the compensation week. Robbennolt, 555 N.W.2d 229, 235.

Penalty is not imposed for delayed interest payments. Davidson v. Bruce, 593 N.W.2d 833, 840 (Iowa App. 1999). Schadendorf v. Snap-On Tools Corp., 757 N.W.2d 330, 338 (Iowa 2008).

When an employee's claim for benefits is fairly debatable based on a good faith dispute over the employee's factual or legal entitlement to benefits, an award of penalty benefits is not appropriate under the statute. Whether the issue was fairly debatable turns on whether there was a disputed factual dispute that, if resolved in favor of the employer, would have supported the employer's denial of compensability. Gilbert v. USF Holland, Inc., 637 N.W.2d 194 (Iowa 2001).

Claimant is due both temporary disability benefits. He has received no benefits. Therefore the burden shifts to the defendant to prove that it had reasonable cause to not pay these benefits and that this reasonable cause was timely communicated to the claimant. Defendant provided no such evidence. Therefore, a penalty of 50 percent of the temporary benefits owed shall be imposed.

A copy of this decision is being provided to the workers' compensation commissioner to determine whether further action should take place under Iowa Code section 87.19 for failure to have workers' compensation insurance.

ORDER

THEREFORE IT IS ORDERED:

That defendant shall pay claimant healing period benefits from July 27, 2012, until October 28, 2012, at the rate of eight hundred sixty and 13/100 dollars ($860.13) per week.

That defendant shall pay accrued weekly benefits in a lump sum.

That defendant shall pay directly or reimburse claimant for past medical costs associated with the work injury.

Defendants shall provide reasonable medical care and treatment related to the work injury.

That defendant shall pay interest on unpaid weekly benefits awarded above as set forth in Iowa Code section 85.30.

That defendant shall pay claimant a penalty in the amount of fifty (50) percent of the temporary benefits owed.

That defendant shall pay costs.

Signed and filed this 3rd day of April, 2018.

JENNIFER S. GERRISH-LAMPE
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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CERTIFIED AND REGULAR MAIL

JGL/kjw

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.