BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

FILED

MAR 20 2015

WORKERS COMPENSATION

LISA BENNETT,

Claimant,

vs.

ROC MANAGEMENT & ASSOC., INC., a/k/a GODFATHER'S PIZZA,

Employer,

and

CONTINENTAL WESTERN INS. CO.,

Insurance Carrier,
Defendants.

File Nos. 5046573
5046574
5047058

ARBITRATION DECISION

Head Note No.: 1803

STATEMENT OF THE CASE

Claimant, Lisa Bennett, has filed a petition in arbitration and seeks workers' compensation benefits from ROC Management & Assoc., Inc., a/k/a Godfather's Pizza, employer, and Continental Western Insurance Company, insurance carrier, defendants.

Deputy workers' compensation commissioner, Stan McElderry, heard this matter in Sioux City, Iowa.

ISSUES

The parties have submitted the following issues for determination:

For File No. 5046573:

1. The extent of permanent disability, if any, from the work injury of February 10, 2012; and

2. Penalty.

For File No. 5046574:

1. The extent of permanent disability, if any, from the work injury of November 22, 2012; and

2. Penalty.

For File No. 5047058:

1. The extent of permanent disability, if any, from the work injury of December 24, 2013; and

2. Penalty.

FINDINGS OF FACT

The undersigned, having considered all of the evidence and testimony in the record, finds:

The claimant was 32 years old at the time of hearing. She is not a high school graduate, but earned a GED in 2003. At the time of hearing she was a student at Iowa Lakes Community College working toward an associate of arts (AA) degree in human services. She is expected to graduate this spring and wants to continue on for a 4 year degree with an ultimate goal of being a drug and alcohol abuse counselor.

On February 10, 2012, the claimant suffered a stipulated injury arising out of and in the course of her employment with Godfather's Pizza when she fell back into stacked chairs. She treated with Alexander Pruitt, M.D., for the injury, who provided injections for the back and a nerve root shot. The claimant continued to work during treatment and recovery.

On November 22, 2012, the claimant suffered a stipulated injury arising out of and in the course of her employment with Godfather's Pizza when she fell on a slick, recently mopped, floor. She did not seek medical treatment until November 27, 2012. (Exhibit 7, page 3) She continued to treat with Dr. Pruitt and attended physical therapy (PT).

She saw Douglas W. Martin, M.D., for an independent medical examination (IME) on February 13, 2013. (Ex. A) Dr. Martin placed the claimant at maximum medical improvement (MMI) and opined a zero percent permanent impairment. (Ex. A) He also imposed no permanent restrictions.

On December 24, 2013, the claimant suffered a stipulated injury arising out of and in the course of her employment with Godfather's Pizza when she fell, mopping the floor. She continued to treat with Dr. Pruitt.

The claimant is still considered an employee of Godfather's, but has voluntarily not worked there since August of 2014. She limits her lifting to 25 pounds (per her testimony) but is aware of no formal restrictions placed on her. She is currently seeking and receiving no treatment for the injuries other than chiropractic maintenance that she began before the injuries herein. A May 2, 2014 MRI showed no changes from an MRI

performed on August 14, 2012. (Ex. 2, p. 5) Dr. Pruitt noted that the MRI was unremarkable. (Ex. 3, p. 20)

The claimant saw Marc E. Hines, M.D., for an IME on August 22, 2014. (Ex. 8) Dr. Hines opined a five percent body as a whole (BAW) impairment for the series of back injuries, and imposed no specific permanent restrictions. (Ex. 8) On October 15, 2014, Dr. Pruitt agreed with the five percent rating of Dr. Hines and noted that no restrictions were necessary. (Ex. 3, p. 24)

The claimant's disability is a result of the series of accidents, none of which were rated by any medical professionals herein as having ratable disability individually as opposed to all calculated together. The claimant's loss of earning capacity from the combination of the three work injuries herein is minimal. She is currently working in a better-paying job than she had/has at Godfather's. If she continues her education her income potential will just continue to improve. She has no formal restrictions, but does have an impairment rating that the primary treating physician has adopted. Given the claimant's pain, claimant's medical impairment, training, permanent restrictions, as well as all other factors of industrial disability, the claimant has suffered a ten percent loss of earning capacity.

On the last date of injury, based on the claimant's gross earnings, single status, and entitlement to 2 exemptions, her weekly benefit rate is $282.62. The parties stipulated to a commencement date of June 17, 2014 for the injury of December 24, 2013.

REASONING AND CONCLUSIONS OF LAW

Permanent disability.

Since claimant has an impairment to the body as a whole, an industrial disability has been sustained. Industrial disability was defined in Diederich v. Tri-City R. Co., 219 Iowa 587, 258 N.W. 899 (1935) as follows: "It is therefore plain that the legislature intended the term 'disability' to mean 'industrial disability' or loss of earning capacity and not a mere 'functional disability' to be computed in the terms of percentages of the total physical and mental ability of a normal man."

Functional impairment is an element to be considered in determining industrial disability which is the reduction of earning capacity, but consideration must also be given to the injured employee's age, education, qualifications, experience, motivation, loss of earnings, severity and situs of the injury, work restrictions, inability to engage in employment for which the employee is fitted and the employer's offer of work or failure to so offer. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963); Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961).

Compensation for permanent partial disability shall begin at the termination of the healing period. Compensation shall be paid in relation to 500 weeks as the disability bears to the body as a whole. Section 85.34.

While a claimant is not entitled to compensation for the results of a preexisting injury or disease, its mere existence at the time of a subsequent injury is not a defense. Rose v. John Deere Ottumwa Works, 247 Iowa 900, 76 N.W.2d 756 (1956). If the claimant had a preexisting condition or disability that is materially aggravated, accelerated, worsened or lighted up so that it results in disability, claimant is entitled to recover. Nicks v. Davenport Produce Co., 254 Iowa 130, 115 N.W.2d 812 (1962); Yeager v. Firestone Tire & Rubber Co., 253 Iowa 369, 112 N.W.2d 299 (1961). Total disability does not mean a state of absolute helplessness. Permanent total disability occurs where the injury wholly disables the employee from performing work that the employee's experience, training, education, intelligence and physical capacities would otherwise permit the employee to perform. See McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Diederich v. Tri-City R. Co., 219 Iowa 587, 258 N.W. 899 (1935).

Based on the finding that the claimant has suffered a 10 percent loss of earning capacity from the 3 injuries and manifesting after the last injury date herein, she has sustained a 10 percent permanent partial industrial disability entitling her to 100 weeks of permanent partial disability pursuant to Iowa Code section 85.34(2)(u).

The next issue to be resolved is whether claimant is entitled to penalty benefits under Iowa Code section 86.13 and, if so, how much.

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).

In Schadendorf v. Snap-on Tools Corp., 757 N.W.2d 330, 335 (Iowa 2008), the court held that the delay in paying the award did allow the imposition of a penalty after the defendants no longer had a reasonable excuse for non-payment. The court in Schadendorf affirmed an award of penalty when the defendants did not reasonably pay benefits after an award of benefits.

If the employer fails to show reasonable cause or excuse for the delay or denial, the commissioner shall impose a penalty in an amount up to 50 percent of the amount unreasonably delayed or denied. Christensen v. Snap-on Tools Corp., 554 N.W.2d 254 (Iowa 1996). The factors to be considered in determining the amount of the penalty include the length of the delay, the number of delays, the information available to the employer and the employer's past record of penalties. Robbennolt, 555 N.W.2d at 238.

Whether there was any industrial loss in this case was fairly debatable and therefore no penalty can be imposed on this record.

ORDER

That the defendants pay the claimant one hundred (100) weeks of permanent partial disability commencing June 17, 2014 at the weekly rate of two hundred eighty-two and 62/100 dollars ($282.62).

Defendants shall receive credit for all benefits previously paid.

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

Accrued benefits shall be paid in lump sum together with interest pursuant to Iowa Code section 85.30 with subsequent reports of injury pursuant to rule 876 IAC 3.1.

Signed and filed this 30th day of March, 2015.

STAN MCELDERRY
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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SRM/srs

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.