BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

LENYN WELSH,	FILED	File No. 5053006
Claimant,	APR 30 2019	ARBITRATION DECISION
vs.	WORKERS' COMPENSATION	
ALL IN ONE CONSTRUCTION,		
Employer,		
Defendant.		Head Notes: 1802, 1803, 2500, 3000, 4000

STATEMENT OF THE CASE

Claimant, Lenyn Welsh, filed a petition in arbitration seeking workers' compensation benefits from All in One Construction, the defendant employer, as a result of injuries sustained on or about September 22, 2014 that arose out of and in the course of employment. This file originally included defendant Second Injury Fund, however, the claim involving the Second Injury Fund was resolved prior to the hearing, and the matter proceeded to hearing against the employer only. The insurance carrier is unknown.

On May 11, 2017, claimant filed an application for entry of default against defendant based on their failure to file an answer. On July 7, 2017, a default judgment was entered against the employer. The hearing on damages was scheduled for February 21, 2019, and occurred by telephone. The proceedings were recorded digitally, and constitute the official record of the proceeding. Claimant filed a post-hearing brief on or about March 28, 2019, and the matter was considered fully submitted at that time.

The record consists of exhibits 1 through 7, which are described in the documents as both "claimant's exhibits" and "joint exhibits." The exhibits will be referred to in this decision exclusively as "claimant's exhibits." Claimant provided testimony.

Claimant submitted a Hearing Report. But, because this is a hearing on damages following entry of default against the employer, the employer is not participating and is unable to indicate their stipulation or dispute and therefore the hearing report will be disregarded and an assessment of damages will be considered as set forth in the issues below based on claims made by claimant.

ISSUES

1. The extent of claimant's entitlement to healing period benefits. Claimant asserts entitlement to benefits for the period of September 22, 2014 through January 21, 2015.

2. The extent of claimant's entitlement to permanent partial disability benefits concerning claimant's right foot versus entitlement to industrial disability.

3. Rate.

4. Entitlement to medical expenses, including mileage.

5. Entitlement to reimbursement under Iowa Code section 85.39.

6. Entitlement to alternate care under Iowa Code section 85.27.

7. Entitlement to penalty benefits under Iowa Code section 86.13.

8. Costs.

FINDINGS OF FACT

Claimant, Lenyn Welsh, was 60 years old at the time of the hearing. On September 22, 2014, the date of the work injury, claimant was an employee of All in One Construction and was married with one child. (Testimony)

Claimant obtained his G.E.D. in 1975. He was enlisted in the U.S. Army from 1975 to 1977. His work experience involves factory work, construction of homes and bridges, and working in meat processing facilities. In 1999 claimant had a stroke and began receiving Social Security Disability benefits. He has continued to receive those benefits, although he has been able to return to work to some degree. Claimant began working for All in One Construction, the defendant employer a few months before the September 22, 2014 work injury.

On September 22, 2014, claimant was hanging siding on a home while standing on a plank that was resting on two ladders. The ladders fell and claimant fell to the ground landing on his right heel. (Exhibit 2-14; Testimony) Claimant had immediate difficulty walking. A co-worker assisted him with walking and his foreman took him to the hospital.

Claimant was taken to Mercy Medical Center in Dubuque, Iowa. (Ex. 2-14) He was diagnosed with a "comminuted intraarticular displaced calcaneus fracture." (Ex. 2-17) He was advised that he should be admitted "for strict elevation and icing." (Ex. 2-17) Claimant left against medical advice and returned by ambulance two days later when his pain was unbearable. (Ex. 2-20; Ex. 3-29)

Claimant's condition was deemed to present too high of a risk for surgery and he received nonsurgical treatment, including splints and casts. (Ex. 4-38) Claimant testified that he understood a potential risk of surgery included potentially losing his foot. (Testimony) Judson Ott, M.D. stated that "with or without surgery, he is likely to have some disability related to this, that he is likely to have a limp, have some hindfoot pain, development of arthritis and they understand and accept this." (Ex. 4-38)

On October 6, 2014, claimant was placed in a short leg cast. (Ex. 4-38) On October 22, 2014, claimant was taken out of the cast and placed in a boot. (Ex. 4-40) On November 24, 2014, claimant was noted to have "satisfactory ankle range of motion." (Ex. 4-41) On December 24, 2014, he was noted to have minimal discomfort, and the treating physician stated, "His subtalar motion actually is amazingly good considering his fracture. In retrospect it was clearly a good decision to not perform surgical treatment . . . ." (Ex. 4-46) On January 21, 2015, claimant was noted to be fully weight bearing with "some discomfort, but nothing dramatic," and he is "back into a regular shoe." (Ex. 4-49) At that time, claimant had reasonable subtalar range of motion and no significant swelling.

On May 18, 2015, claimant was seen in follow-up for his calcaneus fracture and reported that he had been in a motor vehicle accident, which resulted, "by his account, in a pelvic fracture, rib fractures and a brain injury." (Ex. 4-52) Claimant reported "using a cane because of his pelvic fracture. He says he also has some soreness in his heel but the pelvic fracture is a more significant issue." (Id.)

However, by October 1, 2015, claimant was referred to Dan Meyer, PA-C at the Regional Medical Pain Clinic "for headaches," and "right heel pain that is daily and constant" related to his calcaneus fracture. (Ex. 5-54) At that time, claimant reported using his cane for his right heel pain. (Id.)

Claimant seeks healing period benefits and states that he was off work from September 22, 2014 through reaching maximum medical improvement (MMI) on January 15, 2015, when claimant was taken out of his walking boot and allowed to wear his regular shoes. (Claimant's Post-Hearing Brief, p. 13)

Claimant has not returned to work for All in One Construction, although he also testified that he was never told that he was fired. (Testimony) Claimant testified that the owner of All in One Construction told him that he would "take care of claimant," concerning this injury, but has not. (Testimony) Claimant has not worked since the injury.

I find that claimant did not work from the date of injury through January 15, 2015. I also find that claimant was not fully weight bearing until January 15, 2015, and was therefore unable to return to work that was substantially similar to the type of work that claimant was employed in at the time of the injury. I further agree with claimant and find that he likely reached MMI on January 15, 2016, when he was taken out of the boot and

was allowed to be fully weight bearing on the injured right foot. The period of September 22, 2014 to January 15, 2015 is 16 weeks and 4 days, or 16.571 weeks.

At the time of the hearing claimant testified credibly that he no longer had any pain from the pelvic fracture from the motor vehicle accident and that he healed from that incident without any complications or ongoing issues or pain.

Claimant also credibly testified that he continued to have constant pain in his right heel and regular swelling in his right foot. Standing and walking causes increased pain and swelling, sometimes to the extent that putting on his sock and shoe is difficult. He continues to take hydrocodone for pain and wear compression socks. Claimant frequently uses a cane and walks with a limp. He testified that he can only stand for about 30 minutes before he needs to change position. He can walk about 50 yards without his cane, and about 100 yards with his cane.

He does not believe that he has any skills or qualifications to do an office-type job that would allow him to sit for a majority of the work day.

Claimant did not testify to any pain, swelling or other symptoms beyond the right foot and ankle. Claimant did testify that he walks with a limp, but expressed no symptoms of pain or problems with his hips, low back or any other part of his body that may invade the body as a whole. I find the situs of the injury to be limited to the right lower extremity, based on the medical records presented and claimant's testimony.

There are no medical opinions concerning the extent of permanent impairment. However, Dr. Ott, claimant's treating physician stated that claimant is "likely to have some disability related to this, that he is likely to have a limp . . . some hindfoot pain," and "development of arthritis. . . ." (Ex. 4-38)

Considering claimant's reliance on the use of a cane, I note that Table 17-5 of the American Medical Association Guides to the Evaluation of Permanent Impairment, Fifth Edition, at page 529, provides for a 20 percent impairment to the whole person for moderate gait derangement, which requires routine use of a cane. However, as found above, I have determined that the situs of the injury is limited to the right lower extremity. Therefore, I note that a 20 percent whole body impairment rating converts to 49 to 51 percent impairment of the lower extremity according to Table 17-3 of the AMA guides, at page 527. Choosing the center of that range, I find that claimant has sustained 50 percent permanent impairment to the right lower extremity. I note that 50 percent of 220 weeks (220 weeks is the maximum value of the right lower extremity) is 110 weeks.

I find based on claimant's unrebutted testimony that while working for All in One Construction, claimant earned twelve dollars ($12.00) per hour and worked about 30 hours per week, for an average weekly wage of $360.00.

I find that based on claimant's testimony he was married with one dependent child at the time of the work injury and is entitled to an exemption status of M-3 for purposes of rate calculation.

I find that the medical expenses set forth in Exhibit 1 are fair, reasonable and appropriate to treat this work injury.

I find that claimant did not obtain a specific opinion concerning permanent impairment and that no physician retained employer offered an opinion of permanent impairment.

Claimant testified that a co-worker assisted him after he fell at work and his foreman took him to the hospital. He also testified that the owner told claimant he would "take care" of this injury, but did not. (Testimony) I find that defendant employer had notice of the injury less than 90 days after the injury occurred.

I find that claimant was paid no benefits for this injury, including healing period and permanent partial disability benefits.

I further find that claimant has been provided no medical benefits, and the failure to provide medical care for this injury is unreasonable.

There is no evidence that the defendant employer conducted any investigation or contemporaneously relied upon any investigation in the denial of the claim. There is no evidence that defendant, at any time, communicated to claimant the basis for their denial of the claim.

There is no evidence that the defendant employer had workers' compensation insurance in place at the time of this work injury.

CONCLUSIONS OF LAW

1. Healing Period.

Healing period benefits are payable to an employee who has sustained a permanent partial disability "beginning on the first day of disability after the injury, and until the employee has returned to work or it is medically indicated that 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 injury, whichever occurs first." Iowa Code section 85.34(1)

In this case, I have found above that claimant did not work following the work injury on September 22, 2014. I also found that claimant likely reached MMI on January 15, 2015 and that he was unable to return to substantially similar employment until that date.

I conclude that claimant is entitled to healing period benefits for the period of September 22, 2014 to January 15, 2015.

2. Permanent Partial Disability.

Under the Iowa Workers' Compensation Act, permanent partial disability is compensated either for a loss or loss of use of a scheduled member under Iowa Code section 85.34(2)(a)-(t) or for loss of earning capacity under section 85.34(2)(u). The extent of scheduled member disability benefits to which an injured worker is entitled is determined by using the functional method. Functional disability is "limited to the loss of the physiological capacity of the body or body part." Mortimer v. Fruehauf Corp., 502 N.W.2d 12, 15 (Iowa 1993); Sherman v. Pella Corp., 576 N.W.2d 312 (Iowa 1998). The fact finder must consider both medical and lay evidence relating to the extent of the functional loss in determining permanent disability resulting from an injury to a scheduled member. Terwilliger v. Snap-On Tools Corp., 529 N.W.2d 267, 272-273 (Iowa 1995); Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417, 420 (Iowa 1994).

An injury to a scheduled member may, because of after effects or compensatory change, result in permanent impairment of the body as a whole. Such impairment may in turn be the basis for a rating of industrial disability. It is the anatomical situs of the permanent injury or impairment which determines whether the schedules in section 85.34(2)(a) - (t) are applied. Lauhoff Grain v. McIntosh, 395 N.W.2d 834 (Iowa 1986); Blacksmith v. All-American, Inc., 290 N.W.2d 348 (Iowa 1980); Dailey v. Pooley Lumber Co., 233 Iowa 758, 10 N.W.2d 569 (1943). Soukup v. Shores Co., 222 Iowa 272, 268 N.W. 598 (1936).

Compensation for permanent partial disability shall begin at the termination of the healing period. Section 85.34. Having determined above that healing period in this case ceases on January 15, 2015, I conclude that the commencement date for permanent partial disability benefits is January 16, 2015.

In this case, claimant argues that he has an altered gait as a result of the foot injury and that based on the altered gait alone, he is entitled to compensation as an industrial disability. However, claimant puts forth no evidence of the effect of the altered gait on any portion of his body that would involve the body as a whole. Claimant does not assert that he has sustained any permanent impairment to his hips or low back as a result of the altered gait. Claimant did not testify to any pain or problems in his hips or low back. Rather, he stated clearly that his pain and swelling are in his right foot and ankle area. I have found above that the situs of this injury is limited to claimant's right lower extremity. Therefore, the permanency of the injury is also limited to the right lower extremity.

Where an injury is limited to scheduled member the loss is measured functionally, not industrially. Graves v. Eagle Iron Works, 331 N.W.2d 116 (Iowa 1983).

The courts have repeatedly stated that for those injuries limited to the schedules in Iowa Code section 85.34(2)(a-t), this agency must only consider the functional loss of the particular scheduled member involved and not the other factors which constitute an "industrial disability." Iowa Supreme Court decisions over the years have repeatedly cited favorably the following language in the 66-year-old case of Soukup v. Shores Co., 222 Iowa 272, 277; 268 N.W. 598, 601 (1936):

> [t]he legislature has definitely fixed the amount of compensation that shall be paid for specific injuries . . . and that, regardless of the education or qualifications or nature of the particular individual, or of his inability . . . to engage in employment . . . the compensation payable . . . is limited to the amount therein fixed.

Our court has even specifically upheld the constitutionality of the scheduled member compensation scheme. Gilleland v. Armstrong Rubber Co., 524 N.W.2d 404 (Iowa 1994). Permanent partial disabilities are classified as either scheduled or unscheduled. A specific scheduled disability is evaluated by the functional method; the industrial method is used to evaluate an unscheduled disability. Graves, 331 N.W.2d 116; Simbro v. DeLong's Sportswear 332 N.W.2d 886, 887 (Iowa 1983); Martin v. Skelly Oil Co., 252 Iowa 128, 133, 106 N.W.2d 95, 98 (1960).

I have found above for the reasons there stated that claimant has sustained a 50 percent permanent impairment to his right lower extremity, which is 110 weeks of permanent partial disability benefits.

3. Rate.

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

Iowa Code section 85.36 sets forth the basis for determining an injured employee's compensation or rate. Mercy Med. Ctr. v. Healy, 801 N.W.2d 865, 870 (Iowa Ct. App. 2011). The statute expressly provides the determination is made using the last thirteen consecutive calendar weeks immediately preceding the injury. Iowa Code § 85.36(6). Under the statute,

> The basis of compensation shall be the weekly earnings of the injured employee at the time of the injury. Weekly earnings means gross salary, wages, or earnings of an employee to which such employee would have been entitled had the employee worked the customary hours for the full pay period in which the employee was injured, as regularly required by the employee's employer for the work or employment for which the employee was employed, computed or determined as follows and then rounded to the nearest dollar:

* * * *

> 6. In the case of an employee who is paid on a daily or hourly basis, or by the output of the employee, the weekly earnings shall be computed by dividing by thirteen the earnings, including shift differential pay but not including overtime or premium pay, of the employee earned in the employ of the employer in the last completed period of thirteen consecutive calendar weeks immediately preceding the injury. If the employee was absent from employment for reasons personal to the employee during part of the thirteen calendar weeks preceding the injury, the employee's weekly earnings shall be the amount the employee would have earned had the employee worked when work was available to other employees of the employer in a similar occupation. A week which does not fairly reflect the employee's customary earnings shall be replaced by the closest previous week with earnings that fairly represent the employee's customary earnings.

Id. The statute defines "gross earnings" as "recurring payments by employer to the employee for employment, before any authorized or lawfully required deduction or withholding of funds by the employer, excluding irregular bonuses, retroactive pay, overtime, penalty pay, reimbursement of expenses, expense allowances, and the employer's contribution for welfare benefits," and "pay period" as "that period of employment for which the employer customarily or regularly makes payments to employees for work performed or services rendered." Id. § 85.61(3), (5).

I have found above based on claimant's unrebutted testimony that at the time of the injury, he earned twelve dollars ($12.00) per hour and worked about 30 hours per week, for an average weekly wage of $360.00. I have also found above that claimant's applicable exemption status for rate purposes is M-3.

Considering the injury date of September 22, 2014, I refer to the Iowa Workers' Compensation Manual for the period of July 1, 2014 through June 30, 2015. On page 35, of said manual, the average weekly wage of $360.00 with an exemption status of M-3 produces a weekly workers' compensation rate of $259.34. I conclude that two hundred fifty-nine and 34/100 dollars ($259.34) is the correct applicable rate in this case.

4. Medical Expenses and Alternate Medical Care.

a) Medical Expenses.

The employer shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance, and hospital services and supplies for all conditions compensable under the workers' compensation law. The employer shall also allow reasonable and necessary transportation expenses incurred for those services. The employer has the right to choose the provider of care, except

where the employer has denied liability for the injury. Section 85.27. Holbert v. Townsend Engineering Co., Thirty-second Biennial Report of the Industrial Commissioner 78 (Review-Reopening October 16, 1975).

Prudent persons customarily rely upon their physician's recommendation for medical care without expressly asking the physician if that care is reasonable. Proof of reasonableness and necessity of the treatment can be based on the injured person's testimony. Sister M. Benedict v. St. Mary's Corp., 255 Iowa 847, 124 N.W.2d 548 (1963).

The medical records demonstrate that claimant had some improvement from the treatment he received.

It is said that "actions speak louder than words." When a licensed physician prescribes and actually provides a course of treatment, doing so manifests the physician's opinion that the treatment being provided is reasonable. A physician practices medicine under standards of professional competence and ethics. Knowingly providing unreasonable care would likely violate those standards. Actually providing care is a nonverbal manifestation that the physician considers the care actually provided to be reasonable. A verbal expression of that professional opinion is not legally mandated in a workers' compensation proceeding to support a finding that the care provided was reasonable. The success, or lack thereof, of the care provided is evidence that can be considered when deciding the issue of reasonableness of the care. A treating physician's conduct in actually providing care is a manifestation of the physician's opinion that the care provided is reasonable and creates an inference that can support a finding of reasonableness. Jones v. United Gypsum, File No. 1254118 (App. May 2002); Kleinman v. BMS Contract Services, Ltd., File No. 1019099 (App. September 1995); McClellon v. Iowa Southern Utilities, File No. 894090 (App. January 1992). This inference also applies to the reasonableness of the fees actually charged for that treatment.

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)

The Court in Bell Bros. stated:

> We do not believe the statute can be narrowly construed to foreclose all claims by an employee for unauthorized alternative medical care solely because the care was unauthorized. Instead, the duty of the employer to furnish reasonable medical care supports all claims for care by an employee that are reasonable under the totality of the circumstances, even when the employee obtains unauthorized care, upon proof by a preponderance of the evidence that such care was reasonable and

> beneficial. In this context, unauthorized medical care is beneficial if it provides a more favorable medical outcome than would likely have been achieved by the care authorized by the employer.

Bell Bros. Heating and Air Conditioning v. Gwinn, 779 N.W.2d 193, 206 (Iowa 2010)

In this case, there is no evidence that defendant paid for any medical care at all and there was no authorized medical provider identified by the defendant. I conclude that it was reasonable for claimant to proceed with the medical treatment as recommended by the treating physicians and that the treatment he received was beneficial and provided a more favorable medical outcome than would have likely occurred with the lack of treatment offered by defendant. I therefore find that the medical treatment claimant received as identified in Exhibit 1 was reasonable and beneficial and the defendant is obligated to pay the same.

b) Medical Mileage.

Concerning medical mileage, there is no evidence presented. Claimant stated in his post-hearing brief that a "Mileage Summary" was attached to the Hearing Report, but none was provided. (Claimant's Post-Hearing Brief, p. 14) Therefore, I am unable to award any medical mileage.

c) IME Reimbursement.

Concerning reimbursement under Iowa Code section 85.39, I have found above that there was no opinion from an employer-retained physician concerning permanent impairment in this case. Also, I found above that claimant did not obtain an opinion from any physician concerning permanent impairment.

Section 85.39 permits an employee to be reimbursed for subsequent examination by a physician of the employee's choice where an employer-retained physician has previously evaluated "permanent disability" and the employee believes that the initial evaluation is too low. The section also permits reimbursement for reasonably necessary transportation expenses incurred and for any wage loss occasioned by the employee attending the subsequent examination.

Defendant is responsible only for reasonable fees associated with claimant's independent medical examination. Claimant has the burden of proving the reasonableness of the expenses incurred for the examination. See Schintgen v. Economy Fire & Casualty Co., File No. 855298 (App. April 26, 1991). Claimant need not ultimately prove the injury arose out of and in the course of employment to qualify for reimbursement under section 85.39. See Dodd v. Fleetguard, Inc., 759 N.W.2d 133, 140 (Iowa App. 2008).

In this case, I conclude that claimant is not entitled to reimbursement of a non-existent IME.

d) Alternate Medical Care.

Turning to the issue of alternate medical care, under Iowa law, the employer is required to provide care to an injured employee and is permitted to choose the care. Pirelli-Armstrong Tire Co. v. Reynolds, 562 N.W.2d 433 (Iowa 1997).

> [T]he employer is obliged to furnish reasonable services and supplies to treat an injured employee, and has the right to choose the care. . . . The treatment must be offered promptly and be reasonably suited to treat the injury without undue inconvenience to the employee. If the employee has reason to be dissatisfied with the care offered, the employee should communicate the basis of such dissatisfaction to the employer, in writing if requested, following which the employer and the employee may agree to alternate care reasonably suited to treat the injury. If the employer and employee cannot agree on such alternate care, the commissioner may, upon application and reasonable proofs of the necessity therefor, allow and order other care.

By challenging the employer's choice of treatment – and seeking alternate care – claimant assumes the burden of proving the authorized care is unreasonable. See Iowa R. App. P. 14(f)(5); Long v. Roberts Dairy Co., 528 N.W.2d 122 (Iowa 1995). Determining what care is reasonable under the statute is a question of fact. Id. The employer's obligation turns on the question of reasonable necessity, not desirability. Id.; Harned v. Farmland Foods, Inc., 331 N.W.2d 98 (Iowa 1983). In Pirelli-Armstrong Tire Co., 562 N.W.2d at 433, the court approvingly quoted Bowles v. Los Lunas Schools, 109 N.M. 100, 781 P.2d 1178 (App. 1989):

> [T]he words "reasonable" and "adequate" appear to describe the same standard.
>
> [The New Mexico rule] requires the employer to provide a certain standard of care and excuses the employer from any obligation to provide other services only if that standard is met. We construe the terms "reasonable" and "adequate" as describing care that is both appropriate to the injury and sufficient to bring the worker to maximum recovery.

The commissioner is justified in ordering alternate care when employer-authorized care has not been effective and evidence shows that such care is "inferior or less extensive" care than other available care requested by the employee. Long; 528 N.W.2d at 124; Pirelli-Armstrong Tire Co.; 562 N.W.2d at 437.

I have found above that the failure to provide medical care in this case was unreasonable. I conclude that the employer's unreasonable failure to provide medical care for claimant concerning this work injury justifies an order from this agency compelling defendant to provide said care. It is appropriate for defendant to

immediately identify an appropriate board certified physician to provide for and manage any ongoing medical care for claimant made necessary as a result of this work injury.

7. Entitlement to penalty benefits under Iowa Code section 86.13.

Iowa Code section 86.13(4) provides that:

> (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, of chapter 85, 84A, 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 of 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 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. Weekly compensation payments are due at the

end of the compensation week. Robbennolt v. Snap-on Tools Corp., 555 N.W.2d 229, 235 (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).

If the employer fails to show reasonable cause or excuse for the delay or denial, the commission must impose a penalty in an amount up to fifty percent (50%) 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.

Penalty is not imposed for delayed interest payments. Davidson v. Bruce, 593 N.W.2d 833, 840 (Iowa 1999).

In this case, I have found above that defendant has failed to make any payment to claimant for healing period or permanent partial disability benefits. I have found that there is no evidence that defendant conducted an investigation, relied upon such investigation, or contemporaneously communicated the basis of the denial of benefits to claimant. Therefore, claimant is entitled to penalty benefits. I find that considering the complete and unjustified denial of benefits, claimant is entitled to penalty of 50 percent of the amount denied.

I have found above that claimant is entitled to healing period benefits for the period of September 22, 2014 to January 15, 2015 (16.571 weeks). I have also found above that claimant's weekly workers' compensation benefit rate is two hundred fifty-nine and 34/100 dollars ($259.34). The weekly rate multiplied by the healing period produces $4,297.52, and fifty percent of this amount is $2,148.76.

I have found that claimant is entitled to permanent partial disability of 50 percent of the right lower extremity, which is 110 weeks. Multiplying 110 weeks by the applicable rate of two hundred fifty-nine and 34/100 dollars ($259.34) produces $28,527.40, and fifty percent of this amount is $14,263.70.

I find that claimant is entitled to penalty benefits of $2,148.76 for denied healing period benefits in addition to $14,263.70 for denied permanent partial disability benefits, for a total penalty amount of $16,412.46.

8. Costs.

The final issue is costs. Assessment of costs is a discretionary function of this agency. Iowa Code section 86.40. Costs are to be assessed at the discretion of the deputy commissioner or workers' compensation commissioner hearing the case. 876 IAC 4.33. I conclude that claimant was generally successful in this claim and therefore

exercise my discretion and assess costs against the defendant in this matter. Defendant shall pay costs per Rule 876 IAC 4.33.

9. No Insurance.

There was no evidence that the employer had workers' compensation insurance in place at the time of this injury, therefore, defendant is advised that:

A copy of this decision is being provided to the workers' compensation commissioner to determine whether further action should take place under Iowa Code section 87.19 for failure to have workers' compensation insurance.

ORDER

IT IS THEREFORE ORDERED:

Defendant shall pay claimant healing period benefits from September 22, 2014 to January 15, 2015.

Defendant shall pay claimant one hundred ten (110) weeks of permanent partial disability benefits commencing on January 16, 2015 and continuing each week thereafter until paid in full.

All weekly benefits shall be paid at the rate of two hundred fifty-nine and 34/100 dollars ($259.34).

Defendant shall pay accrued weekly benefits in a lump sum together with interest at the rate of ten percent for all weekly benefits payable and not paid when due which accrued before July 1, 2017, and all interest on past due weekly compensation benefits accruing on or after July 1, 2017, shall be payable at an annual rate equal to the one-year treasury constant maturity published by the federal reserve in the most recent H15 report settled as of the date of injury, plus two percent, See Gamble v. AG Leader Technology File No. 5054686 (App. Apr. 24, 2018).

Defendant shall pay medical providers directly for any outstanding medical expenses, reimburse claimant for any out-of-pocket expenses paid, and otherwise hold claimant harmless for the medical expenses contained in Claimant's Exhibit 1.

Defendant shall immediately identify an authorized treating physician to provide care for this work injury.

Defendant shall pay claimant sixteen thousand four hundred twelve and 46/100 dollars ($16,412.46) in penalty benefits for unreasonable denial of healing period and permanent partial disability benefits.

Defendant shall pay costs.

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

Signed and filed this 30th day of April, 2019.

TOBY J. GORDON
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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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.