BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JODY WILSON, Claimant, vs. J & L INVESTMENTS, INC., Employer, and AMERICAN FAMILY INSURANCE CO., Insurance Carrier, Defendants.	File No. 5060690.02 REVIEW-REOPENING DECISION Headnotes: 2905, 4000.2

STATEMENT OF THE CASE

Claimant, Jody Wilson, filed a petition in review-reopening seeking workers' compensation benefits from J & L Investments, Inc., (McDonald's), employer, and American Family Insurance, insurer, both as defendants. This case was heard on September 1, 2021, with a final submission date of October 22, 2021.

The record in this case consists of Joint Exhibits 1 through 9, Claimant's Exhibits 1 through 8, Defendants' Exhibits A through I, and the testimony of claimant.

The parties filed a hearing report at the commencement of the review-reopening hearing. On the hearing report, the parties entered into various stipulations. All of those stipulations were accepted and are hereby incorporated into this review-reopening 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 additional permanent partial disability benefits under review-reopening procedure.

2. Commencement date of benefits.

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

4. Costs.

The parties indicated in the hearing report there was a dispute regarding defendants' liability for medical expenses and credit. At hearing, the parties indicated those issues were resolved. As a result, the issue of defendants' liability for past medical expenses and defendants' right for a credit are not discussed in this decision.

FINDINGS OF FACT

Claimant was 65 years old at the time of hearing. Claimant went up to the 10th grade. Claimant does not have a GED.

Claimant worked for different McDonald's restaurants since 1972. Claimant began working at the Evansdale McDonald's in 2000. (Hearing Transcript pp. 13-15) Claimant worked full time. Claimant testified her main job, before 2015, required claimant to work the grill. (TR pp. 15-16)

On June 13, 2015, claimant slipped and fell on both knees while at work. (TR p. 17; Joint Exhibit 3, page 6) Claimant had a partial medial meniscectomy on her left knee on August 26, 2015. She underwent a partial medial meniscectomy on her right knee on October 27, 2015. Both surgeries were performed by Thomas Gorsche, M.D. (JE 2)

Dr. Gorsche found that claimant was at maximum medical improvement (MMI) for the right knee on January 19, 2016. He returned claimant to work at regular duty 4-6 hours a day. (JE 3, p. 10) Dr. Gorsche found that claimant had a 2 percent permanent impairment to the right lower extremity on January 22, 2016. (JE 3, p. 15)

Claimant returned to Dr. Gorsche on February 16, 2016. He found claimant was at MMI for her left knee at that time. He allowed claimant to return to work at 4-6 hours per day. (JE 3, p. 16) On March 7, 2016, he opined claimant had a 2 percent permanent impairment to the left lower extremity. (JE 3, p. 18)

Claimant testified she returned to McDonald's. She said that due to problems with her knees she moved from the grill to doing food preparation. Claimant said that during this period she worked 4-5 hour shifts for a total of 20 hours per week. (TR p. 19; Claimant's Exhibit 4, p. 8)

On December 12, 2017, the parties entered into an Agreement for Settlement. The parties agreed that claimant had a work-related injury to her bilateral knees occurring on July 13, 2015. The parties also agreed claimant was due a 2 percent rating to the body as a whole for 10 weeks of permanent partial disability benefits commencing on December 29, 2015. (Ex. 1)

On May 30, 2018, claimant was evaluated by Quentin Stenger, PA-C, for bilateral knee pain. Claimant's pain was progressively worsening. PA Stenger recommended an orthopedic referral. (JE 4, pp. 20-21)

On June 18, 2018, claimant saw Brenda Cooper, ARNP. Nurse Practitioner Cooper is an associate with Jeffrey Clark, D.O., an orthopedic specialist. X-rays showed bone-on-bone arthritis in the right medial compartment, and 0-1 mm of space on the left. (JE 5, p. 24) Visco supplement injections were recommended. (JE 5, p. 24)

In July of 2018 claimant underwent three visco supplement injections with Dr. Clark. (JE 5, pp. 25-29)

Claimant testified the injections helped with symptoms for approximately three months. (TR p. 21) Claimant said that after the injections wore off, she returned to work on two-hour shifts. (TR p. 22; Ex. 4, p. 8)

In September of 2019 claimant's counsel wrote to McDonald's requesting authorized care. Defendants refused to authorize care (Alternate Medical Care Decision, file no. 5060690.01, p. 2) (filed April 7, 2020).

Claimant saw Jason Stanford, D.O., an orthopedic specialist, on March 4, 2020 for bilateral knee pain. X-rays showed end-stage degenerative osteoarthritis in the knees bilaterally. Dr. Stanford recommended bilateral total knee replacements. Surgery was scheduled for March 31, 2020, and April 1, 2020. (JE 6, pp. 31-35)

On March 25, 2020, claimant filed an alternate medical care petition seeking authorization for the surgeries recommended by Dr. Stanford. In an April 7, 2020, alternate medical care decision, defendants were ordered to authorize the bilateral total knee replacements recommended by Dr. Stanford. (Alternate Medical Care Decision, p. 4)

In a June 11, 2020 letter, Dr. Stanford recommended claimant stay off work from July 1, 2020 through November 11, 2020. (JE 6, p. 36)

On August 11, 2020, and August 12, 2020, Dr. Stanford performed claimant's bilateral knee surgeries. (JE 7)

Claimant saw Dr. Stanford in follow-up on September 2, 2020. Claimant complained of "neuritis-type symptoms." Claimant was prescribed gabapentin. (JE 6, p. 39)

On September 30, 2020, claimant was evaluated by Thomas Veiseth, ARNP. Claimant had left knee pain and muscle spasms in the hamstring. Claimant was to continue physical therapy and kept off work until the next follow-up exam. (JE 6, pp. 40-42)

Claimant returned to Dr. Stanford on November 11, 2020. Claimant had left knee pain. Dr. Stanford assessed claimant as having iliotibial band symptoms (IT band). He gave claimant an IT band injection. (JE 6, p. 43)

Claimant saw Dr. Stanford in follow up on November 25, 2020. Claimant indicated temporary relief from the injection, but still had bilateral knee pain. Dr. Stanford indicated claimant could transition to regular activity. He recommended claimant do home exercises. Dr. Stanford found claimant at MMI. (JE 6, pp. 45-46)

In a May 17, 2021 letter, Dr. Stanford opined that claimant had a 37 percent permanent impairment to each knee, converting to a 15 percent permanent impairment to the body as a whole for each knee. He opined claimant had a 30 percent permanent impairment to the body as a whole or a 74 percent combined permanent impairment to the lower extremities. (JE 6, p. 47)

Claimant testified she contacted Jade Miller in approximately October 2020 regarding her work status. She said Mr. Miller was the manager of the Evansdale store. Claimant said she told Mr. Miller, at that time, she had not been released to return to work. She said she went to the store a second time and told Mr. Miller she believed she would be released to return to work soon. (TR pp. 25-26)

Claimant said that in approximately November 2020, she learned the Evansdale store was being sold to another owner. (TR pp, 28, 44-45) She said she went to the store a third time to discuss her work status. She said she was told she no longer had a job and would have to reapply. (TR pp. 26-27)

Claimant said that when she last worked at McDonald's, Scott Ames was the district manager for all five McDonald's owned by J & L. She said she asked Mr. Miller to have Mr. Ames call her regarding returning to work at McDonald's. (TR p. 27)

Claimant says she was never offered a job at McDonald's after her surgery. (TR pp. 27-28)

Exhibit I, p. 62 is an e-mail from, allegedly, the new owner of the McDonald's where claimant once worked. The e-mail reads, in part:

> As to whether or not we have a position for Jody Wilson, she cannot "return" to work as she never worked for us. She can apply like anyone else and we are hiring, but we gave all active employees an opportunity to apply before 4/1/2021 and receive preferential treatment and to be hired without losing years of service for 401K, PTO, vacation benefits, etc. I do not know why, but she did not apply at that time, so we cannot extend that treatment and honoring of service. She is welcome to apply for employment at any of my locations in the area and the GM or hiring manager would be happy to set up an interview and we would complete reference checks and a background check like any new hire.

(Ex. I, p. 62)

Claimant testified that Jade Miller told her she needed to reapply to McDonald's for a job. Claimant did not reapply. Claimant testified she did not intend to reapply to McDonald's. Claimant testified that if she was offered a job at McDonald's, she did not believe she could return to work. Claimant said she has not applied for any other jobs. (TR pp. 46-50)

CONCLUSION OF LAW

The first issue to be determined is whether claimant is entitled to additional permanent partial disability benefits under review-reopening procedure.

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).

Upon review-reopening, claimant has the burden to show a change in condition related to the original injury since the original award or settlement was made. The change may be either economic or physical. Blacksmith v. All-American, Inc., 290

N.W.2d 348 (Iowa 1980); Henderson v. Iles, 250 Iowa 787, 96 N.W.2d 321 (1959). A mere difference of opinion of experts as to the percentage of disability arising from an original injury is not sufficient to justify a different determination on a petition for review-reopening. Rather, claimant's condition must have worsened or deteriorated in a manner not contemplated at the time of the initial award or settlement before an award on review-reopening is appropriate. Bousfield v. Sisters of Mercy, 249 Iowa 64, 86 N.W.2d 109 (1957). A failure of a condition to improve to the extent anticipated originally may also constitute a change of condition. Meyers v. Holiday Inn of Cedar Falls, Iowa, 272 N.W.2d 24 (Iowa App. 1978).

A loss of earning capacity due to voluntary choice or lack of motivation to return to work is not compensable. Malget v. John Deere Waterloo Works, File No. 5048441 (Remand Dec. May 23, 2018); Rus v. Bradley Puhrmann, File No. 5037928 (App. December 16, 2014); Gaffney v. Nordstrom, File No. 5026533 (App. September 1, 2011); Snow v. Chevron Phillips Chemical Co., File No. 5016619 (App. October 25, 2007). Copeland v. Boone's Book and Bible Store, File No. 1059319 (App. November 6, 1997). See also, Brown v. Nissen Corp., 89-90 IAWC 56, 62 (App. 1989) (no prima facie showing that claimant is unemployable when claimant did not make an attempt for vocational rehabilitation).

Claimant had surgery to both knees in 2016 by Dr. Gorsche. Claimant settled those work-related claims with defendants under an Agreement for Settlement for 2 percent to the body as a whole in December 2017. (Ex. 1)

In August 2020 claimant had bilateral total knee replacements. Surgery was performed by Dr. Stanford. Dr. Stanford found that claimant had a 30 percent permanent impairment to the body as a whole for both knees. (JE 6, pp. 36, 47)

There is no evidence to suggest claimant's physical condition has not worsened since her 2017 Agreement for Settlement. Given this record, claimant has carried her burden of proof her physical condition has worsened since the 2017 Agreement for Settlement.

Claimant also needs to carry her burden of proof to show her worsening physical condition resulted in a reduction of earning capacity. Kohlhaas v. Hog Slat, Inc., 777 N.W.2d 387, 391 (Iowa 2009)

Claimant was kept off work from July 1, 2020, through November 11, 2020, based on Dr. Stanford's orders. (JE 6, p. 36)

She was found to be at MMI on November 25, 2020. (JE 6, pp. 45-46) Claimant was not given any work restrictions.

Claimant testified she tried to contact her old manager on at least two occasions to return to work. The record indicates that the McDonald's restaurant, where claimant worked, once owned by J & L, were bought out by another company when claimant was off work. Claimant knew she had to submit a new application to work under the new ownership. (TR pp. 26-27; Ex. I, p. 62)

Claimant testified that despite knowing she had to reapply for her old job, claimant did not submit a new application. She indicated she did not intend to file a new application with the new ownership. She testified that even if the new ownership offered her a job, she would not take the position, as she does not believe she is physically able to do the job. (TR pp. 46-50)

No physician or expert has opined that claimant is unable to return to work at McDonald's.

Claimant had two total knee replacements. I can appreciate the fact that claimant has difficulty walking and standing since her total knee replacements. However, claimant had the opportunity to return to work to her job by reapplying for a position. Claimant knew she needed to reapply. Claimant failed to reapply. Claimant testified she would not return to work at McDonald's if offered a job. She testified she has not looked for a job since leaving McDonald's to have surgery. No expert has opined claimant could not return to work. Claimant does have a loss of earning capacity. However, the record in this case indicates that the loss of earning capacity is due to claimant's voluntary removal of herself from the work force. Given this record, claimant has failed to carry her burden of proof she is entitled to additional permanent partial disability benefits under a review-reopening procedure.

As claimant failed to carry her burden of proof she is entitled to additional permanent partial disability benefits under review-reopening proceeding, the issue regarding commencement of benefits is moot.

The next issue to be determined is whether defendants are 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 Custom Meats, Inc., 528 N.W.2d at 109, 111 (Iowa 1995); or (b) the employer had a reasonable basis to contest the claim—the "fairly debatable" basis for delay. See Christensen, 554 N.W.2d at 260 (holding two-month delay to obtain employer's own medical report reasonable under the circumstances).

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

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

Id.

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

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

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

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

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

Penalty is not imposed for delayed interest payments. Davidson v. Bruce, 594 N.W.2d 833, 840 (Iowa App. 1999). Schadendorf v. Snap-On Tools Corp., 757 N.W.2d 330, 338 (Iowa 2008).

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

As noted, claimant was taken off work by Dr. Stanford from July 1, 2020 through November 11, 2020. (JE 6, p. 36) Claimant was found to be at MMI as of November 25, 2020. (JE 6, pp. 45-46) Claimant was due temporary benefits from July 1, 2020, through November 25, 2020. The record indicates defendants first paid claimant temporary benefits on June 23, 2021, or almost one year after benefits were initially due. (Ex 5, p. 9) There is no evidence of any excuse for defendants waiting almost a year to pay temporary benefits to claimant. Given this record, a penalty is appropriate.

The period of July 1, 2020 through November 25, 2020 is approximately 21 weeks. A 50 percent penalty is appropriate. Defendants are liable for $2,651.78 in penalty for failure to promptly pay temporary benefits (21 weeks x $252.55 x 50 percent).

The final issue to be determined is costs. Costs are assessed at the discretion of this agency. Claimant failed to prevail on the issue of additional permanent partial disability benefits under review-reopening proceeding. Claimant did prevail on the issue of penalty. Costs are awarded to claimant.

ORDER

THEREFORE IT IS ORDERED:

That defendants shall pay claimant two thousand six hundred fifty-one and 78/100 dollars ($2,651.78) in penalty.

That defendants shall pay costs.

That defendants shall file subsequent reports of injury as required under Rule 876 IAC 3.1(2).

Signed and filed this _____26th_____ day of January, 2022.

JAMES F. CHRISTENSON
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Benjamin Roth (via WCES)

Kelsey Paumer (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.