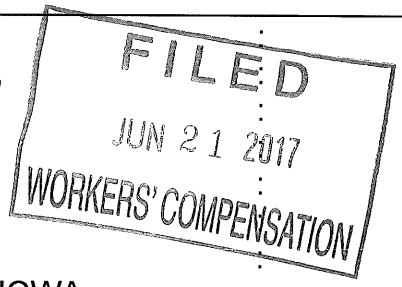
BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER



JOHN W. GILSON, JR.,	
Claimant,	
vs.	File Nos. 5042119, 5042120
CITY OF SIOUX CITY, IOWA,	REVIEW-REOPENING
Employer,	DECISION
and	
SAFETY NATIONAL,	
Insurance Carrier, Defendants.	Head Note No.: 2403

STATEMENT OF THE CASE

The claimant filed a petition in review-reopening from an arbitration decision dated January 8, 2014, which awarded a 40 percent permanent partial disability, a $3,000.00 penalty, and medical benefits.

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

ISSUES

1. Whether the claimant has established a change in condition such as to merit an additional award of disability; and

2. Penalty.

FINDINGS OF FACT

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

Claimant worked for the City of Sioux City from September 1976 until his voluntary retirement on December 31, 2011. The vast majority of his employment at the City involved equipment operation. He operated all forms of equipment, including graders, street cleaning, and driving a dump truck. In the winter, he drove a snow plow

truck. The City's own testing of noise levels indicated that claimant was at times exposed to excessive noise levels. (Original Exhibit G)

The claimant submitted his retirement form to the City on October 12, 2011 seeking retirement when he reached "the rule of 88." This is a rule under the Iowa Public Employee Retirement Fund, which allows a person to retire and receive full benefits when their age in years and years of service total 88. He actually qualified under this rule on October 21, 2011, but he was able to extend his formal employment to the end of the year by using his accumulated leave. The claimant last worked on October 19, 2011. Claimant has not been employed and has not applied for any employment since leaving the City. Nor has he applied for or received any disability.

Due to claimant's noise exposure at work; his hearing was regularly tested by the City over the years. His hearing declined, but, according to Rodney Cassens, M.D., in a report dated October 5, 2011, claimant did not attain a standard threshold hearing shift in his right ear until August 31, 2011. Dr. Cassens stated that a sensory neuro component of his loss cannot be ruled out, which may be related to noise exposure at work. The City originally relied on the binaural hearing loss calculations set forth in Original Exhibit F, (also Ex. 4-61) which calculated claimant's occupational binaural hearing loss in September 2013 to be 6.12 percent after age adjustment pursuant to Iowa Code section 85B.9A.

Claimant's independent medical evaluation (IME) doctor for the original arbitration hearing was Richard S. Tyler, Ph.D., a professor and director of audiology at the University of Iowa. In his report of October 2013 he agreed that Exhibit F is the binaural hearing loss calculated under Iowa Code section 85B.9A. (Ex. 4-50) Dr. Tyler, however, opined that the formula under that Code section should not be used to calculate actual impairment from hearing loss because it excludes losses at higher frequencies, which are more of a problem in communication abilities, especially in noisy environments and identifying the source or location of a particular noise such as the direction of an oncoming car or a warning alarm. Dr. Tyler calculated that claimant's hearing impairment was 14 percent after including losses at higher frequencies. (Original Ex. 4-51) In a March 15, 2017 report, Dr. Tyler opined that the claimant now has a 39 percent age adjusted hearing loss and opined a 51 percent hearing impairment. (Ex. 2)

The unrefuted evidence is that the claimant's hearing loss has worsened. The question then is whether the claimant's industrial loss has accordingly increased. The claimant voluntarily retired before the last hearing. He has not sought any employment or Social Security Disability since. There is not sufficient evidence in the record utilizing and considering all factors of industrial liability to find that the claimant's industrial loss is any greater than the 40 percent already awarded.

The claimant's weekly benefit rate was previously established as $866.97 per week. Claimant seeks a penalty based on the City paying the initial arbitration award of just over $62,000.00 21 days late. A penalty of $3,000.00 on $6,000.00 of the award was made in the first arbitration decision.

REASONING AND CONCLUSIONS OF LAW

The first issue is whether claimant is entitled to additional permanent disability benefits via a claim for review-reopening.

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 Rule of Appellate Procedure 6.14(6).

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).

In a proceeding to reopen an award for payments or agreement for settlement as provided by section 86.13, inquiry shall be into whether or not the condition of the employee warrants an end to, diminishment of, or increase of compensation so awarded or agreed upon. Iowa Code section 86.14(2).

The Iowa Supreme Court has held that a claimant does not need to prove that the change in the condition was not contemplated at the time of the original decision(s). Kohlhaas v. Hog Slat, Inc., 777 N.W.2d 387 (Iowa 2009).

The claimant showed additional or continued hearing loss. He did not meet his burden of establishing additional industrial loss and the review-reopening must be denied.

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."
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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.
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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).
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> > 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.
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> Id.
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> (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.
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> (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.
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> (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.
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> 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 v. Snap-on Tools Corp., 555 N.W.2d 229, 238 (Iowa 1996).

Benefits which were unreasonably paid late were over $56,000.00 ($62,000.00-$6,000.00 previous penalty assessed on). The defendant employer has a history of penalties, but the benefits were not that late. The defendants shall pay a penalty of $5,000.00 which is in the range of 10 percent.

ORDER

THEREFORE, IT IS ORDERED:

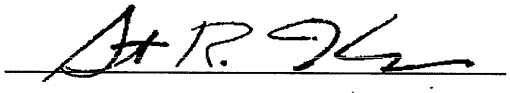
That defendants pay the claimant a penalty of five thousand and 00/100 dollars ($5,000.00); all of which is accrued.

Defendants shall pay the costs of this action pursuant to 876 IAC 4.33.

Defendants shall receive credit for benefits previously paid.

Defendants shall file subsequent reports of injury as required by the agency.

Signed and filed this 21st day of June, 2017.



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DEPUTY WORKERS'
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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.