BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JONATHAN D. TONGAY, Claimant, vs. STORY COUNTY, Employer, and IMWCA, Insurance Carrier, Defendants.	File Nos. 5053307, 5053308 ARBITRATION DECISION Head Note Nos.: 1801; 1108; 2203; 2401

FILED
SEP 19 2017
WORKERS' COMPENSATION

STATEMENT OF THE CASE

Jonathan Tongay filed two petitions for arbitration seeking workers' compensation benefits from, the employer, Story County, and its insurance carrier, Iowa Municipal Workers' Compensation Association (IMWCA).

The matter came on for hearing on June 7, 2016, before Deputy Workers' Compensation Commissioner Joseph L. Walsh in Des Moines, Iowa. The record in the case consists of claimant's exhibits 1 through 25; defense exhibits A through G; as well the sworn testimony of claimant, Jonathan Tongay. Jessi Lass was appointed court reporter. The parties argued this case and the matter was fully submitted on June 28, 2016.

ISSUES AND STIPULATIONS

All stipulations presented by the parties in the hearing report and order are accepted and should be deemed enforceable at this time.

File No. 5053307:

The parties stipulate that the claimant was employed by the employer on the date of the injury. Claimant sustained an injury which arose out of and in the course of his employment on March 16, 2015. While the defendants concede that an injury occurred on that date, defendants deny that the injury resulted in any permanent or temporary disability. The claimant alleges he is intermittently entitled to healing period benefits commencing on March 19, 2015, through July 29, 2015. The defendants deny this. The claimant alleges he is entitled to permanent partial disability benefits as a result of

the work injury. If permanency benefits are owed, the commencement date is disputed by the parties. The defendants dispute this. Claimant seeks medical expenses as outlined in claimant's exhibit 16. Defendants dispute liability for these bills based upon lack of authorization and reasonableness of the bills. The claimant seeks a penalty on the basis of the unreasonable denial of temporary disability benefits.

The parties have stipulated to the elements which comprise the rate of compensation. Defendants have waived all affirmative defenses. The parties agree there is no issue regarding credit and no benefits have been paid.

File No. 5053308:

The parties stipulate that the claimant was employed by the employer on the date of the alleged injury. Claimant has alleged that he sustained an injury which arose out of and in the course of his employment on April 18, 2015. The defendants deny that the injury occurred, and further deny that the alleged injury resulted in any permanent or temporary disability. The claimant alleges he is intermittently entitled to healing period benefits commencing on April 19, 2015 through July 29, 2015. The defendants deny claimant is entitled to any benefits. The claimant alleges he is entitled to permanent partial disability benefits. The defendants dispute this, as well as the commencement date for any benefits, should they be awarded. Claimant seeks medical expenses as outlined in claimant's exhibit 16. Defendants dispute liability for these bills based upon lack of authorization and reasonableness of the bills. The claimant seeks a penalty on the basis of the unreasonable denial of temporary disability benefits.

The parties have stipulated to the elements which comprise the rate of compensation. Defendants have waived all affirmative defenses. The parties agree there is no issue regarding credit and no benefits have been paid.

The stipulations entered by the parties in both hearing orders are accepted by this agency and are deemed enforceable at this time.

FINDINGS OF FACT

In July 2014, Jonathan Tongay worked as a Resident Care Assistant for Story County. He was 24 years old on the date of hearing. He was responsible for providing general care and mentoring for individuals with disabilities in Story County's Community Life Program. The employer has 4 group homes (residential sites) in the area. Prior to starting this job, Mr. Tongay passed a preemployment physical and was generally healthy. (Claimant's Exhibit 21)

The claimant testified live at hearing. I find him to be generally credible. He is young, bright and has significant potential in life. He attended Des Moines Area Community College in 2010, studying Liberal Arts and Criminal Justice. He has certifications in medication management and CPR. His work history is set forth in detail in Claimant's Exhibit 12.

On March 16, 2015, claimant assisted a client in significant distress while working at the Ames Calhoun location. In the process he injured his left hip and lower back. He really began to notice the pain after his shift had ended. This incident of injury is stipulated. The following day, March 17, 2015, Mr. Tongay reported the injury by calling the Company Nurse Injury Hotline. (*See* Cl. Ex. 19) On the same day, he was directed to McFarland Clinic, where he was first evaluated by John McClelland, PA-C. The following is documented.

> Jonathan Tongay is a very pleasant gentleman, works as a residential care assistant in a group home. States that he had a client call out on the date of occurrence. He went to assist the individual who was already on the floor. In the process of lifting/straining the person had some pain and discomfort. The gentleman reports he called the ambulance. The client at that point had accompanied himself to the restroom. He was again working with him to the floor to get him in a more comfortable position and then subsequently helped paramedics get the patient to the gurney as they prepped her for transport. Gentleman is not certain exactly which of these lifting moments caused the back strain or discomfort. Regardless, he does have back strain/pain, tenderness to the low back area at the lumbar erectors just above the beltline. Denies any radiating symptoms of pain or discomfort to the lower extremities. Denies fever or chills. Denies any bowel or bladder difficulties. Denies any radiating pain.

(Cl. Ex. 4, p. 15) Mr. Tongay was placed on rather significant medical restrictions, including a 15-pound lifting restriction, at this visit. (Cl. Ex. 4, p. 16) After following up shortly thereafter, he began physical therapy. (Cl. Ex. 4, p. 20) At the end of March, his condition had not improved and he was placed on a 10-pound lifting restriction. (Cl. Ex. 4, p. 22)

Mr. Tongay testified that his employer never discussed his restrictions with him. He testified that no accommodations were made to his job duties whatsoever. Instead, he continued to work in the same position. He continued in physical therapy.

On April 18, 2015, Mr. Tongay contends he further injured his back while standing on a chair and reaching overhead. He testified he felt a tearing sensation and immediately had increased pain in his low back and left hip. He described the symptoms as being new in that began radiating. He reported the new injury the same day. (Cl. Ex. 20) On April 18, 2015, he returned to McFarland Clinic. The following is documented.

> Has had 9 sessions thus far with PT. With each subsequent disease as he returns to me he appears to in the interim be somewhat improving and then has occurrence or issue where the back seems to regress. The same is true as he returns today. Reports approximately a week ago he was standing up at work, arising from a seated position. Simply went to

> stretch, leaning rearward performing to stretch, felt pain and discomfort which he described as a sensation of a "hook" of sharp nature to the left low back area, and at that moment it radiated across the waistline over to the right low back. . . . Describes at the more recent occurrence of irritation that he had some 1 week ago. He has had pain and discomfort to the buttock region that has persisted and radiated down just a bit into the low buttock, upper hamstring consistent with sciatica.

(Cl. Ex. 4, p. 27) He was placed on a 15-pound restriction with limited bending, twisting and no deep squatting or kneeling. (Cl. Ex. 4, p. 28)

Mr. Tongay was laid off, along with most other employees, on April 30, 2015. Notice of this layoff was provided on April 16, 2015. (Cl. Ex. 24) Claimant testified, the program was to be conducted by a new service provider, Optimae Life Services.

On May 5, 2015, an MRI was conducted of claimant's low back. It demonstrated several disc bulges among other findings. (Cl. Ex. 3) On May 6, 2015, claimant was evaluated by Charles Mooney, D.O., for the first time. Dr. Mooney changed his restrictions to allow claimant to lift up to 40 pounds. (Cl. Ex. 4, p. 31) He recommended some chiropractic care. Mr. Tongay completed the chiropractic care and underwent an injection with Dr. Mooney. Dr. Mooney released the claimant on July 29, 2015. "I do not feel that any further intervention is indicated." (Cl. Ex. 4, p. 42) He was released to full-duty. I find that Dr. Mooney's report is quite clear that there was no further reason for the claimant to return to him. "It is my opinion that no further treatment is likely to reduce his overall symptoms." (Cl. Ex. 4, p. 42) This is the date claimant reached maximum medical improvement. Shortly thereafter, Dr. Mooney wrote a report with expert opinions for the defendants. He opined claimant suffered no impairment and any of his ongoing difficulties were related to degenerative findings unrelated to the work injury. (Def. Ex. A)

At the time claimant was placed at maximum medical improvement, however, he was not fully healed. At that time he had, and continued to have through the date of hearing, moderately significant symptoms in his low back and hip.

Since being laid off, claimant has worked very little. He was hired by a children's furniture company in September 2015, but was unable to perform the work. On the third day of doing the job, he attempted to deliver a mattress to a customer and had increased pain in his low back. He sought medical treatment and ultimately determined he would be unable to perform this job. Mr. Tongay has not worked in any job since he left the furniture store. He has been applying for more sedentary jobs since he left.

Mr. Tongay was evaluated by Sunil Bansal, M.D., on September 25, 2015. Dr. Bansal reviewed claimant's medical records and performed a thorough medical evaluation. (Cl. Ex. 1) He diagnosed L5-S1 disc bulge and aggravation of facet arthropathy. (Cl. Ex 1, p. 8) He related this condition to the work injuries and provided a 5 percent whole person impairment rating. (Cl. Ex. 1, p. 4-5, 8-9) He recommended

permanent restrictions of no lifting greater than 40 pounds occasionally or 25 pounds frequently. (Cl. Ex. 1, p. 11)

Claimant has sought treatment with other providers since being released by Dr. Mooney because of the ongoing symptoms in his low back and left hip. On January 22, 2016, he was evaluated at Mercy North Family Practice by a nurse practitioner and was given the diagnosis chronic back pain. (Cl. Ex. 6) He has been provided medications and referred to physical therapy but did not complete any therapy because of the cost. (Cl. Ex. 6, p. 59)

CONCLUSIONS OF LAW

The defendants have stipulated that the claimant suffered a work injury which arose out of and in the course of his employment on March 16, 2015. They contend that the injury resulted in no temporary or permanent disability. The defendants deny that the claimant suffered a second injury on or about April 18, 2015.

Thus, the first question is whether the claimant suffered a work injury on April 18, 2015.

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.

A personal injury contemplated by the workers' compensation law means an injury, the impairment of health or a disease resulting from an injury which comes about, not through the natural building up and tearing down of the human body, but because of trauma. The injury must be something that acts extraneously to the natural processes of nature and thereby impairs the health, interrupts or otherwise destroys or damages a part or all of the body. Although many injuries have a traumatic onset, there is no requirement for a special incident or an unusual occurrence. Injuries which result from cumulative trauma are compensable. Increased disability from a prior injury, even if brought about by further work, does not constitute a new injury, however. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); Ellingson v. Fleetguard, Inc., 599 N.W.2d 440 (Iowa 1999); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa

1995); McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985). An occupational disease covered by chapter 85A is specifically excluded from the definition of personal injury. Iowa Code section 85.61(4) (b); Iowa Code section 85A.8; Iowa Code section 85A.14.

When the injury develops gradually over time, the cumulative injury rule applies. The date of injury for cumulative injury purposes is the date on which the disability manifests. Manifestation is best characterized as that date on which both the fact of injury and the causal relationship of the injury to the claimant's employment would be plainly apparent to a reasonable person. The date of manifestation inherently is a fact based determination. The fact-finder is entitled to substantial latitude in making this determination and may consider a variety of factors, none of which is necessarily dispositive in establishing a manifestation date. Among others, the factors may include missing work when the condition prevents performing the job, or receiving significant medical care for the condition. For time limitation purposes, the discovery rule then becomes pertinent so the statute of limitations does not begin to run until the employee, as a reasonable person, knows or should know, that the cumulative injury condition is serious enough to have a permanent, adverse impact on his or her employment. Herrera v. IBP, Inc., 633 N.W.2d 284 (Iowa 2001); Oscar Mayer Foods Corp. v. Tasler, 483 N.W.2d 824 (Iowa 1992); McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985).

By a preponderance of evidence, I find that the claimant has met his burden of proof that he suffered an injury on this date. The claimant's testimony, combined with the contemporaneous documentation of the injury report and the medical notes makes it more likely than not that the event described above, did in fact occur.

I find there is really no question that the claimant suffered a second injury in this case. He was at work stretching and reaching to get something for a client and had a sudden onset of increased back pain. The real issue in this case is whether either or both events in question were a cause of any temporary or permanent disability in claimant's low back.

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).

I find the expert opinion of Dr. Bansal to be the most credible opinion on medical causation. (Cl. Ex. 1) In contrast, I do not find the opinion of Dr. Mooney convincing at all. He wrote the following. "Mr. Tongay does demonstrate more advanced degenerative findings of the lumbar spine than would be expected for someone of his young age. This would not be related to the injury, but may be related to an underlying spondyloarthropathy which was discussed with him previously." (Def. Ex. A, p. 1) It is not known what question Dr. Mooney was asked to elicit this answer, however, he simply did not address any relevant standard for medical causation. The question is whether Mr. Tongay's underlying spondyloarthropathy was substantially aggravated or lit up by his work injury. The claimant was symptom free with a normal healthy back prior to his work injuries. He passed a preemployment physical without incident. I find that he credibly described ongoing symptoms since reaching maximum medical improvement. I also note that Dr. Mooney minimizes or ignores the bulging discs, which are clearly set forth in the MRI report.

The opinions of Dr. Bansal more closely align with the facts of this case. Dr. Bansal performed an extremely thorough review of the records. He fully understood the claimant's medical and work history. He diagnosed L5-S1 disc bulge and aggravation of facet arthropathy. (Cl. Ex 1, p. 8) I find this is the most appropriate diagnosis. Unlike Dr. Mooney, Dr. Bansal clearly utilized the correct standard for medical causation. (Cl. Ex. 1, pp. 8-9) Dr. Bansal opined that the reaching incident on April 18, 2015, was merely a temporary aggravation. (Cl. Ex. 1, p. 10)

For these reasons, I find the claimant has met his burden that his March 16, 2015, work injury is a proximate cause of both temporary and permanent disability. The April 18, 2015, work injury was a temporary aggravation of his March 16, 2015, work injury, however, no benefits are owed for this injury. Consequently, for File No. 5053308, claimant shall take nothing.

The next issue is whether any temporary disability benefits are owed.

Healing period compensation describes temporary workers' compensation weekly benefits that precede an allowance of permanent partial disability benefits. Ellingson v. Fleetguard, Inc., 599 N.W.2d 440 (Iowa 1999). Section 85.34(1) provides that healing period benefits are payable to an injured worker who has suffered permanent partial disability until the first to occur of three events. These are: (1) the worker has returned to work; (2) the worker medically is capable of returning to

substantially similar employment; or (3) the worker has achieved maximum medical recovery. Maximum medical recovery is achieved when healing is complete and the extent of permanent disability can be determined. Armstrong Tire & Rubber Co. v. Kubli, Iowa App., 312 N.W.2d 60 (Iowa 1981). Neither maintenance medical care nor an employee's continuing to have pain or other symptoms necessarily prolongs the healing period.

The claimant alleges he was not provided any accommodations for his medical restrictions. Consequently, he was forced to use more sick leave than he should have between the date of his injury, March 16, 2015, and his layoff. While this may be the case and it could be a basis for a finding of temporary partial disability, I find that the documentation in the file is not strong enough to make a specific finding in claimant's favor on this point. All of the claimant's evidence on this point was general and not specific with dates and other details. Claimant has failed to establish a claim for temporary partial disability. The more interesting question is what benefits, if any, claimant was entitled after his layoff on April 30, 2015.

Claimant was laid off effective May 1, 2015. He became unemployed. Defendants point out that claimant could have applied for a job with the new service provider, however, this does not change the fact that claimant was laid off. At the point claimant was laid off, there is no question that the claimant had medical restrictions of no lifting more than 15 pounds. The defendants were required to investigate whether claimant was entitled to healing period or other temporary disability benefits. I find no evidence that such an investigation or analysis was performed in this record. Based upon the evidence before me, the claimant was entitled to healing period commencing on May 1, 2015, the day immediately following his last day of work. He was not at maximum medical improvement. He was not capable of substantially similar employment. He was not offered suitable work by the employer.

The defendants argue that claimant simply chose not to work after April 30, 2015. According to defendants, claimant could have worked for the new service provider but chose not to. It is true that the claimant worked from the date of his injury through his layoff essentially as though he had no restrictions. Claimant, however, testified this was because the employer specifically never acknowledged his medical restrictions. Claimant also points out that he had to call in sick several times during this time frame because his pain flared up when his restrictions were not followed. I find that claimant is entitled to healing period benefits from the date he was no longer employed May 1, 2015, through the date he reached maximum medical improvement, July 29, 2015.

The next issue is permanency.

Since claimant has an impairment to the body as a whole, an industrial disability has been sustained. Industrial disability was defined in Diederich v. Tri-City R. Co., 219 Iowa 587, 258 N.W. 899 (1935) as follows: "It is therefore plain that the legislature intended the term 'disability' to mean 'industrial disability' or loss of earning capacity and

not a mere 'functional disability' to be computed in the terms of percentages of the total physical and mental ability of a normal man."

Functional impairment is an element to be considered in determining industrial disability which is the reduction of earning capacity, but consideration must also be given to the injured employee's age, education, qualifications, experience, motivation, loss of earnings, severity and situs of the injury, work restrictions, inability to engage in employment for which the employee is fitted and the employer's offer of work or failure to so offer. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963); Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961).

Compensation for permanent partial disability shall begin at the termination of the healing period. Compensation shall be paid in relation to 500 weeks as the disability bears to the body as a whole. Section 85.34.

After carefully considering all the factors of industrial disability, I find the claimant has suffered a 25 percent loss of earning capacity as a result of his work injury.

Claimant is a young man. He is bright. He presented quite well at hearing. He is capable of further education. His medical impairment is 5 percent of the whole person, which is modest. He has restrictions against lifting over 40 pounds occasionally and 25 pounds frequently. These restrictions are not insignificant, particularly given claimant's work history. These restrictions are consistent with his ongoing symptoms, which can be significant at times. He testified he feels as though he has a pebble in his joint in his low back which is constantly irritating and at times, truly debilitating. It affects his activities of daily living. He now has difficulty riding long distances in a vehicle, fishing, performing yard work or maintaining his family swimming pool. He has performed an honest work search and has had difficulty finding appropriate employment within his limitations. A 25 percent loss of earning capacity entitles claimant to 125 weeks of benefits commencing at the conclusion of his healing period, July 30, 2015.

Claimant also seeks medical expenses as set forth in claimant's exhibits 16 and 17. 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. Iowa Code section 85.27 (2013).

Claimant is entitled to an order of reimbursement only if he has paid treatment costs; otherwise, to an order directing the responsible defendants to make payments directly to the provider. See, Krohn v. State, 420 N.W.2d 463 (Iowa 1988). Defendants should also pay any lawful late payment fees imposed by providers. Laughlin v. IBP, Inc., File No. 1020226 (App., February 27, 1995).

I have reviewed claimant's exhibits 16 and 17. The defendants have denied these expenses on the basis of reasonableness and authorization.

Claimant sought emergency treatment on September 10, 2015, following an acute, temporary exacerbation of his injury while working for another employer. I find that these expenses were reasonable. Furthermore, authorization is not a valid defense for emergency treatment. Claimant is therefore entitled to the expenses associated with that visit, as well as the mileage. Claimant also sought treatment with Mercy North Family Practice. This care was not authorized. Claimant has not met the requirements of the beneficial care doctrine to overcome the lack of authorization. Bell Bros. Heating & Cooling v. Gwinn, 779 N.W.2d 193 (Iowa 2010). As such, the remaining expenses are denied.

There is also an issue regarding the rate of compensation; average gross wages in particular.

Section 85.36 states the basis of compensation is the weekly earnings of the employee at the time of the injury. The various subsections of section 85.36 set forth methods of computing weekly earnings depending upon the type of earnings and employment.

The rate dispute in this case is not particularly well defined in this record. I find that the gross wage calculation prepared by the defendants in their discovery answers is the appropriate rate. (See Cl. Ex. 14, p. 99)

The final issue is penalty. Claimant seeks penalties for late payments based upon the underpayment of rate. Claimant's penalty benefit claim is based upon the statutory language contained at Iowa Code section 86.13(4), which provides:

> 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 in 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.

If weekly compensation benefits are not fully paid when due, section 86.13 requires that additional benefits be awarded unless the employer shows reasonable cause or excuse for the delay or denial. Robbennolt v. Snap-on Tools Corp., 555 N.W.2d 229 (Iowa 1996).

Delay attributable to the time required to perform a reasonable investigation is not unreasonable. Kiesecker v. Webster City Meats, Inc., 528 N.W.2d 109 (Iowa 1995).

It also is not unreasonable to deny a claim when a good faith issue of law or fact makes the employer's liability fairly debatable. An issue of law is fairly debatable if viable arguments exist in favor of each party. Covia v. Robinson, 507 N.W.2d 411 (Iowa 1993). An issue of fact is fairly debatable if substantial evidence exists which would support a finding favorable to the employer. Gilbert v. USF Holland, Inc., 637 N.W.2d 194 (Iowa 2001).

An employer's bare assertion that a claim is fairly debatable is insufficient to avoid imposition of a penalty. The employer must assert facts upon which the commissioner could reasonably find that the claim was "fairly debatable." Meyers v. Holiday Express Corp., 557 N.W.2d 502 (Iowa 1996).

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, 555 N.W.2d at 238.

Under the current statutory framework, the burden is on the claimant to demonstrate when a payment is due and that the payment was not made on time.

Once the claimant has proven the delay or denial, the burden shifts to the defendants to provide a reasonable excuse.

In this case, claimant seeks penalty for the denial of temporary disability payments from the time the claimant was laid off. In this record, the defendants have not presented any evidence as to why they refused to pay the claim when claimant was laid off in April 2015. The case may have become fairly debatable at the point where Dr. Mooney changed claimant's restrictions, allowing him to lift up to 40 pounds, an amount which exceeded the lifting requirements set forth in his job description. Nevertheless, this was never communicated to the claimant. No benefits were paid to him and no contemporaneous explanation was provided. He was simply laid off, while on work-related medical restrictions, with no explanation regarding benefits. A penalty is mandatory. Considering all of the appropriate factors in assessing the amount of penalty, I award the claimant a penalty of $1,000.00 to deter the defendants from engaging in this type of conduct in the future.

ORDER

THEREFORE IT IS ORDERED:

File No.: 5053307:

All weekly benefits shall be paid at the rate of three hundred and seventeen and 66/100 ($317.66).

Defendants shall pay the claimant healing period commencing May 1, 2015, through July 29, 2015.

Defendants shall pay the claimant one hundred and twenty-five (125) weeks of permanent partial disability benefits commencing July 30, 2015.

Defendants shall pay accrued weekly benefits in a lump sum.

Defendants shall pay interest on unpaid weekly benefits awarded herein as set forth in Iowa Code section 85.30.

Defendants shall pay medical expenses, including medical mileage, for claimant's emergency room visit at Story County Medical Center on September 10, 2015, as set forth in claimant's exhibits 16 and 17, subject to the limitations set forth in this decision.

Defendants shall pay a penalty in the amount of one thousand dollars ($1,000.00) for late payment of healing period benefits.

Defendants shall file subsequent reports of injury as required by this agency pursuant to rule 876 IAC 3.1(2).

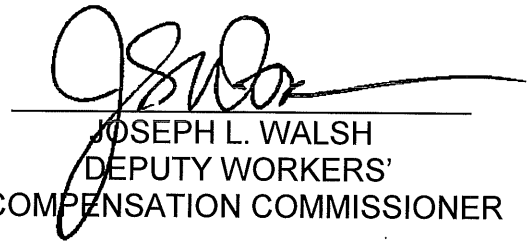
Costs are taxed to defendants.

File No. 5053308:

Claimant takes nothing.

Costs are taxed to defendants.

Signed and filed this 19th day of September, 2017.



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DEPUTY WORKERS'
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JLW/kjw

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.