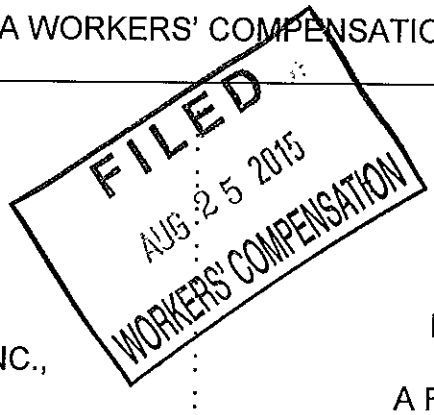
BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER



JOHN HEEREN,

Claimant,

vs.

WILLOW VALLEY PORK, INC.,

Employer,

and

IMT INSURANCE

Insurance Carrier,
Defendants.

File No. 5044263

ARBITRATION

DECISION

Head Note No.: 1803

STATEMENT OF THE CASE

This matter was heard by Deputy Workers' Compensation Commissioner Ron Pohlman in Sioux City, Iowa. The record in the case consists of claimant's exhibits 1-17, defendants' exhibits A, E through L, as well as the testimony of the claimant.

ISSUES

1. The issues in the case are whether the claimant is entitled to a running award of healing period benefits;

2. The nature and extent of claimant's entitlement to permanent partial disability benefits;

3. The correct weekly rate;

4. Whether the claimant is entitled to alternate medical care; and

5. Whether the claimant is entitled to penalties based upon an underpayment of the rate.

FINDINGS OF FACT

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

The claimant at the time of the hearing was 46 years old. He graduated high school and attended Western Iowa Technical College for a year and a half and received a diploma as an ag power mechanic. He also obtained a maintenance certification through employment at IBP. Claimant has work experience as a farmer, laborer, working in manufacturing, meat production and cold storage. The claimant has had multiple OWI charges and was sent to prison for a third offense OWI. It should be noted that the claimant has had more than three OWI offenses, but for some reason he was not prosecuted for his offenses consistent with the number that he had incurred. Even though he has been to prison for OWI he still drinks three to four beers before going home each day.

The claimant began working for Willow Valley Pork in 2009 because he met the manager at a local bar. The facility he was working in was a gestation to farrowing operation, and his job was a laborer. He sustained an injury when he was electrocuted operating a welder in the employer's facility. The electrocution affected his left hand, and there was an exit wound in his right shoulder. The claimant had his fifth and fourth fingers amputated and underwent grafting of his wounds. While the claimant was hospitalized for treatment of his injury he was referred to James Bobenhouse, M.D., a neurologist. Dr. Bobenhouse's opinion on October 24, 2012 was:

> IMPRESSION:
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> Left arm and [sic] pain with phantom pain status post fourth and fifth finger amputations and electrical burn injury secondary to work accident on July 16, 2012.
>
> Intermittent vascular headaches.
>
> Muscle contraction headaches.

(Exhibit 4, page 6)

The claimant began treating with Liane Donovan, M.D. for pain management at the Spine and Pain Center of Nebraska. Dr. Donovan on January 29, 2014 noted the claimant had phantom limb pain. See Exhibit 5, page 42. The claimant was sent to Douglas Martin, M.D. at the request of the defendants for evaluation. Dr. Martin did not address the issue of whether the claimant has phantom pain. See Exhibit F. After the work injury the claimant never returned to work for Willow Valley. His employment was terminated. The claimant tried a job at Fareway working at the meat counter but left after one day because he felt he was not able to grip properly with his left hand. He was also having difficulty with the pace of the work. In the fall of 2014 the claimant

worked for four weeks at a local grain elevator but complained that the work activities caused pain to his hand. The claimant has made applications for work at other businesses but has not been hired. The claimant continues to complain of chronic pain.

When the claimant was hired he was advised that if he worked extra hard he would receive a bonus in addition to his regular wages. In order to earn this bonus full-time employees had to produce pigs over a specified number. This bonus has been paid by Willow Valley to full-time employees since 1998. While working for the employer the claimant typically received quarterly bonuses. In the quarter preceding his injury the claimant along with his coworkers produced enough pigs over the specified level to earn a bonus a $1,800.00, which was paid on the 15th of July. After the claimant's injury he also received an additional $400.00 because he had helped to breed sows farrowed in that quarter. The claimant contends that the $400.00 should also be included in the claimant's average weekly wage and that if it is his weekly benefits paid should have been $485.00. In 2012 the claimant was paid bonuses of $2,400.00 on January 1st, $1,540.00 on April 1st, $1,800.00 on July 1st, and October 1st of 2012 $400.00. He received bonuses in 2009, 2010 and 2011 as well. The decision on whether to issue a bonus and the payment of bonus was apparently done quarterly. It is concluded that bonuses were regular and must be included in the calculation of the claimant's rate. Therefore, the claimant's correct rate is $485.18 as a single individual entitled to one exemption.

It is found that the claimant's work injury was to the body as a whole.

REASONING AND CONCLUSIONS OF LAW

The first issue in this case is the nature and extent of the claimant's disability.

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).

The greater weight of evidence indicates that the claimant has sustained an injury that has resulted in a body as a whole problem and the nature of phantom pain. This is body as a whole, as it is a nervous system disruption rather than simply an injury to a scheduled member. As such, this claim must be analyzed industrially.

The next issue is whether the claimant is entitled to a running award.

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, 312N.W.2d 60 (Iowa App. 1981). Healing period benefits can be interrupted or intermittent. Teel v. McCord, 394 N.W.2d 405 (Iowa 1986).

The claimant argues that he has not returned to meaningful employment since his work injury and that if the claimant were put at maximum medical improvement it was simply out of convenience because the claimant was moving to another medical provider.

Defendants contend that the claimant's healing period ended on September 23, 2013 when he was released with the restriction of working as tolerated with the left hand by his treating physicians in Lincoln, Nebraska. The undersigned agrees with the defendants' position. The care the claimant has received since then has really been nothing more than palliative. The claimant's condition has plateaued and has essentially remained stable since that point.

The next issue is the extent of claimant's entitlement to permanent partial disability.

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.

The claimant contends that he is permanently and totally disabled. The record does not reflect this. The claimant has a substantial barrier to entering the workforce based upon his OWI record. Moreover, the claimant continues to drink and drive, which indicates poor judgment. These factors cannot be overlooked in the claimant's attempts to search for work. He was fortunate to have found the job at Willow Valley because he happened to run into somebody in a bar that would hire him. This is a substantial impediment to the claimant's ability to return to the workplace. Claimant might argue that the defendants have caused the claimant's inability to reenter the workforce because of his work injury. The claimant's ability to find jobs is extremely limited anyway. The record shows that he has been able to be hired and work, and it has not been satisfactorily established that the work injury is what has kept him from staying at those jobs.

Nevertheless, the claimant does have significant industrial disability given his injury and pain difficulties. It is concluded based upon this record that the claimant has sustained a 30 percent industrial disability entitling him to 150 weeks of permanent partial disability benefits pursuant to Iowa Code section 85.34(u). The commencement date for payment of these benefits is September 24, 2013.

The next issue is whether the claimant is entitled to alternate medical care.

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 1975).

The claimant seeks care consistent with his continuing problems of pain. The defendants shall provide the claimant continuing care for his chronic pain problems.

Finally, the claimant argues that the bonuses must be included in the calculation of his rate.

Section 85.36 states 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 excluded, however. Section 85.36(6).

The undersigned agrees that the claimant's bonuses were regular. The record indicates that the claimant was consistently receiving bonuses in each quarter, and this was an expected and regular part of the claimant's compensation. Where this is the case the claimant is entitled to have these included in the calculation of his rate. Therefore, the claimant's weekly rate is $485.18.

The next issue is whether the claimant is entitled to a penalty.

In Christensen v. Snap-on Tools Corp., 554 N.W.2d 254 (Iowa 1996), and Robbennolt v. Snap-on Tools Corp., 555 N.W.2d 229 (Iowa 1996), the supreme court said:

> Based on the plain language of section 86.13, we hold an employee is entitled to penalty benefits if there has been a delay in payment unless the employer proves a reasonable cause or excuse. A reasonable cause or excuse exists if either (1) the delay was necessary for the insurer to investigate the claim or (2) the employer had a reasonable basis to contest the employee's entitlement to benefits. A "reasonable basis" for denial of the claim exists if the claim is "fairly debatable."
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> Christensen, 554 N.W.2d at 260.

The supreme court has stated:

> (1) If the employer has a reason for the delay and conveys that reason to the employee contemporaneously with the beginning of the delay, no penalty will be imposed if the reason is of such character that a reasonable fact-finder could conclude that it is a "reasonable or probable cause or excuse" under Iowa Code section 86.13. In that case, we will defer to the decision of the commissioner. See Christensen, 554 N.W.2d at 260 (substantial evidence found to support commissioner's finding of legitimate reason for delay pending receipt of medical report); Robbennolt, 555 N.W.2d at 236.

(2) If no reason is given for the delay or if the "reason" is not one that a reasonable fact-finder could accept, we will hold that no such cause or excuse exists and remand to the commissioner for the sole purpose of assessing penalties under section 86.13. See Christensen, 554 N.W.2d at 261.

(3) Reasonable causes or excuses include (a) a delay for the employer to investigate the claim, Christensen, 554 N.W.2d at 260; Kiesecker v. Webster City Meats, Inc., 528 N.W.2d at 109, 111 (Iowa 1995); or (b) the employer had a reasonable basis to contest the claim—the "fairly debatable" basis for delay. See Christensen, 554 N.W.2d at 260 (holding two-month delay to obtain employer's own medical report reasonable under the circumstances).

(4) For the purpose of applying section 86.13, the benefits that are underpaid as well as late-paid benefits are subject to penalties, unless the employer establishes reasonable and probable cause or excuse. Robbennolt, 555 N.W.2d at 237 (underpayment resulting from application of wrong wage base; in absence of excuse, commissioner required to apply penalty).

> If we were to construe [section 86.13] to permit the avoidance of penalty if any amount of compensation benefits are paid, the purpose of the penalty statute would be frustrated. For these reasons, we conclude section 86.13 is applicable when payment of compensation is not timely . . . or when the full amount of compensation is not paid.

Id.

(5) For purposes of determining whether there has been a delay, payments are "made" when (a) the check addressed to a claimant is mailed (Robbennolt, 555 N.W.2d at 236; Kiesecker, 528 N.W.2d at 112), or (b) the check is delivered personally to the claimant by the employer or its workers' compensation insurer. Robbennolt, 555 N.W.2d at 235.

(6) In determining the amount of penalty, the commissioner is to consider factors such as the length of the delay, the number of delays, the information available to the employer regarding the employee's injury and wages, and the employer's past record of penalties. Robbennolt, 555 N.W.2d at 238.

(7) An employer's bare assertion that a claim is "fairly debatable" does not make it so. A fair reading of Christensen and Robbennolt, makes it clear that the employer must assert facts upon which the commissioner

could reasonably find that the claim was "fairly debatable." See Christensen, 554 N.W.2d at 260.

Meyers v. Holiday Express Corp., 557 N.W.2d 502 (Iowa 1996).

Weekly compensation payments are due at the end of the compensation week. Robbennolt, 555 N.W.2d 229, 235.

Penalty is not imposed for delayed interest payments. Davidson v. Bruce, 593 N.W.2d 833, 840 (Iowa App. 1999). Schadendorf v. Snap-On Tools Corp., 757 N.W.2d 330, 338 (Iowa 2008).

When an employee's claim for benefits is fairly debatable based on a good faith dispute over the employee's factual or legal entitlement to benefits, an award of penalty benefits is not appropriate under the statute. Whether the issue was fairly debatable turns on whether there was a disputed factual dispute that, if resolved in favor of the employer, would have supported the employer's denial of compensability. Gilbert v. USF Holland, Inc., 637 N.W.2d 194 (Iowa 2001).

The question of whether to include the bonuses in the calculation of the claimant's rate is fairly debatable. This is a close question even in this record, and as such the claimant is not entitled to penalties.

ORDER

THEREFORE IT IS ORDERED:

Defendants shall pay claimant healing period benefits from July 17, 2012 through September 23, 2013 at the weekly rate of four hundred eighty-five and 18/100 dollars ($485.18).

Defendants shall pay claimant one-hundred fifty (150) weeks of permanent partial disability benefits commencing September 24, 2013 at the weekly rate of four hundred eighty-five and 18/100 dollars ($485.18).

Accrued benefits shall be paid in lump sum together with interest pursuant to Iowa Code section 85.30 with subsequent reports of injury filed as directed by the agency.

Defendants shall receive credit for benefits previously paid.

Defendants shall provide claimant medical care to treat his work injury pursuant to Iowa Code section 85.27.

Costs of this action are taxed to the defendants pursuant to rule 876 IAC 4.33.

Signed and filed this 25th day of August, 2015.

RON POHLMAN
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.