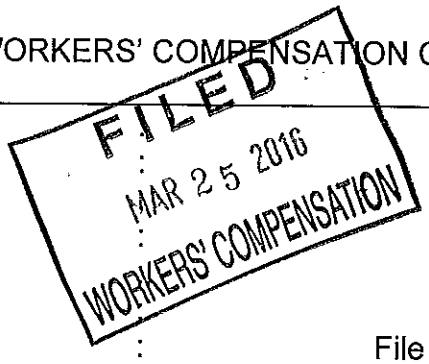
BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER



SENADA COVIC,

Claimant,

vs.

ADVANCED DRAINAGE SYSTEMS, INC. d/b/a GREEN LINE POLYMERS,

Employer,

and

TRAVELERS INDEMNITY CO. OF CT.,

Insurance Carrier,
Defendants.

File No. 5051643

ARBITRATION

DECISION

Head Note No.: 1402.30, 1402.40, 1801, 2501, 2502, 4000.2

STATEMENT OF THE CASE

Claimant, Senada Covic, filed a petition in arbitration seeking workers' compensation benefits from Advanced Drainage Systems, Inc. d/b/a Green Line Polymers (ADS), employer, and Travelers Indemnity Company of Connecticut, insurer, both as defendants. This case was heard in Waterloo, Iowa on December 8, 2015 with a final submission date of January 18, 2016.

The record in this case consists of claimant's Exhibits 1 through 22, defendants' Exhibits A through F, and the testimony of claimant and Suad Covic, claimant's son. Serving as interpreter was Ljupka Poleksic.

ISSUES

1. Whether claimant's back injury arose out of and in the course of employment.

2. Whether claimant's injuries resulted in a permanent disability; and if so

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

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

5. Whether there is a causal connection between the injury and the claimed medical expenses.

6. Whether claimant is due reimbursement for an independent medical evaluation (IME) under Iowa Code section 85.39.

7. Costs.

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

Defendants stipulate claimant sustained a respiratory injury on June 7, 2013. Defendants dispute claimant had a back injury that arose out of and in the course of employment on June 7, 2013. (Defendants' post-hearing brief, page 1)

FINDINGS OF FACT

Claimant was 42 years old at the time of hearing. Claimant went up to the 8th grade in Bosnia. She does not have a GED. Claimant came to the United States in the 1990s. Claimant has done production line work in meat packing facilities.

Claimant testified she understands and speaks a little English. Claimant testified she cannot read or write in English.

Claimant began with ADS in 2011. ADS is a recycling company. Claimant worked as a sort line operator, sorting recyclable materials on a conveyer belt.

Claimant's prior medical history is relevant. In January of 2012 claimant was seen at Peoples Community Health Clinic with complaints of sore throat and dizziness. Claimant was assessed as having bronchial asthma. (Exhibit F)

On April 25, 2013 claimant was evaluated at Allen Memorial Hospital. Claimant indicated she got weak and lightheaded at work. Claimant said she passed out and fell down. Claimant was given medication and discharged. (Ex. A, pp. 1-6)

According to an ADS employer investigation report, on June 7, 2013, at approximately 1:00 p.m., maintenance workers placed two aerosol bug bombs in the conveyer room to kill bugs in the sorting area. (Ex. 17, p. 9; Ex. 18) At approximately 3:40, claimant and coworkers entered the sorting line area. Id.

At approximately 3:52 employees were given dust masks to keep away flies and gnats. Most employees discarded the mask because of fogging of safety glasses. (Ex. 17, p. 9)

A DVD of the accident is found at Exhibit 19. At approximately 4:16 p.m., or approximately 54 minutes and 28 seconds into the DVD, a puff of white dust appears across the line from claimant. Claimant appears to stop the line she is working on. In the DVD claimant appears to be woozy. A coworker runs to claimant. At approximately

4:17 p.m., or 54 minutes and 53 seconds into the DVD, claimant falls to the floor. She is later walked out of the sorting area. (Ex. 17, p. 9; Ex. 18)

Claimant was transported from ADS, by an ambulance to the Allen Memorial Hospital. (Ex. 1) Records from the ambulance do not indicate claimant had any back pain.

Claimant was evaluated at Allen Hospital Emergency Room on June 7, 2013. Claimant was dizzy and short of breath after a white substance blew into her face. (Ex. 2, p. 2) Claimant denied back pain. (Ex. 2, p. 3) Claimant was assessed as having wheezing after an inhalation injury. She was given an albuterol inhaler and released. (Ex. 2, pp. 4-5; Ex. 7)

Claimant testified she returned after two days. She said when she went to work she fainted while in the cafeteria. She said she returned a third time and fainted again, and again was sent home.

On June 10, 2013 claimant underwent a CT scan of the chest. It found no abnormality in the chest. (Ex. 2, pp. 12-13) Claimant was released to return to work on June 18, 2013. (Ex. 2, p. 15)

On June 21, 2013 claimant was evaluated by Vinko Bogdanic, M.D. for headaches and shortness of breath. Claimant was a current smoker with a history of smoking for years. Claimant was breathing normally with no effort. Claimant was treated with medication. (Ex. 3, pp. 1-5)

Claimant returned to Dr. Bogdanic on June 29, 2013. Claimant still had shortness of breath. She was referred to a pulmonologist. (Ex. 3, pp. 11-12)

On July 2, 2013 claimant was evaluated by Udaya Shreesha, M.D., a pulmonologist. Claimant was not wheezing or coughing on exam. Claimant was treated with medication. She was released to return to work on July 9, 2013. (Ex. 4, pp. 1-4)

On July 15, 2013 claimant met with supervisors at ADS. Supervisors noted claimant's return to work note from physicians. Claimant was asked about accommodations to return to work. Claimant did not believe she could return to work on line. Claimant suggested working in the office. However, claimant had difficulty communicating and had no computer skills. (Ex. 19, pp. 5-6) On July 17, 2013 claimant was terminated from her employment with ADS. (Ex. 19, pp. 2-4)

Claimant testified she did not quit her job at ADS but was terminated. She said her employer did not try to accommodate her condition so that she could return to work.

On October 28, 2013 claimant was evaluated at Peoples Community Health Clinic. Claimant indicated some breathing difficulty and shortness and breath with exertion. She was a smoker. Claimant was advised to stop smoking. She was

assessed as having bronchial asthma and depression. Claimant was treated with medication. (Ex. 5, pp. 1-5)

Claimant returned to the Peoples Clinic on March 21, 2014. Claimant's breathing had improved with use of an inhaler. Claimant complained of back pain into the left leg. Claimant was treated with medication. (Ex. 5, pp. 17-20)

On April 23, 2014 claimant was evaluated by Patrick Hartley, M.D. at the University of Iowa Hospitals and Clinics. Dr. Hartley is a pulmonologist. Claimant was using an inhaler, which helped with difficulty with breathing. Claimant's spirometry was normal. Claimant was assessed as having exposure to chemical inhalation and asthma. Further testing was recommended. (Ex. 7, pp. 1-5)

On May 27, 2014 claimant met with Dan O'Malley, PT for back pain and scoliosis. Claimant's back pain began as a headache. Claimant indicated back pain four months after inhaling chemicals at work. (Ex. 9, pp. 1-2)

On July 10, 2014 claimant was assessed by Gayathry Inamdar, M.D. at the North Iowa Pain Management Clinic. Claimant complained of lower back pain. Claimant felt work caused her back pain. Epidural steroid injections (ESI) were recommended as a treatment option. (Ex. 8) Claimant underwent an L5-S1 ESI on July 30, 2014. (Ex. 9, p. 8)

Claimant returned to Dr. Hartley on August 13, 2014. Claimant was assessed as having exposure to chemical inhalant and mild asthma. Claimant was also assessed as having bronchial hyperreactivity. She was recommended to avoid chemical fumes, smoke, and high levels of dust. (Ex. 7, pp. 12-20)

On October 24, 2014 claimant underwent a lumbar MRI. It showed a disc protrusion at the L2-3 level and severe stenosis at the L5-S1 levels. (Ex. 9, p. 10)

In an October 28, 2014 note Dr. Hartley assessed claimant as having bronchial hyperreactivity. He opined claimant's experience with chemicals in the work area was a substantially contributing factor to the development of the disease. Claimant was recommended to continue with an inhaler. Dr. Hartley did not find claimant at maximum medical improvement (MMI). (Ex. 7, pp. 22-23)

Claimant followed up with Dr. Hartley on February 11, 2015. Claimant was found to be at MMI. He found restrictions given to claimant on August 13, 2014 and October 28, 2014 were permanent. (Ex. 7, pp. 24-27)

On June 5, 2015 claimant was evaluated by Patrick Hitchon, M.D. for back pain. Claimant indicated she inhaled chemicals at work, fell down and injured her back. Changes shown at the L5-S1 levels were chronic and were not related to a fall. Claimant's back and left leg pain were age related and not related to a fall. Conservative treatment was recommended. (Ex. C, pp. 22-23)

Claimant's son, Suad Covic, testified at hearing he attended the exam with Dr. Hitchon with his mother. He said Dr. Hitchon told his mother she had a congenital problem and there was nothing he could do for her. Suad testified Dr. Hitchon said his mother was born with bad discs in her back.

In an August 21, 2015 letter Dr. Hartley gave a second opinion regarding causations of claimant's pulmonary disorder. Dr. Hartley indicated he reviewed the DVD of claimant's work area taken on June 7, 2013. He also indicated he reviewed an EMS report and the emergency room records. Dr. Hartley noted a significant irritant exposure would have probably caused problems with coworkers. This is not indicated on the DVD. He said his review of the video, EMS report and emergency room records caused him to alter his opinion regarding causation. He opined claimant may have had a temporary exacerbation of preexisting reactive airway disease. (Ex. 7, pp. 27-28)

Dr. Hartley indicated inconsistencies between claimant's symptoms, the assessment of EMS and emergency room staff, and the video, made him reassess prior causation opinions. As a result, he could no longer say, within a reasonable degree of medical certainty, claimant's respiratory problems were attributed to a single workplace exposure of June 7, 2013. (Ex. C, p. 28)

In an August 24, 2015 report Farid Manshadi, M.D. gave his opinions of claimant's condition following an independent medical evaluation (IME). Dr. Manshadi opined claimant had a work-related inhalation injury on June 7, 2013. He also opined claimant had a work-related back injury on June 7, 2013. Dr. Manshadi found claimant at MMI on June 2, 2015 for her back injury. He restricted claimant from lifting more than 10-20 pounds. He found claimant had a 6 percent permanent impairment to the body as a whole, for the back injury, based on a finding claimant fell in the DRE lumbar category II under the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition. (Ex. 11)

In an undated report, Michael Witte, D.O., gave his opinions of claimant's condition following an IME. Dr. Witte is an internist who specializes in pulmonary medicine. Dr. Witte reviewed the DVD of the accident, EMS records and records from the emergency room. He also reviewed University of Iowa Hospital records. He opined claimant had an Idiopathic Environmental Intolerance. Dr. Witte did not believe claimant had an asthmatic condition. He also opined it was possible claimant's anxiety may be playing a role with her symptoms. (Ex. D)

Claimant testified she has continued breathing problems. She says she has asthma. She says she feels like she is strangling when she breathes. She testifies her back hurts. She said she has difficulty walking and bending. She says she has difficulty lifting. Claimant said she has difficulty sitting for more than 10 to 15 minutes.

Claimant testified she is depressed due to her respiratory problems and she sees a doctor for depression.

Claimant testified she told doctors, before March 21, 2014, she had back pain. She testified she was told she did not get immediate treatment for her back pain, as physicians wanted to focus on her breathing problems.

Claimant said she is unable to do any chores around her house due to her limited abilities.

Claimant testified she receives Social Security Disability for asthma, back pain, leg pain and depression.

Claimant testified she never smoked. She said medical records indicating she smoked were not true.

Exhibit 22 consists of correspondence between claimant's counsel and defendant insurer. It also indicates claimant was paid temporary total disability benefits from approximately June 18th through July 9th at the rate of $342.10 per week. (Ex. 22, p. 28)

CONCLUSIONS OF LAW

The first issue to be determined is if claimant sustained a back injury that arose out of and in the course of employment.

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.

Claimant alleges a low back injury that occurred on June 7, 2013 when she fell at work after passing out.

As noted in finding of facts, the DVD of the work incident shows a white cloud of particle going by claimant's face. The record indicates claimant shut down the line she

worked on. The DVD shows claimant being assisted by a coworker and then slumping to the floor. (Ex. 17, 18)

Claimant was taken by the Waterloo Fire Rescue to the Allen Hospital. There is no record in the ambulance records of a back injury. (Ex. 1)

At Allen Hospital claimant was treated for problems with breathing. At the emergency room, claimant denied back pain. (Ex. 2, p. 3)

In June of 2013 through March of 2014 claimant treated with Dr. Bogdanic, Dr. Shreesha and at the Peoples Community Health Clinic. There is no mention in the record from any of these three providers that claimant had back pain related to a fall in June of 2013. (Ex. 3, pp. 1-12; Ex. 4, pp. 1-4; Ex. 5, pp. 1-16)

The first indication, in the record regarding back pain, occurs in records from the Peoples Clinic on April 23, 2014, approximately ten months after the date of injury. There is no indication in the April 23, 2014 records claimant's back pain was caused by a fall on June 7, 2013. (Ex. 5, p. 17)

Claimant treated with Dr. Hitchon for back pain. Dr. Hitchon opined claimant's complaint of back and leg pain were not work related. (Ex. C, p. 22)

Only one expert, Dr. Manshadi, opined claimant's back condition was caused by her fall at work. Dr. Manshadi indicated, in his IME report, there was a discrepancy between the date of injury, and ten months later when reports of back pain first show up in the medical records. Dr. Manshadi's explanation for this inconsistency is not persuasive or plausible. Based on this, it is found Dr. Manshadi's opinion regarding causation of claimant's back condition is not convincing.

Claimant alleges a back injury occurring on June 7, 2013. Claimant denied back pain when initially treated at the emergency room. There is no record of back pain in the records until approximately ten months after the date of injury. Dr. Hitchon opined claimant's back pain is not work related. Dr. Manshadi's opinion regarding causation of the back condition is not convincing. Given this record, claimant has failed to carry her burden of proof her back condition arose out of and in the course of employment on June 7, 2013.

As claimant has failed to carry her burden of proof she sustained a work-related back injury, all issues, as they relate to claimant's back condition, are moot.

The next issue to be determined is if claimant's respiratory condition resulted in a permanent disability.

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 parties agree claimant had a respiratory injury that arose out of and in the course of employment. The parties disagree claimant's respiratory injury resulted in a permanent disability. (Defendants' post-hearing brief, pp. 4-6)

As noted, claimant sustained a respiratory injury on June 7, 2013. Claimant began treatment with Dr. Hartley, a pulmonologist, in June of 2014. In an October 28, 2014 opinion, Dr. Hartley assessed claimant as having bronchial hyperreactivity due to exposures of pesticides. He opined work was a substantially contributing factor to the development of claimant's disease. At that time Dr. Hartley also gave permanent restrictions of avoidance of chemical fumes, smoke, and high levels of dust. (Ex. 7, pp. 22-27)

In an August of 2015 letter Dr. Hartley indicated he reviewed a DVD of the work accident, and reviewed claimant's medical records, specifically the EMS and emergency room records. After review of these materials, Dr. Hartley indicated he could not say, within a reasonable degree of medical certainty, claimant's respiratory problems were caused by a single exposure on June 7, 2013. He opined claimant's condition was likely a temporary exacerbation of a preexisting ailment. (Ex. C, pp. 27-28)

Dr. Witte, an internist specializing in pulmonology, also opined claimant's complaints were idiopathic. (Ex. D)

Claimant testified she continues to have problems with breathing. She testified she continues to take medication related to her shortness of breath.

No expert has opined claimant has a permanent impairment due to her respiratory injury. Dr. Hartley suggests claimant's injury was temporary. Dr. Witte

suggests claimant's current complaints are due to a non-work-related cause. No expert has opined claimant's respiratory problems resulted in a permanent disability.

I am empathetic to claimant's situation. However, both Dr. Hartley and Dr. Witte suggest claimant's current problems are not due to the June of 2013 work injury. No expert has opined the respiratory injury resulted in permanent disability. Given this record, claimant has failed to carry her burden of proof her respiratory injury resulted in a permanent disability.

As claimant has failed to carry her burden of proof her respiratory injury resulted in a permanent disability, the issue regarding the extent of claimant's entitlement to permanent partial disability benefits is moot.

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

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).

As noted, claimant failed to carry her burden of proof her back injury arose out of and in the course of employment. She also failed to carry her burden of proof her respiratory injury resulted in a permanent disability. For these reasons, the issue of temporary benefits is the extent of claimant's entitlement to temporary total disability benefits.

Claimant was injured on June 7, 2013. The record indicates she tried to return to work at least on two occasions but was unsuccessful. Claimant was terminated from ADS on July 17, 2013. (Ex. 19, pp. 2-4)

Dr. Hartley initially opined claimant was not at MMI for her injury until February 11, 2015. (Ex. 7, pp. 24-27) However, in an August 21, 2015 letter Dr. Hartley rescinded his opinions regarding causation and found claimant had a temporary disability. (Ex. C, pp. 27-28) For this reason, the February 11, 2015 MMI date is not a valid date to set parameters for temporary benefits.

Claimant was treated by Dr. Shreesha on July 2, 2013. Claimant was referred to Dr. Shreesha by Dr. Bogdanic. (Ex. 3, pp. 11-12) Claimant was returned to work by Dr. Shreesha on July 9, 2013. (Ex. 4, p. 4) Given this record, claimant is due temporary total disability benefits from June 7, 2013 through July 9, 2013.

The next issue to be determined is whether there is a causal connection between claimant's 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).

As noted above, claimant failed to carry her burden of proof she sustained an injury to her back that arose out of and in the course of employment with ADS. As a result, defendants have no liability regarding medical expenses related to the treatment of claimant's back condition. Defendants stipulated claimant's respiratory ailment arose out of and in the course of employment. As a result, defendants are only liable for medical expenses, including any medical mileage, related to treatment of claimant's respiratory injury.

The next issue to be determined is whether claimant is entitled to reimbursement for an IME by Dr. Manshadi.

Section 85.39 permits an employee to be reimbursed for subsequent examination by a physician of the employee's choice where an employer-retained physician has previously evaluated "permanent disability" and the employee believes that the initial evaluation is too low. The section also permits reimbursement for reasonably necessary transportation expenses incurred and for any wage loss occasioned by the employee attending the subsequent examination.

Defendants are responsible only for reasonable fees associated with claimant's independent medical examination. Claimant has the burden of proving the reasonableness of the expenses incurred for the examination. See Schintgen v. Economy Fire & Casualty Co., File No. 855298 (App. April 26, 1991). Claimant need not ultimately prove the injury arose out of and in the course of employment to qualify for reimbursement under section 85.39. See Dodd v. Fleetguard, Inc., 759 N.W.2d 133, 140 (Iowa App. 2008).

In a June 5, 2015 note Dr. Hitchon, the employer-retained physician, opined claimant's back problem was not work related. (Ex. C, pp. 22-23)

In an August 24, 2015 report Dr. Manshadi, the employee-retained physician, gave his opinions regarding claimant's back condition. Claimant is due reimbursement for the IME by Dr. Manshadi.

The next issue to be determined is costs. Defendants' exhibit regarding costs is found at Exhibit 12. Defendants did not brief the issue of costs. It appears the only costs in dispute would be the IME with Dr. Manshadi. The issue of reimbursement of

the IME, as noted above, is found in claimant's favor. For this reason, costs will be assessed as against defendants.

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."
>
> 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.
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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).

Section 86.13 provides in relevant part:

2. If an employer or insurance carrier fails to file the notice required by this section, the failure stops the running of the time periods in section 85.26 as of the date of the first payment. If commenced, the payments shall be terminated only when the employee has returned to work, or upon thirty days' notice stating the reason for the termination and advising the employee of the right to file a claim with the workers' compensation commissioner.

. . . .

4. a. If a denial, a delay in payment, or a termination of benefits occurs without reasonable or probable cause or excuse known to the employer or insurance carrier at the time of the denial, delay in payment, or termination of benefits, the workers' compensation commissioner shall award benefits in addition to those benefits payable under this chapter, or chapter 85, 85A, or 85B, up to fifty percent of the amount of benefits that were denied, delayed, or terminated without reasonable or probable cause or excuse.

b. The workers' compensation commissioner shall award benefits under this subsection if the commissioner finds both of the following facts:

(1) The employee has demonstrated a denial, delay in payment, or termination of benefits.

(2) The employer has failed to prove a reasonable or probable cause or excuse for the denial, delay in payment, or termination of benefits.

c. In order to be considered a reasonable or probable cause or excuse under paragraph "b", an excuse shall satisfy all of the following criteria:

(1) The excuse was preceded by a reasonable investigation and evaluation by the employer or insurance carrier into whether benefits were owed to the employee.

(2) The results of the reasonable investigation and evaluation were the actual basis upon which the employer or insurance carrier contemporaneously relied to deny, delay payment of, or terminate benefits.

(3) The employer or insurance carrier contemporaneously conveyed the basis for the denial, delay in payment, or termination of benefits to the employee at the time of the denial, delay, or termination of benefits.

Iowa Code section 86.13(4)(b) creates a two-prong test that requires the agency to award a claimant penalty benefits if (1) "The employee has demonstrated a denial, delay in payment, or termination of benefits"; and (2) "The employer has failed to prove a reasonable or probable cause or excuse for the denial, delay in payment, or termination of benefits."

As noted, claimant is due temporary total disability benefits from June 7, 2013 through July 9, 2013. Records indicate claimant was paid temporary total disability benefits from June 18th through July 9, 2013. (Ex. 22, p. 28) It is unclear why defendants did not pay temporary total disability benefits from June 7, 2013 through June 18, 2013. The record suggests the rationale of defendant-insurer might have been that claimant chose to quit her job. (Ex. 22, p. 14) As noted, the record suggests claimant was actually terminated from her employment with ADS on July 17, 2013.

Claimant was due temporary total disability benefits from June 7, 2013 through June 18, 2013. This is approximately a two-week period of time. No reasonable cause or excuse was given by defendants for failure to pay temporary benefits during this period of time. Defendants are liable for a penalty of $360.93 for failure to pay temporary benefits from June 7, 2013 through June 18, 2013 ($360.93 x 2 x 50%).

The record suggests defendants failed to timely notify claimant why her benefits stopped after a check was issued on July 3, 2013. (Ex. 22, p. 28) The record also suggests defendants did not give rationale for termination or delay of benefits until a November 25, 2014 email from defendant-insurer. (Ex. 22, p. 14) Defendants have an obligation under Iowa Code section 86.13(4)(c) to perform a reasonable investigation, and contemporaneously communicate the basis of the denial or delay of benefits based on that investigation. The record suggests defendants failed to timely investigate claimant's claim for benefits and failed to timely communicate the rationale for the denial or delay of claimant's benefits.

Claimant contends defendants are liable for penalty under Iowa Code section 86.13, even in the case where claimant is not due any temporary total disability benefits after July 9, 2013, and is not due any permanent partial disability benefits (claimant's post-hearing brief, pp. 30-32)

As noted above, Iowa Code section 86.13(4) states in relevant part:

4. a. If a denial, a delay in payment, or a termination of benefits occurs without reasonable or probable cause or excuse known to the employer or insurance carrier at the time of the denial, delay in payment, or termination of benefits, the workers' compensation commissioner shall award benefits **in addition to those benefits payable under this chapter**, or chapter 85, 85A, or 85B, up to fifty percent of the amount of benefits that were denied, delayed, or terminated without reasonable or probable cause or excuse. (Emphasis added)

Claimant suggests even though it has been found defendants do not owe any permanent partial disability benefits, or any temporary total disability benefits after July 9, 2013, defendants still have an obligation to pay claimant several thousand dollars in penalty based upon a failure to give timely notice of denial or delay of benefits under Iowa Code section 86.13. The statute does not suggest penalty is appropriate, in a situation where defendants have no obligation to pay benefits, even though they failed to give timely notice of denial or delay of benefits.

ORDER

THEREFORE IT IS ORDERED:

That defendants shall pay claimant temporary total disability benefits from June 7, 2013 through July 9, 2013 at the rate of three hundred sixty and 93/100 dollars ($360.93) per week.

That defendants shall pay accrued benefits in a lump sum.

That defendants shall pay interest on unpaid weekly benefits as ordered above and as set forth in Iowa Code section 85.30.

That defendants shall be given a credit for benefits previously paid.

That defendants shall pay medical expenses as detailed above.

That defendants shall reimburse claimant for the IME of Dr. Manshadi.

That defendants shall pay claimant three hundred sixty and 93/100 dollars ($360.93) in penalty.

That defendants shall file subsequent reports of injury as required by this agency under rule 876 IAC 3.1(2).

That defendants shall pay the costs of this matter as required under rule 876 IAC 4.33.

Signed and filed this 25th day of March, 2016.

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.