BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER



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| TAMMY ABNER, | File No. 5054911 |
| Claimant, | ARBITRATION |
| vs. | DECISION |
| THE RED BARON, INC., | |
| Employer, Defendant. | Head Note Nos. 1803, 2501, 2907, 3003, 4000.2 |

## STATEMENT OF THE CASE

Claimant, Tammy Abner, filed a petition in arbitration seeking workers' compensation benefits from The Red Baron, Inc., defendant employer, insurer unknown, as a result of an injury she sustained on June 25, 2015 that arose out of and in the course of employment.

On June 27, 2016 claimant filed an entry of default against defendant for failure to timely answer the petition. On June 21, 2016, an entry of default was entered against defendant, and a hearing was scheduled for September 22, 2016 by telephone. The hearing took place as scheduled. The proceedings were recorded digitally, and constitute the official record of the proceeding. The record consists of claimant's Exhibits 1 – 4.

## ISSUES

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

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

3. Rate.

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

## FINDINGS OF FACT

Claimant was employed with The Red Baron, Inc. in Cedar Rapids, Iowa. The Red Baron was a restaurant/bar in Cedar Rapids. (Exhibit 1, page 1)

On June 25, 2015 claimant was showing a new bartender how to fix an ice machine. During demonstration, a panel of the ice machine hit claimant's left hand and left ring finger. The accident resulted in a dislocated and fractured left ring finger. (Ex. 1)

Claimant was treated at a Cedar Rapids area hospital emergency room. Claimant was assessed as having a fractured and dislocated ring finger. Claimant's finger was splinted, and she was referred to an orthopedist. (Ex. 2, p. 2)

Claimant was evaluated by Sarah Kluesner, ARNP in June and July of 2015. Claimant was continued with a splint and referred to a physical therapist. (Ex. 2, p. 2) At physical therapy claimant was provided with TheraPutty and given home exercises. Claimant was released from care on September 28, 2015. (Ex. 2, p. 2)

In a June 22, 2016 report, Mark Taylor, M.D. gave his opinions of claimant's condition following an independent medical evaluation (IME). Claimant had difficulty fully flexing her left ring finger. Dr. Taylor found claimant at maximum medical improvement (MMI) on September 28, 2015. He found claimant had a 45 percent permanent impairment to the ring finger converting to a 5 percent permanent impairment to the left hand. (Ex. 2, pp. 1-7)

Claimant indicated, in an affidavit, she continues to have pain, loss of range of motion and function in her finger and hand. Claimant is no longer receiving medical treatment. (Ex. 1)

At the time of the injury claimant worked approximately 42 hours per week at $15.00 per hour. She was single with two exemptions. (Ex. 1)

Claimant has incurred $657.69 in medical bills for her treatment. These charges have been paid by Medicaid. (Ex. 3)

## CONCLUSIONS OF LAW

As a result of the entry of default claimant has established there was an employee-employer relationship between claimant and the defendant in this case. The default also establishes the employee sustained an injury arising out of and in the course of employment with defendant-employer on the date alleged in the petition.

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

Claimant sustained a fracture and a dislocation to her left ring finger. Dr. Taylor found claimant had a 45 percent loss to the ring finger from the June 25, 2015 injury. Claimant is due 11.25 weeks of permanent partial disability benefits, under Iowa Code section 85.34(2)(d) (45% x 25 weeks). Benefits will commence as to the date claimant was at MMI, September 28, 2015.

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).

Claimant seeks payment of medical expenses as detailed in Exhibit 3. Claimant indicates in an affidavit the bills found at Exhibit 3 relate to treatment she received for her ring finger incident. Records indicate the costs detailed in medical bills found in Exhibit 3 are related to the care and treatment claimant received for her June 25, 2015 work injury. There is no evidence these bills detailed in the records are not causally connected to claimant's June 25, 2015 injury. There is no evidence costs related to the treatment are not fair and reasonable. Based on this, defendant is liable for the claimed medical expenses to Medicaid.

The next issue to be determined is rate.

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

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

Claimant worked 42 hours per week and earned $15.00 an hour. (Ex. 1) Based on this, claimant's average weekly wage is $630.00 per week. Claimant was single with two exemptions. (Ex. 1) Claimant's rate is $402.20.

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 11.25 weeks of permanent partial disability benefits. Defendant gave no reason why claimant's permanent partial disability benefits have not been paid. A penalty of 50 percent is appropriate. Defendant is liable for a penalty of $2,262.38 in penalty (11.25 weeks x $402.20 x 50%).

ORDER

THEREFORE IT IS ORDERED:

That defendant shall pay claimant eleven point twenty-five (11.25) weeks of permanent partial disability benefits at the rate of four hundred two and 20/100 dollars ($402.20) per week commencing on September 28, 2015.

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

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

That defendant shall reimburse Medicaid for claimant's medical expenses as detailed above.

That defendant shall pay claimant two thousand two hundred sixty-two and 38/100 dollars ($2,262.38) in penalty.

That defendant shall pay two thousand two hundred sixty-two and 80/100 dollars ($2,262.80) for costs as detailed in Exhibit 4.

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

Signed and filed this 14th day of October, 2016.

JAMES F. CHRISTENSON
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

Copies to:

Joseph S. Powell
Attorney at Law
4900 University Ave.
Des Moines, IA 50311
jpowell@reillylawfirm.com

The Red Baron, Inc.
c/o Baron Stark
52 E. Cemetery Rd.
Fairfax, IA 52228
CERTIFIED AND REGULAR MAIL

JFC/sam

**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.