BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

ALISHA CARR,

Claimant,

vs.

NEW YORK & COMPANY,

Employer,

and

SENTINEL INSURANCE COMPANY,

Insurance Carrier,
Defendants.

File No. 5045323

APPEAL

DECISION

Head Note Nos: 1100, 1803, 4000.2

Defendants New York & Company, employer, (hereinafter NYC) and its insurer, Sentinel Insurance Company, appeal from an arbitration decision filed on March 20, 2015. Claimant Alisha Carr cross-appeals. The case was heard on November 7, 2014, and it was considered fully submitted in front of the deputy workers' compensation commissioner on December 5, 2014.

The deputy commissioner found claimant carried her burden of proof that she sustained an injury on October 20, 2011, which arose out of and in the course of her employment with NYC. The deputy commissioner found this claim is not barred by the going and coming rule. The deputy commissioner awarded claimant healing period benefits from June 22, 2012, through October 1, 2013. The deputy commissioner awarded claimant 50 percent industrial disability, which entitles claimant to 250 weeks of permanent partial disability (PPD) benefits commencing October 2, 2013. The deputy commissioner found claimant was not entitled to penalty benefits because the issue of compensability of this claim was found to be fairly debatable. The deputy commissioner ordered defendants to pay claimant's past medical expenses itemized in Exhibits 6 and 7. The deputy commissioner ordered defendants to pay the cost of the independent medical evaluation (IME) performed by Sunil Bansal, M.D., on May 2, 2014. The deputy commissioner also ordered defendants to pay claimant's costs of the arbitration proceeding.

Defendants assert on appeal that under the going and coming rule, the deputy commissioner erred in finding claimant's injury of October 20, 2011, arose out of and in the course of her employment with NYC. Defendants assert the deputy commissioner

erred in awarding claimant 50 percent industrial disability. Defendants also assert the finding that claimant is not entitled to penalty benefits should be affirmed.

Claimant asserts on appeal that the finding of compensability and the award of 50 percent industrial disability should be affirmed. Claimant asserts on cross-appeal that the deputy commissioner erred in failing to award penalty benefits.

Those portions of the proposed agency decision pertaining to issues not raised on appeal are adopted as a part of this appeal decision.

Having performed a de novo review of the evidentiary record and the detailed arguments of the parties, pursuant to Iowa Code sections 86.24 and 17A.15, I affirm and adopt as the final agency decision those portions of the proposed arbitration decision filed in this matter on March 20, 2015, which relate to the following issues:

I affirm the deputy commissioner's finding that claimant carried her burden of proof that she sustained an injury on October 20, 2011, which arose out of and in the course of her employment with NYC. I affirm the deputy commissioner's finding that this claim is not barred by the going and coming rule. I affirm the deputy commissioner's award of healing period benefits from June 22, 2012, through October 1, 2013. I affirm the deputy commissioner's award of 50 percent industrial disability, which entitles claimant to 250 weeks of PPD benefits commencing October 2, 2013. I affirm the deputy commissioner's award of claimant's past medical expenses itemized in Exhibits 6 and 7. Because defendants did not challenge the award of Dr. Bansal's IME fee on appeal, I affirm that award. I affirm the deputy commissioner's findings, conclusions and analysis regarding those issues.

I reverse the deputy commissioner's finding that claimant is not entitled to penalty benefits. I provide the following analysis with regard to the issue of penalty benefits.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Claimant was the manager of NYC's retail women's clothing store at Jordan Creek Mall in West Des Moines, Iowa. (Hearing Transcript page 20) In addition to her duties as manager of the Jordan Creek store, from time to time claimant was called upon to troubleshoot problems at other stores the company owns in other cities. (Tr. p. 22) She has traveled to Davenport, Iowa, Arizona, Wisconsin, Minnesota, Louisiana and Tennessee to help out in stores in those areas. (Tr. pp. 25-26)

Claimant was directed by her district manager to go to the Davenport store to work for the day on October 20, 2011. (Tr. pp. 27-28) Claimant drove her personal vehicle and she was reimbursed for her mileage expense for the trip. (Id.) Claimant worked all day in the Davenport store and she left sometime between 5:15 p.m. and 5:30 p.m. to return home. (Tr. p. 29) As she attempted to leave the parking lot of the mall where the Davenport store is located, claimant was involved in a motor vehicle

accident. She was driving down an aisle in the parking lot of the mall when her vehicle was struck forcefully by another vehicle which was backing out of a parking space. (Tr. p. 30) Claimant reported the accident to the Davenport store manager and also to her supervisor immediately after it occurred and afterwards she drove home on Interstate 80, taking the same route she had traveled to Davenport earlier that day. (Tr. pp. 32-34, 50-51) The facts cited herein are not disputed by defendants.

Generally, absent special circumstances, injuries occurring off the employer's premises while the employee is on the way to or from work are not compensable. This is known as the going and coming rule. 2800 Corp. v. Fernandez, 528 N.W.2d 124, 129 (Iowa 1995).

However, in Iowa, there are some long-time and well-established exceptions to going and coming rule. In Quaker Oats Co. v Ciha, 552 N.W.2d 143 (Iowa 1996), the Iowa Supreme Court stated the following, in pertinent part:

> . . . if an employee is on a special errand or mission for his or her employer at the time of the injury, the injury is held to have arisen in the course of employment. In *Pribyl,* we stated an employee
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> > *would be pursuing his master's business* if his trip to and from the employer's premises were a special trip made in response to a special request, agreement or instructions to go from his home to the plant to do something for the employer's benefit. In that case it is clear the entire trip would be his mater's business and by all authorities would be held to be in the course of the employment.
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> *Pribyl,* 246 Iowa at 339, 67 N.W. 2d at 442. We have further explained the special errand exception as follows:
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> > [T]he going and coming rule is [not] dependent on the extent of the hazards of travel. It is based rather on contract, express or implied. If the employer assumes the burden of the workman's coming and going expense, that is held to imply that the *time* of coming and going is a part of the time of employment. Or *when the employer sends [the employee] on a special mission apart from his usual employment, the coming and going time of such mission is implied to be within the course of employment.*
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> *Bulman,* 247 Iowa at 494, 73 N.W. 2d at 30 (emphasis added). In special errand cases, we typically ask the following questions: "Whose business was [the employee] pursuing at the time of the injury?" *Pribyl,* 246 Iowa at 340, 67 N.W.2d at 442.

Ciha, 552 N.W.2d at 151-152

Claimant in this case was sent by NYC to the Davenport store on a special errand to help with the operation of that store. Claimant was paid mileage for her trip to Davenport to perform that special errand. (Tr. p. 28) Her normal work location was not in Davenport. Instead, it was the store at Jordan Creek Mall in West Des Moines. Claimant's injury occurred while she was on that special errand and while she was returning from that special errand. No evidence was introduced to suggest claimant had somehow deviated from the special errand at the time the accident occurred. Claimant's injury clearly arose out of and in the course of her employment and, as stated above, I affirm the deputy commissioner's finding in that regard.

This raises the question of whether, in light of the undisputed evidence of how claimant's injury occurred, was it reasonable under the circumstances of this case for defendants to deny this claim without recognizing this claim falls within the special errand exception to the going and coming rule?

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."
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> 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.
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> (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, 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).

Defendants denied this claim and have cited the going and coming rule as the basis for their denial. It does not appear defendants considered anything more than the fact that claimant walked out of the Davenport store and was driving her vehicle in the mall parking lot when the accident occurred. Had that been the scenario for an accident occurring in the parking lot of Jordan Creek Mall, where claimant typically worked, the going and coming rule would likely apply to render this claim non-compensable. However, this clearly is not what occurred in this case.

There has never been any dispute that claimant was out of town on a special errand for NYC. It is undisputed that at no time did defendants ever have any reason to suspect claimant may have deviated from the special errand. The denial letter sent to claimant by defendant-insurer on August 21, 2012, did not cite a specific factual basis for denial of the claim. That letter only stated that based on the information obtained to date, it was defendants' "opinion that the original incident did not occur within the course and scope of your employment." (Exhibit 11) No one ever interviewed claimant on behalf of defendants regarding the injury. (Tr. p. 51) Defendants simply denied the claim and never reconsidered their denial. (Id.) A cursory review of the legal authority that applies to the undisputed facts of this case would have indicated this is a compensable claim. The legal authority cited by defendants in their appeal brief does not support the contention that there was a fairly debatable basis for the denial of this claim considering the undisputed facts.

I therefore find it was not reasonable for defendants to deny this claim and refuse to pay claimant weekly benefits starting when she went off work on June 22, 2012. I respectfully disagree with the deputy commissioner's finding that the compensability of this claim is fairly debatable based on a good faith dispute over claimant's factual or legal entitlement to benefits. I therefore reverse the deputy commissioner's denial of penalty benefits.

The next question to decide is the amount of penalty to impose for defendants' failure to accept this claim and pay weekly benefits. The applicable period for penalties in this case is from June 22, 2012, the date claimant began to miss work for the injury in question, through March 20, 2015, the date the arbitration decision was filed, a period of 143.142 weeks. Claimant's weekly workers' compensation benefit rate is $650.46. The maximum amount of penalty that could be imposed is 50 percent of the amount of the benefits wrongfully withheld. Iowa Code section 86.13(4) Therefore, the maximum penalty that could be imposed in this case is $46,554.07.

It is undisputed that after claimant went off work for her injury starting June 22, 2012, she had to borrow money from her father and she was forced to cash in her 401K. (Tr. p. 55) At one point, claimant was forced to receive food stamps. (Tr. p. 69) Defendants' unreasonable denial of this claim clearly caused claimant undue hardship. At the same time, no evidence was introduced to show defendants have engaged in a regular pattern of improperly denying claims or withholding weekly benefits. I therefore find it is appropriate to impose a penalty of $22,500.00 which is slightly less than half the maximum amount of penalty that could be imposed in this matter.

ORDER

IT IS THEREFORE ORDERED that the arbitration decision of March 20, 2015, is MODIFIED as follows:

Defendants shall pay claimant healing period benefits from June 22, 2012, through October 1, 2013, at the weekly rate of six hundred fifty and 46/100 dollars ($650.46).

Defendants shall pay claimant two-hundred fifty (250) weeks of permanent partial disability benefits commencing October 2, 2013, at the weekly rate of six-hundred fifty and 46/100 dollars ($650.46).

Accrued benefits shall be paid in a lump sum together with interest pursuant to Iowa Code section 85.30.

Defendants shall pay claimant the sum of twenty-two thousand five hundred and 00/100 dollars ($22,500.00) as a penalty for defendants' unreasonable denial of this claim.

Pursuant to Iowa Code section 85.27, defendants shall directly pay claimant's past medical expenses itemized in Exhibits 6 and 7 and defendants shall reimburse claimant for those expenses she has personally paid.

Claimant has received a third party settlement and defendants are entitled to credit as appropriate under Iowa Code section 85.22.

Defendants shall reimburse claimant for Dr. Bansal's IME in the amount of two thousand seven hundred ninety-five and 00/100 dollars ($2,795.00).

Pursuant to rule 876 IAC 4.33, defendants shall pay the costs of the arbitration proceeding and defendants shall pay the costs of the appeal, including the cost of the hearing transcript.

Defendants shall file subsequent reports of injury (SROI) as required by this agency pursuant to rules 876 IAC 3.1(2), and 876 IAC 11.7.

Signed and filed this 26th day of August, 2016.

Joseph S. Cortese II

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WORKERS' COMPENSATION
COMMISSIONER

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