BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

CLINT ALFORD, Claimant, vs. ANNETT HOLDINGS, INC., Employer, Self-Insured, Defendants.	:	File No. 5026211 A R B I T R A T I O N D E C I S I O N Head Note Nos.: 1402.40; 1803; 1702; 4000.2

STATEMENT OF THE CASE

Claimant, Clint Alford, filed a petition in arbitration seeking workers' compensation benefits from self-insured employer Annett Holdings, Inc. (Annett). This case was heard in Des Moines, Iowa, on April 2, 2009. The record in this case consists of claimant's exhibits 1 through 18, defendant's exhibits A through B and D through H, and the testimony of claimant.

ISSUES

1. Whether the alleged injury is a cause of permanent disability.

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

3. Whether the defendant is liable for penalty pursuant to Iowa Code section 86.13.

4. The extent of defendant's entitlement to credit.

FINDINGS OF FACT

Claimant was 32 years old at the time of the hearing. Claimant graduated from high school. He went to trucking school and has a general certificate in truck driving. Claimant has worked for various rental companies. While working for rental companies, claimant performed delivery duties. He also worked as an assistant and general manager for U-Haul stores.

Claimant began working for Annett, also known as TMC, in October 2006. Claimant's job duties with TMC, as a truck driver, required him to pick up and deliver freight nationwide. Claimant testified his job required him to drive, do general truck maintenance, and tarp loads. Claimant testified he was required to lift tarps weighing

between 120 and 150 pounds. A more detailed description of claimant's job duties with TMC is found at Exhibit 11, page 90.

On June 29, 2007, claimant hurt his lower back while lifting a tarp. Claimant testified he tried to work through his lower back pain.

On July 1, 2007, claimant was evaluated by Scott Burns, M.D., at the Georgetown Memorial Hospital emergency room with complaints of lower back pain. Claimant was assessed as having lower back pain. He recommended claimant have an MRI. (Exhibit 1, pages 1-2)

Claimant's MRI revealed a disc herniation at the L5-S1 level. (Ex. 1, pp. 3-4)

In July 2007, claimant was evaluated by James Merritt, M.D. Dr. Merritt prescribed physical therapy. (Ex. 2, pp. 5-7) Claimant was referred by Dr. Merritt to Wayne Bauerle, M.D., a spine specialist. Dr. Bauerle evaluated claimant in October 2007. He did not believe claimant was a candidate for surgery. (Ex. 2, pp. 8-11)

In September 2007, claimant had two epidural steroid injections (ESI). Claimant testified the ESI's had no significant impact on his symptoms. (Ex. 4)

Claimant testified he returned to work in November 2007 part time. He testified defendants paid temporary partial disability benefits until January 2008. At TMC, claimant did light duty consisting of filing, stuffing envelopes and checking trailers. He testified his light duty was based in Des Moines. Claimant testified he would work for two weeks in Des Moines, and then return to his family in South Carolina for three days. Claimant testified that living away from his family in this fashion hurt him financially.

Claimant testified he performed this light duty work for approximately six to seven weeks and eventually left TMC. He testified he left TMC because of the difficulty and expense of living away from his family, and because he lost access to child care in South Carolina.

In December 2007, claimant was evaluated by David Hatfield, M.D., for lower back pain. Claimant had had two ESI's without significant improvement. Claimant was recommended to have physical therapy. (Ex. 5, pp. 41-44)

During the week of December 15, 2007 through December 22, 2007, claimant was paid vacation pay at $720.42. (Ex. G, p. 3) During the same period, claimant was also paid light duty pay at $350.00 and temporary partial disability benefits at $368.50. (Ex. G, pp. 1-2)

On March 11, 2008, claimant underwent a functional capacity evaluation (FCE). Claimant was found to be able to work an eight-hour work day in the light overall work category. Claimant was found to have given valid effort for the FCE. (Ex. 6)

On March 11, 2008, claimant was evaluated by Dr. Merritt. He was found to be at maximum medical improvement (MMI). Using the FCE, claimant was restricted to lifting up to 20 pounds. Dr. Merritt found claimant fell into the Class I impairment for lower back injuries pursuant to the AMA Guides to the Evaluation of Permanent Impairment, Sixth Edition. Based on this, Dr. Merritt found claimant had a 3 percent permanent partial impairment to the body as a whole. (Ex. 2, pp. 17-18)

In correspondence dated March, April, and June of 2008, claimant's counsel requested defendants pay Dr. Merritt's 3 percent rating. (Ex. 14, 15)

Claimant testified he ultimately got a job driving trucks with Stone Construction. Claimant started with Stone in June 2008. He was laid off in December 2008. Claimant testified he hopes he is allowed to return to work for Stone as the job worked well with his restrictions and his needs to stretch his back. Claimant testified he has not told Stone Construction of the restrictions imposed by Dr. Merritt.

Sometime prior to June 10, 2008, claimant was put under surveillance. The surveillance DVD shows claimant pulling rubber strips out of a large box. (Ex. H)

In a July 10, 2008 letter, Dr. Hatfield agreed with Dr. Merritt's 3 percent permanent impairment regarding claimant's back injury. Based on claimant's FCE, he found claimant's 20-pound lifting restriction appropriate. Dr. Hatfield indicated he viewed the surveillance DVD and this did not change his opinion regarding claimant's permanent impairment or restriction. (Ex. 7, p. 78)

On September 28, 2008, claimant underwent an independent medical examination (IME) with David Berg, D.O. Claimant indicated his symptoms had improved approximately 80 percent since the date of injury. He complained of lower back pain aggravated with bending, twisting, or extended sitting. Claimant indicated he had a pain level at 2, on a scale where 10 is excruciating pain. (Ex. B, pp. 1-3)

Dr. Berg opined claimant's March 2008 FCE was not an accurate reflection of claimant's ability. This is because Dr. Berg believed claimant was deconditioned when he took the FCE. He opined claimant had no permanent impairment based on Table 15-1 on page 385 of the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition. Dr. Berg opined there was no medical reason claimant could not function as he did prior to his injury. (Ex. B)

Claimant testified that based on his 2007 tax returns, he believes he could have earned approximately $40,000 per year with TMC had he stayed on as a truck driver. He testified, that based on his earnings records with Stone, he believes he could earn approximately $20,000 per year as a truck driver for Stone. (Ex. 18)

Claimant testified he did not believe he could return to work at any of his prior jobs at the rental agencies as they all required heavy lifting and bending. He testified he

could potentially return to work as a long-haul truck driver if accommodations could be made for him to stop every hour.

Claimant testified he has continued lower back pain and occasional numbness in his legs. He testified he has difficulty sleeping. He testified walking and standing for extended periods of time aggravates his back pain. Claimant testified he is limited in doing recreational activities due to his back pain. Claimant takes over-the-counter medication for the back pain.

On July 25, 2008, defendants paid claimant a lump sum of $9,152.50 for permanent partial disability benefits. This is approximately equal to a 3 percent rating of permanent impairment as assigned by Dr. Hatfield and Merritt. (Ex. G)

CONCLUSIONS OF LAW

The first issue to be determined is if claimant's injury is the cause of permanent disability.

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. App. P. 6.14(6).

The claimant has the burden of proving by a preponderance of the evidence that the injury is a proximate cause of the disability on which the claim is based. A cause is proximate if it is a substantial factor in bringing about the result; it need not be the only cause. A preponderance of the evidence exists when the causal connection is probable rather than merely possible. George A. Hormel & Co. v. Jordan, 569 N.W.2d 148 (Iowa 1997); Frye v. Smith-Doyle Contractors, 569 N.W.2d 154 (Iowa App. 1997); Sanchez v. Blue Bird Midwest, 554 N.W.2d 283 (Iowa App. 1996).

The question of causal connection is essentially within the domain of expert testimony. The expert medical evidence must be considered with all other evidence introduced bearing on the causal connection between the injury and the disability. Supportive lay testimony may be used to buttress the expert testimony and, therefore, is also relevant and material to the causation question. The weight to be given to an expert opinion is determined by the finder of fact and may be affected by the accuracy of the facts the expert relied upon as well as other surrounding circumstances. The expert opinion may be accepted or rejected, in whole or in part. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); IBP, Inc. v. Harpole, 621 N.W.2d 410 (Iowa 2001); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995). Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417 (Iowa 1994). Unrebutted expert medical testimony cannot be summarily rejected. Poula v. Siouxland Wall & Ceiling, Inc., 516 N.W.2d 910 (Iowa App. 1994).

Claimant injured his lower back on June 29, 2007 while moving a tarp. The records indicate claimant had no permanent restrictions or permanent impairment to his

low back prior to this date. An MRI of the lumbar spine indicated the June 2007 injury resulted in a herniated disc at the L5-S1 levels.

Dr. Merritt was the authorized treating physician. He assigned claimant a 3 percent permanent impairment rating based on the Guides, Sixth Edition. He also limited claimant to lifting 20 pounds based on a valid FCE. Dr. Merritt treated claimant for approximately 8 months. He has recommended against surgery.

Defendants had claimant evaluated for a second opinion with Dr. Hatfield. Dr. Hatfield agreed with Dr. Merritt's opinion regarding permanent impairments, limitations, and recommendations.

Defendants had claimant evaluated a third time with Dr. Berg. Dr. Berg opined that based on the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, claimant has a zero percent permanent impairment. Dr. Berg also opined the FCE used to give claimant his lifting restrictions, was not an accurate reflection of claimant's ability. This was because Dr. Berg believed claimant was, allegedly, deconditioned when he performed the FCE. This opinion appears to be speculation on the part of Dr. Berg and does not appear to be based upon any objective findings in the record. Based on this, I find the valid FCE is more convincing in measuring claimant's limitations, than the speculation of Dr. Berg.

Dr. Berg also opined that claimant's disc protrusion is probably not the cause of his pain. He bases this opinion, in part, on an opinion that because two ESI's failed to provide pain relief, that this is a good indication that this disc herniation at the L5-S1 level is not a pain generator. Using this assumption, Dr. Berg found that claimant had a zero percent permanent impairment pursuant to the Guides, Fifth Edition.

It is unclear how Dr. Berg arrived at this opinion. Based on evidence in the record, it appears that the failure of the two ESI's is an indication that the two ESI's failed to give claimant significant pain relief. A review of the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, Table 15-3, suggests that given claimant's criteria, he may be best evaluated as falling into the DRE Lumbar Category II.

In this case, defendant sent claimant for treatment with Dr. Merritt. Defendant was dissatisfied with Dr. Merritt's opinions regarding permanent impairment and permanent restrictions. Defendant forwarded claimant to Dr. Hatfield. Defendant was dissatisfied with the opinion of Dr. Hatfield. Defendant then sent claimant to Dr. Berg. Dr. Berg finally gave defendant the desired opinion. Dr. Berg opines claimant has no permanent restrictions based on speculation. Dr. Berg opines that claimant's failure to have significant pain relief from the two ESI's is an indication that claimant's herniated disc is not the cause of his pain. The record suggests that the failure of the ESI's to significantly help with claimant's pain is an indication that the ESI's were not effective in helping with claimant's pain.

Claimant was injured in June 2007. Approximately, two years later he still has significant symptoms. Claimant has permanent restrictions. He has a permanent impairment of at least 3 percent. Claimant has proven the June 2007 injury is a cause of permanent impairment.

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

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.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 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.

Claimant graduated from high school. He went to trucking school and has a general certificate in truck driving. Claimant has spent the bulk of his working life working for rental companies. Surgery is not recommended as a treatment opion. Claimant has a 20-pound lifting restriction. Claimant's unrebutted testimony is that this restriction would eliminate him from most of his prior jobs. Claimant has a permanent impairment of at least 3 percent, and potentially as high as 8 percent. Claimant left TMC as working with TMC proved to be too costly, and required claimant to be away from his family. The record suggests claimant has had an approximate 50 percent reduction in earnings since leaving his job as a long haul truck driver.

I can appreciate claimant's living condition when he was working light duty, living in Iowa, and commuting biweekly to see his family. However, TMC did give claimant a light-duty job. The termination of his employment with TMC was done voluntarily on the part of claimant. For that reason, even though the change in jobs has resulted in a decrease of earnings for claimant, I do not believe this decrease in earnings can be used, against defendants, as a rationale for assessing claimant's industrial disability.

When all relevant factors are considered, claimant has a 20 percent industrial disability and loss of earning capacity.

The next issue to be determined is if defendants are liable for penalty pursuant to Iowa Code section 86.13.

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.
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> The supreme court has stated:
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> (1) If the employer has a reason for the delay and conveys that reason to the employee contemporaneously with the beginning of the delay, no penalty will be imposed if the reason is of such character that a reasonable fact-finder could conclude that it is a "reasonable or probable cause or excuse" under Iowa Code section 86.13. In that case, we will defer to the decision of the commissioner. See Christensen, 554 N.W.2d at 260 (substantial evidence found to support commissioner's finding of legitimate reason for delay pending receipt of medical report); Robbennolt, 555 N.W.2d at 236.
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> (2) If no reason is given for the delay or if the "reason" is not one that a reasonable fact-finder could accept, we will hold that no such cause or excuse exists and remand to the commissioner for the sole purpose of assessing penalties under section 86.13. See Christensen, 554 N.W.2d at 261.
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> (3) Reasonable causes or excuses include (a) a delay for the employer to investigate the claim, Christensen, 554 N.W.2d at 260; Kiesecker v. Webster City Meats, Inc., 528 N.W.2d at 109, 111 (Iowa 1995); or (b) the employer had a reasonable basis to contest the claim—the "fairly debatable" basis for delay. See Christensen, 554 N.W.2d at 260 (holding two-month delay to obtain employer's own medical report reasonable under the circumstances).

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

> 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).

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 contends defendants are liable for penalty as Dr. Merritt assigned a 3 percent permanent impairment rating on March 17, 2008, and defendants did not pay a 3 percent permanent impairment rating until July 25, 2008. (Claimant's Post-Hearing Brief, page 11) They also indicate defendants should be liable for a penalty for failure to pay permanent partial disability benefits beyond the assigned rating. (Claimant's Post-Hearing Brief, pp. 11-14)

The hearing report indicates the parties stipulated that MMI in this case occurred on June 30, 2008. It is true Dr. Merritt found claimant had a 3 percent permanent impairment in March 2008. But, because the parties stipulated in the hearing report that claimant had not reached MMI until June 30, 2008, it is not appropriate to penalize defendants for allegedly paying benefits late between March 17, 2008 through June 30, 2008.

Two employer-authorized physicians opined claimant had a 3 percent permanent impairment and a 20-pound lifting restriction. Because of this, it is appropriate to penalize defendants for the late payment of benefits between June 30, 2008 through July 25, 2008. This is a period of approximately four weeks. A 50 percent penalty is appropriate for this period. For that reason, defendants are liable for penalty of $1,064.32 ($532.16 x 4 weeks x 50 percent).

Claimant also contends defendant is liable for penalty for failure to pay industrial disability beyond the 3 percent rating.

Claimant did not have any surgery. He was able to return to work and voluntarily left TMC's employment. It is found that Dr. Berg's opinion of no permanent impairment or permanent restrictions is not convincing. However, defendants were not unreasonable in relying on Dr. Berg's opinions, in part, for only paying permanent partial disability benefits equal to claimant's permanent impairment rating. Based on these facts, it is not appropriate to penalize defendants for failure to pay permanent partial disability benefits beyond the 3 percent permanent impairment rating.

The next issue to be determined is the extent of credit due to defendants. Based on the hearing report and the post-hearing briefs, the parties stipulate defendants are entitled to a credit of $2,472.76 for overpayment of temporary total disability, temporary partial disability, and permanent partial disability benefits. (Claimant's Post-Hearing Brief, p. 1) Claimant disputes defendants are also due a credit for $718.50 for light duty and temporary partial disability benefits paid to claimant while on vacation.

An employer will be granted a credit for good faith overpayment of temporary total or temporary partial disability benefits against any permanency owed. Iowa Code section 85.34(4). Credit is also extended for salary paid in lieu of compensation. Iowa Administrative Code 876 IAC 8.4; Holland v. Woden-Crystal Lake Community School

District, III Iowa Industrial Commissioner's Report 131 (1983). Credit will not be given for the credit of vacation pay Brown v. Wilson Foods Corp., III Iowa Industrial Commissioner's Report 37 (1983).

Claimant was paid $718.50 for light-duty and temporary partial disability benefits. During the same period of time, claimant received vacation pay of $720.42. Claimant is correct that defendants should not receive a credit for the $720.42 in vacation pay paid to claimant. However, based on the law as detailed above, defendants should receive a credit for the $718.50 paid to claimant for compensation and temporary partial disability benefits. Based on this, defendants should receive a total credit of $2,761.26 for the overpayment of benefits and compensation. ($2,042.76 + $718.50)

ORDER

THEREFORE, IT IS ORDERED:

That defendants shall pay claimant one hundred (100) weeks of permanent partial disability benefits at a rate of five hundred thirty-two and 16/100 dollars ($532.16) per week commencing on June 30, 2008.

That defendants shall pay accrued weekly benefits in a lump sum.

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

That defendants shall receive credit for benefits previously paid and for the overpayment of benefits as discussed above.

That defendants shall pay a penalty of one thousand sixty four and 32/100 dollars ($1,064.32) as discussed above.

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 pursuant to rule 876 IAC 4.33.

Signed and filed this ___29th__ day of July, 2009.

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JAMES F. CHRISTENSON
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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