BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

TARI SAILORS,	:	
Claimant,	:	
vs.	:	
	:	File No. 5002213
KIND & KNOX GELATIN, INC.,	:	
	:	A R B I T R A T I O N
Employer,	:	
	:	D E C I S I O N
and	:	
LIBERTY MUTUAL INSURANCE CO.,	:	
Insurance Carrier, Defendants.	:	HEAD NOTE NOS: 1802; 1803; 3002; 4000.2

STATEMENT OF THE CASE

Claimant, Tari Sailors, has filed a petition in arbitration and seeks workers' compensation benefits from Kind & Knox Gelatin, Inc. (Knox), employer, and Liberty Mutual Insurance Co., insurer, defendants for an injury occurring on July 7, 1999. The matter was heard by deputy workers' compensation commissioner, James F. Christenson, on March 10, 2004 in Sioux City, Iowa. The record in this case consists of defendants' exhibits A through G, claimant's exhibits 1 through 34, and the testimony of claimant, her husband, Kim Sailors, and Doug Ryan.

At hearing, claimant objected to defendants' exhibit A. Exhibit A is a vocational report from Helen Long, M.S., pages 1 through 3. Claimant objects to Exhibit A because it was served on claimant approximately 27 days prior to hearing and because, allegedly, Ms. Long uses an incorrect legal standard to determine loss of earning capacity.

The hearing assignment order in this case indicates that both parties will complete case preparation 30 days prior to hearing. When admissibility is in dispute, the completion date for case preparation is enforced under a prejudice standard. Claimant had nearly a month to prepare to rebut the opinions contained in Ms. Long's report. Claimant did bring a witness to hearing, Doug Ryan, who rebutted, in part, opinions offered in Exhibit A. In addition, the opinions of Ms. Long found in Exhibit A are facts to be considered by the undersigned, and are not legal conclusions. For those

reasons, the objections to Exhibit A are overruled and the exhibit is allowed in as part of the record.

ISSUES

The parties submitted the following issues for determination:

1. The extent of claimant's entitlement to temporary total/healing period benefits;

2. The extent of claimant's entitlement to permanent partial disability benefits pursuant to Iowa Code section 85.34(2)(u);

3. The rate of compensation;

4. Whether claimant is entitled to penalty benefits under Iowa Code section 86.13.

FINDINGS OF FACT

The deputy workers' compensation commissioner, having heard the testimony of the witnesses and considered the evidence in the record, finds that:

Tari Sailors was born September 8, 1955, making her 48 years old at the time of hearing. She is married with three adult children. The claimant went up to the 11th grade in high school and received her GED in 1975.

Claimant's work history includes work in a bank, as a grocery clerk, and as a clerical worker in an office. Claimant worked 21 years in production at IBP. In 1997 claimant began her employment with Knox.

Claimant, claimant's husband, and Doug Ryan, a union steward at Knox, all testified that Knox manufactured gelatin by processing beef bones and pork hides. Claimant testified that she has worked as a pork cook operator and as a bone cook operator. Claimant testified that at the time of her injury, she was employed as a long-term relief worker. Claimant testified a long-term relief worker covers for other employees who are absent. A long-term relief worker is required to learn how to perform all jobs at the Knox plant.

Claimant was working as a long-term relief worker on July 7, 1999. Claimant was working in the pork chop area performing clean up. Claimant testified she was working on a scaffold cleaning machinery used to chop pork skins. Claimant testified that she believed the machinery was turned off. She testified she grabbed a piece of skin on a rotating blade to clean it and her glove caught. She testified the blade severed her small, ring and almost all of her middle finger. Claimant testified she used her left hand to climb down the scaffold after severing her fingers. She testified she hurt her left shoulder climbing down the scaffold, but was in so much pain and shock from

the loss of her fingers that she did not notice her shoulder pain at the time of the injury. (Exhibit 1, page 3)

An investigation performed by Knox regarding the injury found claimant to have violated a plant safety rule and she was given a four-day suspension. (Ex. 4)

Claimant was taken by ambulance to Marian Health Center in Sioux City. She was then flown by helicopter to the University of Nebraska at Omaha Medical Center to have her fingers re-attached. (Ex. 2, p. 1) On July 7, 1999, Andrew Friedman, M.D., re-planted the ring and small finger of the right hand and revascularized, with repair of the digital nerves and a fracture, the middle finger. (Ex. 5, pp. 1 through 2)

On July 12, 1999, Dr. Friedman indicated that "vascularity did not survive the middle and small fingers" and they were removed. (Ex. 5, pp. 3 through 4)

On July 15, 1999, Dr. Friedman indicated the vascularity did not survive the right ring finger. At that time, the right ring finger was amputated and a revision of the right middle finger "stump" was performed. (Ex. 5, p. 5)

On July 17, 1999, claimant was discharged from the University of Nebraska Medical Center with amputation of the third, fourth, and fifth digits of the right hand. Claimant was prescribed Vicodin and Keflex, and advised to engage in no strenuous activity. (Ex. 5, p. 7)

Claimant continued to treat with Dr. Friedman in July through September of 1999 for the amputation of the right, middle ring, and small finger. On September 28, 1999, Dr. Friedman returned claimant to light duty with lifting restrictions. (Ex. 5, p. 11; Ex. 7, p. 1) Records indicate Dr. Friedman also discussed the possibility of a ring and middle finger extension to aid claimant in function. (Ex. 5, pp. 11 through 14)

On April 4, 2000, claimant saw Dennis Nitz, M.D., regarding pain in her left shoulder.

Records indicate the left shoulder injury was the result of using the left arm to climb down the scaffold during the July 7, 1999 injury and from overuse. Dr. Nitz diagnosed claimant as having left shoulder impingement. He prescribed physical therapy and continued use of over-the-counter ibuprofen. He also gave a 10-pound lifting restriction. (Ex. 7, p. 1)

On April 17, 2000, claimant returned to Dr. Nitz with continued complaints of left shoulder problems. Dr. Nitz diagnosed a left shoulder impingement and a cervical/trapezius strain. He advised continued use of over-the-counter ibuprofen and also prescribed Skelaxin. He also prescribed a home exercise program, heat to the neck, and continued lifting restrictions of 10 pounds. (Ex. 7, p. 2)

During the rest of May, claimant continued to treat with Dr. Nitz with little improvement. On May 26, 2000, Dr. Nitz referred claimant to Spencer Greendyke, M.D., an orthopedic surgeon. (Ex. 7, pp. 3 through 5)

Dr. Greendyke first saw claimant on June 9, 2000. He diagnosed claimant as having a left rotator cuff tear and set her up for an MRI. (Ex. 8, p. 1) A subsequent MRI revealed a rotator cuff tear. (Ex. 8, p. 2) On July 24, 2000, a left rotator cuff repair was performed. (Ex. 8, p. 2) Claimant was off work for this surgery from July 24, 2000 through September 19, 2000. (Exs. B and C)

On August 22, 2000, claimant returned to treat with Dr. Friedman for her amputated fingers. Dr. Friedman indicated claimant had attempted to cope and modify her activities of daily living to function within her injury. He also noted claimant had problems with her hands when pushing, pulling, and gripping. He noted she was unable to participate in prior social recreational activities like racquet sports, sewing, crafts, and yard work. (Ex. 5, p. 15)

Claimant underwent physical therapy for her left shoulder from August of 2000 through early March of 2001. (Ex. 8, pp. 3 through 11)

On November 28, 2000, claimant saw Douglas Martin, M.D., for a second opinion regarding continued problems with her neck and left shoulder. Dr. Martin diagnosed claimant as rehabilitating well from a post rotator cuff repair and suffering from a cervical and trapezius myofascial pain syndrome. Dr. Martin prescribed Celebrex and Zanaflex. He also recommended physical therapy for the cervical and trapezius problems. (Ex. 9, pp. 1 through 3)

Claimant continued to treat with Dr. Martin for her shoulder pain in January through March of 2001. Records indicate that during this time claimant continued to complain of pain in the proximal area of her clavicle despite physical therapy and medication. Medical records from this period indicate frustration on both the part of Dr. Martin and claimant to improve claimant's complaints of pain in her clavicle area. On March 6, 2001, Dr. Martin found claimant to be at maximum medical improvement (MMI) for her shoulder problems despite her continued complaints of clavicle pain. At that time, Dr. Martin returned her to work with no restrictions. (Ex. 9, pp. 4 through 8)

On June 12, 2001, Dr. Friedman found claimant to have a 74 percent permanent partial impairment to her middle finger, an 86 percent permanent partial impairment to her ring finger, and a 90 percent permanent partial impairment to her little finger due to her work-related amputation. (Ex. 6, p. 5) Dr. Friedman noted that when these impairments were totaled and combined, they equaled a 33 percent functional impairment to her right hand. This rating also converted into a 30 percent functional impairment to claimant's right upper extremity. (Ex. 6, p. 2)

On August 15, 2001, claimant saw R. Michael Gross, M.D., with continuing complaints of pain in her left shoulder. Dr. Gross diagnosed claimant as having shoulder instability. Dr. Gross noted:

> I would say that her logical and underlying problem is the shoulder is unstable and that would make sense if you thought of a series of traction injuries trying to get down from a scaffold just pulling on the arm. . . . I believe the rotator cuff is probably healed but inflamed due to overuse and persistent instability of the shoulder. I believe that this injury did occur as a result of the July 7, 1999 injury to her right hand. I believe that there is permanent impairment associated with this. I believe that permanent impairment with or without surgery is 15 percent of the affected left upper extremity.

(Ex. 10, p. 3)

Dr. Gross recommended arthroscopic evaluation with a probable arthroscopic stabilization process. (Ex. 10, p. 4)

On April 1, 2002, claimant was referred to Steven R. Brown, M.D., for a second opinion for her shoulder. Dr. Brown agreed that claimant would be a good candidate for arthroscopic evaluation with a probable arthroscopic stabilization process. (Ex. 14, pp. 1 through 3)

On July 3, 2002, claimant had a left shoulder arthroscopy with stabilization. (Ex. 15; Ex. 10, p. 6) Claimant treated with Dr. Gross for her left shoulder problems from July of 2002 through February of 2003. (Ex. 10, pp. 7 through 12) She was off work for her second shoulder surgery from July 9, 2002 through August 12, 2002. (Exs. B and C)

On February 12, 2003, Dr. Gross noted:

> She is doing very well. Although she is much better than before surgery she is not well. She is real pleased with her left shoulder. . . . She has some mild persistent weakness and crepitance in the shoulder. She has reached her maximum level of improvement. She has been dismissed from care. She has a 15% permanent disability of her left shoulder associated with her instability and rotator cuff tear that required the two surgeries.

(Ex. 10, p. 13) See also (Ex. 11, p. 1)

On September 27, 2003, claimant underwent a functional capacity evaluation (FCE) with Randy Presler, Physical Therapist. Based on that FCE, Mr. Presler found claimant was in the light medium to medium physical demand category. Based upon that FCE, Mr. Presler recommended the following restrictions:

> Prolonged holding/reaching postures using the left arm fully outstretched away from the body or above the shoulder height should be avoided until improved left shoulder and scapular muscle strength is achieved.
>
> Pushing/pulling tasks requiring use of the left arm above shoulder height should be minimized because of reduced shoulder and scapular muscle strength. She is capable of OCCASIONAL pushing or pulling tasks using both arms below shoulder height with a force of 30 pounds and FREQUENT pushing or pulling with a force of 15 pounds.
>
> She is capable of reaching (overhead or forward) on a FREQUENT basis using the left arm. Right arm reaching is not limited.
>
> She should avoid quick or jerking left arm movements.
>
> Heavy gripping/squeezing tasks, some types of assembly tasks and tasks requiring 3 finger pinching would be limited using the right hand secondary to her finger amputations.

(Ex. 16, p. 3)

The FCE indicates that at the time of the tests, claimant still complained of "constant" left shoulder pain. Claimant also noted her severed fingers were overly sensitive and hurt when she bumped them. (Ex. 16, pp. 2 through 5)

In a letter dated October 20, 2003, Dr. Gross agreed with those restrictions. (Ex. 12, p. 1)

Rick Ostrander, L.P.C., C.R.C., C.D.M.S., performed a vocational evaluation on claimant for purposes of this hearing. Mr. Ostrander opines that because of her injury, claimant has a 50 percent loss of access to the labor market. He also opines that claimant could expect an approximate 70 percent loss of wages if she were forced to find new employment. (Ex. 17, pp. 1 through 9)

Helen Long, M.S., also performed a vocational evaluation of Ms. Sailors for defendants. Ms. Long agreed with Mr. Ostrander that claimant lost access to approximately 50 percent of the labor market. However, because claimant continued to work at Knox, Ms. Long opines that claimant sustained "no loss of her ability to earn wages as the result of her injuries." (Ex. A, pp. 1 through 3)

Doug Ryan is the day crew shift union steward at Knox. He testified that gelatin is made at Knox by processing either beef bones or pork hide. He testified that with the recent Mad Cow Disease scare, several clients are not interested in getting bone grade gelatin. Mr. Ryan testified that this decrease in customers resulted in layoffs, ongoing at the time of the hearing, affecting approximately 17 employees at Knox.

Both Mr. Ryan, claimant and her husband testified that prior to layoffs, claimant worked in the bone filter area. Claimant and Mr. Ryan testified that claimant's job was eliminated as a result of the layoffs. Mr. Ryan and claimant testified that pursuant to collective bargaining agreements, claimant was able to take, or "bump," the job of an employee with less seniority. Claimant bumped into a pork dryer job. Mr. Ryan and claimant testified that claimant would have to be able to adequately perform the duties of a pork dryer within five days or she would be terminated. Claimant and Mr. Ryan both testified that the pork dryer job was more physically demanding than the job claimant held previously.

At the time of hearing claimant testified she had one more day to prove she could adequately perform the duties of a pork dryer. She testified the job was very difficult and physically demanding. She testified that if she failed to show she could perform the job, she would be laid off.

Claimant testified her job at Knox requires her to open and shut large valves, and lift 50-pound bags. She testified that because of the amputation and the left shoulder injury, she has difficulty with these tasks. Claimant testified that her amputated finger ends are sensitive to both cold and heat. She testified that her job requires her to be exposed to variances in temperature.

Claimant testified because of her amputated fingers, she can no longer sew, cross-stitch or do most crafts. She testified that handwriting for prolonged periods is also difficult. Claimant testified that if she lost her job at Knox, she would not be able to return to work at IBP.

Claimant's husband testified that prior to her injury, claimant was very active, and played golf and racquet sports. He testified that she no longer golfs or plays racquet sports. He testified that claimant cannot lift her grandchildren. Mr. Sailors testified that at the end of the workweek, his wife is often fatigued due to her work injuries. He testified that the first several years following the accident were "tough" for claimant but that claimant has persevered and adjusted.

In the 13 weeks prior to her July 7, 1999 injury, claimant worked the following hours:

Period Ending	Regular Rate	x	Hours	=	Gross
7/3/99	$16.52	x	44	=	$726.88
6/26/99	$16.52	x	33.9	=	$560.03t
6/16/99	$14.41	x	48	=	$691.68
6/12/99	$14.41	x	24	=	$345.84
6/5/99	$14.41	x	44 (inc. hol)	=	$634.04
5/29/99	$16.82	x	40	=	$672.80
5/22/99	$16.32	x	40	=	$652.80
5/15/99	$13.98	x	36	=	$503.28

5/8/99	$13.98	x	72	=	$1,006.56
5/1/99	$13.98	x	49	=	$685.02
4/24/99	$12.88	x	36	=	$463.68
4/17/99	$12.88	x	36	=	$463.68
4/10/99	$12.88	x	44	=	$566.72

(Ex. 33)

On May 20, 2003, claimant's counsel wrote defendant-insurer requesting that interest be paid for 41 weeks of benefits paid. (Ex. 26) On October 10, 2003, claimant's counsel again wrote defendant-insurer requesting an additional 28.3 weeks of permanent partial disability benefits be paid. This request is based on the contention that the insurer owed permanency benefits based on the combined values of the left shoulder and right hand injury. (Ex. 27, p. 1) On November 17, 2003, claimant's counsel wrote defendants' counsel reiterating the request for payment of interest. The letter also contends the insurer underpaid claimant $29.51 per week and owed a total of $3,877.91 in interest. This difference in weekly benefits is due to the difference in opinion regarding calculation of claimant's weekly rate. (Ex. 28, pp. 1 through 2)

CONCLUSIONS OF LAW

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. of App. P. 6.14(6).

Section 85.34(1) provides that healing period benefits are payable to an injured worker who has suffered permanent partial disability until (1) the worker has returned to work; (2) the worker is medically capable of returning to substantially similar employment; or (3) the worker has achieved maximum medical recovery. The healing period can be considered the period during which there is a reasonable expectation of improvement of the disabling condition. See Armstrong Tire & Rubber Co. v. Kubli, Iowa App 312 N.W.2d 60 (1981). Healing period benefits can be interrupted or intermittent. Teel v. McCord, 394 N.W.2d 405 (Iowa 1986).

It is undisputed that claimant was initially off work for her amputation injury from July 8, 1999 until October 4, 1999. (Ex. 5, p. 11; Ex. B) Claimant was off work for her first shoulder surgery from July 24, 2000 up to September 19, 2000. (Ex. 8, p. 2; Exs. B and C) Claimant was off work for her second shoulder injury from July 9, 2002 through August 12, 2002. (Exs. B and C) She is entitled to healing period benefits for these periods of time.

The next issue to be determined is the extent of claimant's entitlement to permanent partial disability benefits under section 85.34(2)(u).

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 Ry. Co., 219 Iowa 587, 258 N.W.2d 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 Serv. 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.

Industrial disability compensates loss of earning capacity as determined by evaluation of the injured worker's functional impairment, age, intelligence, education, qualifications, experience and ability to engage in employment for which the employee is suited. Second Injury Fund of Iowa v. Shank, 516 N.W.2d 808, 913 (Iowa 1994) The focus is on the ability of the worker to be gainfully employed and rests on comparisons of what the injured worker could earn before the injury and what the same person could earn after the injury. Second Injury Fund of Iowa v. Nelson, 554 N.W.2d 258, 266 (Iowa 1995) Loss of earning capacity is measured in relation to the competitive labor market as a whole and is not limited to the person's current position and employer. Weikert v. Maytag, File No. 5000339 (App. January 15, 2004).

Claimant was 48 years old at the time of hearing. She has a GED. She has been employed with Knox since 1997. Prior to that, claimant worked for 21 years at IBP and spent most of her employment there in production. She has suffered an amputation to three fingers on her dominant hand. She has received a functional impairment rating of a combined value of 33 percent of her right hand. Claimant has also undergone two shoulder surgeries and has a 15 percent functional impairment as a result of the shoulder injury. Despite the physical difficulty and trauma associated with her injuries, claimant has struggled to return to her job at Knox.

Claimant has work restrictions that prohibit her from performing a number of factory or production jobs. She cannot return to her former jobs at IBP. The amputation of the fingers on her dominant hand and the restrictions she has with her left shoulder limit her access to the job market in the event she would be laid off at Knox. Layoffs at Knox were occurring at the time of hearing.

Two experts have opined regarding the vocational impact on claimant regarding her July 7, 1999 injuries. Helen Long opines that claimant has no loss of her ability to earn wages as a result of her injuries. Ms. Long has not met claimant. It is unclear

from Ms. Long's report which records she reviewed. Ms. Long's curriculum vitae was not made a part of the record and it is not clear what her background is regarding vocational evaluations.

Mr. Ostrander also evaluated claimant. Mr. Ostrander performed a comprehensive review of claimant's work history and her job injury and medical records related to that injury. Mr. Ostrander personally interviewed claimant. He performed a detailed transferable job skills analysis. He relied on an automated transferable skills analysis utilizing local job labor data. Mr. Ostrander opines that claimant has lost access to 50 percent of the local labor market. He opines that if claimant lost her job, she would face an approximate 70 percent reduction in wage level. Mr. Ostrander's curriculum vitae indicates he has served as a vocational evaluation consultant with the federal government since 1985. He is certified in Nebraska as a vocational rehabilitation counselor in workers' compensation cases.

Because of his background in the area of vocational rehabilitation counseling, because he performed a more thorough review of claimant's history and job injury and because his review of transferable job skills are far more comprehensive, I find his opinions on claimant's access to the job market and potential wage loss more convincing than that of Ms. Long's.

Considering all of the factors of industrial disability, it is concluded that claimant has sustained a 70 percent industrial disability.

The next issue is the rate of compensation. Claimant claims her gross earnings were $704.56 per week. Defendants contend claimant's gross earnings were $603.58 per week.

Section 85.36 indicates 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 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 to be replaced by the closest previous week having earnings that fairly represent the employee's earnings. Section 85.36(6); Hanigan v. Hedstrom Concrete Products Inc., 524 N.W.2d 158 (Iowa 1994); Thilges v. Snap-On Tools, 531 N.W.2d 644 (Iowa 1995).

From reviewing Exhibit F, Exhibit 33, and the calculation shown in claimant's post hearing brief, it appears the parties agree to the wages earned and hours worked by

claimant. From review of these records, it appears the dispute between the parties is how are these figures are used to calculate claimant's gross weekly earnings. Defendants contend the total wages are to be added and divided by 12. Claimant contends that the rate be determined by only using those weeks that are representative of claimant's normal hours.

Claimant was in a full-time position with Knox. Claimant's gross earnings should be calculated pursuant to Iowa Code 85.36(6). Neither party submitted evidence of earnings beyond the 13-week period preceding the injury. For that reason, it is not possible to look back to claimant's earning history, before her injury, to find a total of 13 weeks that reflect claimant's customary 40-hour workweek. For that reason, any week of the 13 weeks preceding the injury, that does not fairly reflect the employee's customary 40-hour workweek will be disregarded as not being representative of her normal hours. According to claimant's Exhibit 33, and claimant's post hearing brief, claimant's gross earnings were calculated at $704.56. According to the rate book published by the workers' compensation commission, the weekly rate for a married person with three exemptions and a gross weekly wage of $704.56 is $445.28.

The final issue to be determined is penalties.

Section 86.13 permits an award of up to 50 percent of the amount of benefits delayed or denied if a delay in commencement or termination of benefits occurs without reasonable or probable cause or excuse. The standard for evaluating the reasonableness of defendants' delay in commencement or termination is whether the claim is fairly debatable. Where a claim is shown to be fairly debatable, defendants do not act unreasonably in denying payment. See Stanley v. Wilson Foods Corp., File No. 753405 (App. August 23, 1990); Seydel v. Univ. of Iowa Physical Plant, File No. 818849 (App. November 1, 1989). Imposition is mandatory when there has been any unexplained delay or denial. The burden of showing cause for any delay or denial is on the employer. Christensen v. Snap-On Tools Corp., 554 N.W.2d 254 (Iowa 1996).

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.

(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 Custom 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.
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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 1999).

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 makes essentially three arguments why a penalty should be assessed against defendants. First, claimant argues that because it was obvious claimant would suffer some permanency due to the amputation of three fingers, defendants should have paid permanent partial disability benefits to claimant when she returned to work. Claimant contends it was an unreasonable delay of the payment of permanency benefits for defendants to wait until Dr. Friedman rated claimant's finger injury in July of 2001, nearly two years after the injury. (Claimant's post hearing brief, page 6)

Iowa Code section 85.34(1) indicates that healing period shall continue until the employee has returned to work or it is medically indicated that a significant improvement from the injury is not anticipated or until the employee is medically capable of returning to employment substantially similar to the employment in which the employee was engaged at the time of the injury, whichever comes first. Iowa Code section 85.34(2) indicates that permanent partial disability benefits shall begin at the termination of healing period benefits. The record indicates the claimant was released to return to work by Dr. Friedman full time on October 10, 1999.

As detailed, claimant suffered an amputation injury to three fingers on her dominant hand. Defendants offer no explanation why, given claimant had obvious

permanency, that they failed to pay any permanency benefits until after a functional rating was obtained by Dr. Friedman, approximately two years after the injury. Given the nature of claimant's amputation injury, the undersigned finds that there was no reasonable basis for contending that claimant had not sustained some degree of permanent disability. Because no excuse is shown for a significant delay in the commencement of permanency benefits, defendants shall pay a 50 percent penalty for the delay.

Defendants paid claimant 61.7 weeks of permanent partial disability benefits for the functional impairment to the fingers. (Ex. B) Using the rate of $445.28 per week, a 50 percent penalty would total $13,736.89.

Second, claimant contends that defendants should have paid claimant permanency benefits that exceeded the functional rating received by claimant. Claimant argues that defendant should have, at least, paid permanent partial disability benefits based upon the report from Ms. Long.

Functional loss is one of the factors to be used in determining industrial disability. Industrial disability may be greater than, less than, or equal to the functional loss. Dowell v. Wagler d/b/a Ed's Super Value, File No. 880145 (App. May 26, 1994).

As detailed above, the undersigned believes claimant has sustained a significant industrial disability. However, claimant did return to work at Knox. At the time of hearing, she earns a wage that exceeds her wages at the time of injury. Claimant contends, in her post hearing brief, that the opinions of Ms. Long should be ignored because there is no record of her qualifications as an expert, and because she fails to use a proper legal standard for assessing loss of earning capacity. (Claimant's Post Hearing Brief, pages 1 through 2) Later in her brief, claimant asks the commissioner to penalize defendants for failure to pay industrial disability based upon the opinions of an expert that claimant argues should be ignored. (Claimant's Post Hearing Brief, p. 7) Claimant has not proved she is entitled to penalty benefits for defendants' failure to pay a particular amount of permanent partial disability benefits.

Third, claimant contends that defendants should be penalized for failure to pay the proper rate.

The first sentence of Iowa Code section 85.36(6) states, in relevant part, that weekly earnings for an employee paid on a daily or hourly basis shall be computed by dividing by 13 the earnings the employee earned in the 13 consecutive calendar weeks preceding the injury. Based on Exhibit F, this appears to be the way defendants calculated claimant's rate. Given the language used in Iowa Code section 85.36(6), defendants' error in calculating the rate is fairly debatable. For that reason, claimant has failed to prove penalty is due for defendants' error in calculating the rate.

ORDER

THEREFORE, IT IS ORDERED:

That defendants shall pay healing period benefits at the rate of four hundred forty-five and 28/100 dollars ($445.28) from July 8, 1999 to October 4, 1999; from July 24, 2000 to September 19, 2000; and from July 9, 2002 to August 12, 2002.

That defendants shall pay three hundred fifty (350) weeks of permanent partial disability benefits at the rate of four hundred forty-five and 28/100 dollars ($445.28) beginning October 10, 1999.

That defendants shall pay accrued benefits in a lump sum.

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

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

That defendants shall also pay thirteen thousand, seven hundred and thirty-six and 89/100 dollars ($13,736.89) in penalty benefits as described herein.

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

That defendants shall pay the costs of this matter including the cost of filing a transcript with the workers' compensation commission.

Signed and filed this _____4th____ day of May, 2004.

_____
JAMES F. CHRISTENSON.
DEPUTY WORKERS' COMPENSATION
COMMISSIONER

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