BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

DONALD J. MENADUE, Claimant, vs. FLYNN COMPANY INC., Employer, And UNITED HEARTLAND., Defendants.	:	File No. 5048837 ARBITRATION DECISION Head Note Nos: 1801, 1803, 400.2

STATEMENT OF THE CASE

This is a proceeding in arbitration. The contested case was initiated when claimant, Donald J. Menadue, filed his original notice and petition with the Iowa Division of Workers' Compensation. The petition was filed on July 23, 2014. Claimant alleged he sustained a work-related injury on July 17, 2012. (Original notice and petition)

Flynn Company, Inc. and its workers' compensation insurance carrier, United Heartland Insurance Company, filed their answer on July 29, 2014. They admitted the occurrence of the work injury. A first report of injury was filed on July 30, 2012.

The hearing administrator scheduled the case for hearing on May 6, 2015, at 3:00 p.m. The hearing took place in Cedar Rapids, Iowa, at the Iowa Department of Workforce Development. The undersigned appointed Ms. Lucinda Winslow-Haidsiak as the certified shorthand reporter. She is the official custodian of the records and notes.

Claimant testified on his own behalf. Ms. Mary Ann Menadue, spouse, also testified on behalf of claimant.

The parties offered exhibits. Claimant offered exhibits marked 1 through 11. Defendants offered exhibits marked A through J. All proffered exhibits were admitted as evidence in the case. Post-hearing briefs were filled on June 8, 2015. The case was deemed fully submitted on that date.

STIPULATIONS

The parties completed the designated hearing report. The various stipulations are:

1. There was the existence of an employer-employee relationship at the time of the alleged injury.
2. Claimant sustained an injury on July 17, 2012, which arose out of and in the course of his employment;
3. The work injury is a cause of both temporary and permanent disability;
4. Temporary benefits are no longer in dispute;
5. The weekly benefit rate for which benefits should be paid is $798.25 per week;
6. Defendants have waived any affirmative defenses they may have had available;
7. Medical benefits are no longer in dispute;
8. Defendants are entitled to a credit for all weekly benefits paid; and
9. The parties are able to stipulate to the costs allowed by law.

ISSUES

The issues presented are:

1. The extent of permanent disability benefits to which claimant is entitled, if any;
2. Whether claimant is entitled to penalty benefits pursuant to Iowa Code section 86.13; and if so, the amount of those penalty benefits; and
3. The amount of credit for benefits previously paid, that defendants are entitled to claim.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This deputy, after listening to the testimony of claimant and the other witness at hearing, after judging the credibility of all, and after reading the evidence, and the post-hearing briefs makes the following findings of fact and conclusions of law:

The party who would suffer loss if an issue were not established has the burden of proving the issue by a preponderance of the evidence. Iowa R. App. P. 6.14(6)

Claimant is a 64 year-old morbidly obese male who is right hand dominant. Claimant suffers from sleep apnea and must wear a C-PAP machine at night. He sleeps but two to three hours at one time.

He resides with his spouse in Cascade, Iowa. The town has a population of approximately 2,000 residents and is located near Dubuque, Iowa. Claimant has a GED and has taken some college courses in computer programming. All of his course work was taken in the 1980s. In his deposition, claimant identified himself as retired.

Claimant commenced his employment with the Flynn Company, Inc., in May of, 2011. Claimant was hired as a truck driver and his duties included hauling concrete for road construction, and keeping the bed of his truck clean. He often had to travel out of town on a construction project.

The parties agreed claimant sustained a work-related injury to his cervical spine on July 17, 2012. The injury occurred when claimant hit the crown of his head on the cab of his dump truck. He also destroyed a tooth upon impact with the top of the roof. The tooth was repaired and claimant suffered no residual problems following the dental repair.

Chad Abernathey, M.D., a neurosurgeon in Cedar Rapids, Iowa, diagnosed claimant with "cervical myelopathy secondary to C3-4 stenosis and to a lesser degree C4-5 stenosis." (Exhibit 4, page 23)

MRI testing of the cervical spine revealed:

IMPRESSION:

1. Reduction in cord volume and bilateral paracentral T2 hyperintensities consistent with cystic encephalomalacia in the cord at the superior aspect of the C4 level secondary to moderate canal stenosis and a posterior disc osteophyte complex.

2. Likely a posterior osteophyte at C4-C5 indenting the anterior surface of the cord.

3. Likely a posterior midline disc protrusion at C6-C7 indenting the anterior aspect of the cord.

4. Greatest degree of foraminal stenosis is present bilaterally at C3-C4 which is moderate in severity.

(Ex. 4, pp. 26-27)

On December 5, 2012, Dr. Abernathey and Loren J. Mouw, M.D. performed C3-4, C4-5, C6-7 anterior cervical diskectomies, osteophytectomies, using instruments to

complete cervical fusions. The procedures were performed under microscopic control. (Ex. 4, p. 29)

On February 4, 2013, claimant underwent additional radiological testing. Richard F. Seitz, M.D., interpreted the results as:

> Impression: Previous surgical changes of anterior cervical fusion at C3-C5 and C6-7 No change in alignment from study of 12/5/2012.

(Ex. 4, p. 31)

On the same date, claimant visited Dr. Abernathey for a follow-up examination. The neurosurgeon indicated in his clinical notes:

> Mr. Menadue returns today for additional follow-up after his recent anterior cervical discectomy and fusion. His wound is well healed and his neurologic function is intact. He continues to demonstrate excellent relief of his pre-operative pain syndrome and is quite pleased with his surgical result. His new cervical spine films demonstrate excellent healing of the fusion graft. I gave the patient permission to return to his usual activities and advised him to contact me if he has any further difficulty.

(Ex. E, p. 1)

On May 30, 2013, Dr. Abernathey wrote in his clinical notes:

> I would consider the patient to have an 11 % whole body impairment rating due to severe degenerative changes at multiple levels with stenosis at C3-4 and to a lesser degree C4-5 and a prominent disc extrusion at C6-7 with spinal cord compression with subsequent surgical intervention with an anterior cervical discectomy and fusion with instrumented allograft at C3-4, C4-5, and C6-7.

(Ex. 4, p. 25)

On September 13, 2013, claimant applied for Social Security disability benefits. (Exhibit J) In section 3 of the application process, claimant wrote about his perceived disability:

> In 1980 Dr. Miester, an orthopedic surgeon in Dubuque, Ia diagnosed me with carpal fusion in both wrists. It was something I was born with.
>
> In 1979 I was working for John Deere in Silvis, Il as a labor [sic] on heavy chip and grind in the Foundry
>
> I was doing well as it was a piece work job and I was making bonous [sic] money. Then my wrists started getting sore. I started wearing supports to

help but it got to the point where I would lift a part less than 10 lbs, and it would fall out of my hands. I couldn't hold onto anything.

To this day, if I bend my wrists too much or even hold them in a bent position for any length of time they get really sore. When driving the truck they would get really sore to the point of having to use wrist supports. I would usually have to drive with one hand and switch hands to drive.

(Ex. J, p.9)

The State of Iowa Disability Determination Services requested Jill M. Hunt, M.D. to provide a comprehensive history and medical examination of claimant for the purpose of determining whether claimant qualified for Social Security disability benefits. The examination occurred on November 26, 2013. Dr. Hill assessed claimant as having:

1. Cervical fusion after work-related injuries to the neck. It appears that his worker's compensation case has not yet fully resolved, but they have not called him back to work. He has chronic pain associated with this and limited range of motion.

2. Hypertension, not well controlled.

3. Type 2 diabetes mellitus.

4. History of diverticulitis with partial colon resection and chronic constipation and diarrhea.

5. Bilateral carpal fusion in the wrists, congenital.

(Ex. 9, p. 62A)

Some of the conditions were totally unrelated to claimant's work injury.

Dr. Hill concluded the following about claimant's condition:

Based on the patient's history and physical exam, and range of motion testing, he has very limited ability to use his upper arms due to increased pain with movement of the arms and his neck and head.

During range of motion testing, he did on three occasions note pain going up the side of his neck. He stated that he also felt his esophagus spasm at that time. He states that this happens occasionally since the surgery. He has not tried lifting or carrying more than 5 to 10 pounds and that is only when his arms are down at his sides. He cannot lift weights up to his chest level because it causes increased pain. He has no difficulty walking on flat ground and is able to climb up steps, but has difficulty walking up

> hills. His constant pain in his neck would be limiting with most types of employment.

(Ex. 9, pp. 62A and 62B)

It was determined by the Social Security Administration that claimant became disabled under the regulations of that agency on July 20, 2012. Monthly benefits did not begin until January 2013. Claimant's entitlement to Social Security benefits was offset by his weekly entitlement to workers' compensation benefits. (Ex. 9, pp. 57-58)

Claimant exercised his right to an independent medical examination pursuant to Iowa Code section 85.39. On October 6, 2014, claimant presented to Mark C. Taylor, M.D., MPH for an examination. Dr. Taylor authored a report on November 5, 2014. In the report Dr. Taylor opined claimant had a 27 percent permanent impairment rating to the body as a whole. (Ex. 7, p. 47) Dr. Taylor relied upon the range of motion methodology for calculating the impairment rating. (Ex. 7, p. 47) Claimant did not demonstrate significant motor impairment of his nerve roots. (Ex. 7, p. 47)

Dr. Taylor did impose permanent restrictions. (Ex. 7, pp. 47-48) They included:

> With respect to material handling, I would recommend a 30-pound lifting limit at waist level on a rare basis and 25 pounds on an occasional basis. I would recommend lifting 10 pounds or less with the left upper extremity alone and this should generally be between waist and chest level and it should be as close to the body as possible. The more he lifts the left arm and the further he reaches out away from the body, the more the symptoms increase. I would recommend 20 pounds or less between floor level and waist level and 20 pounds or less at or above chest level.
>
> With respect to nonmaterial handling, he should alternate walking, standing and sitting as needed for comfort. His activities will likely have to be broken up, which is what he currently performs at home. He may get up and try and go on a walk or move around but then has to lie back down. He can squat rarely and can bend occasionally. He can crawl rarely and kneel rarely to occasionally. He should not be climbing up on ladders due to his decreased range of motion in the neck. He may be able to go up a step ladder for a step or two but should not extend any higher than that. There are no specific lower extremity restrictions in his particular case.
>
> There are no vision, hearing or communication restrictions with regard to his cervical spine condition. He can travel rarely to occasionally but must have the ability to stop periodically and get out of the vehicle. I will also further note that due to this persistent pain, as well as his decreased range of motion, he may be limited in the operation of his personal vehicle and will likely be limited in operating business vehicles or fork trucks, etc.

> He may be at increased risk for additional injury due to his decreased range of motion and pain. Mr. Menadue should avoid any work tasks that require sustained neck flexion or extension. He may tolerate 10-20 degrees of flexion but will not likely tolerate work that is consistently at or above head level and should only reach at or above head level on an occasional basis. He can use vibratory or power tools on a rare basis, but again, he will be limited related to the neck pain and the positioning that is required to operate such tools. Furthermore, he complained of decreased pinprick throughout all 10 digits. There are no specific environmental restrictions, although extremes of cold may aggravate his symptoms. As far as personal protective equipment, he will not likely tolerate the use of respirators or other similar items that increase the amount of weight and pressure on his head and neck.

(Ex. 7, pp. 47-48)

On May 1, 2015, Dr. Abernathey opined claimant could return to full duty work with no work restrictions. (Ex. E, p. 2) The neurosurgeon rated claimant as having an 11 percent permanent partial impairment rating according to the AMA Guides to the Evaluation of Permanent Impairment, 5th edition. (Ex. E, p. 2) Dr. Abernathey did not explain how he arrived at the 11 percent rating using the AMA Guides as the foundation for his rating.

Claimant testified, once he was released to return to work, he telephoned Jerry Schueller and Jeff Flynn at the Flynn Company and told them he had been released to return to work and he was available. Claimant stated no one returned his telephone call and he was not placed back into the workforce. (Ex. A, p. 8, p. 12)

Claimant admitted during his deposition, he had not done anything else to secure employment since the date of his work injury. (Ex. A, p. 14) Claimant stated, "I couldn't think of anything that I could do." (Ex. A, p. 15) Claimant admitted at hearing, he had been referring to himself as retired. In reality, claimant was disabled as determined by the Social Security Administration. However, that designation did not preclude claimant from securing some type of employment under the regulations of the Social Security Administration.

At the time of the hearing, claimant was not taking any prescription medication for his cervical spine. On occasion he did take over-the-counter pain medications. Claimant explained he relied on home remedies. These consisted of using a pillow behind his neck, reclining in a chair, watching television and petting his small dog.

RATIONALE AND CONCLUSIONS OF LAW

When an expert's opinion is based upon an incomplete history it is not necessarily binding on the commissioner or the court. It is then to be weighed, together with other facts and circumstances, the ultimate conclusion being for the finder of the fact. Musselman v. Central Telephone Company, 261 Iowa 352,154 N.W.2d 128, 133 (Iowa 1967); Bodish v. Fischer, Inc., 257 Iowa 521, 522, 133 N.W.2d 867 (1965).

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.

Claimant is 64 years old. He holds himself out as retired. Retirement status does not preclude an injured employee from receiving an industrial disability award. Claimant has not been motivated to seek any employment. Retraining is an unrealistic goal.

He is receiving Social Security disability benefits and he does not want to jeopardize the receipt of those benefits. Neither the treating surgeon nor the independent medical examiner has advised claimant to stop working. Even with the restrictions provided by Dr. Taylor, there is work claimant is able to perform. There are two permanent impairment ratings. One is 11 percent by Dr. Abernathey. The other rating is 27 percent by Dr. Taylor. Dr. Abernathey neglected to detail how he calculated his rating while Dr. Taylor detailed the manner with which he calculated his rating. It was easy for the undersigned to understand Dr. Taylor's calculations; this deputy did not comprehend how Dr. Abernathey reached the 11 percent rating.

It is doubtful claimant is able to return to truck driving. However, claimant did not spend his entire career as a truck driver. He had other opportunities available to him.

He worked many years in quality control, he supervised employees, and he exhibited mechanical skills in a factory setting. There are employment opportunities available.

After considering all of the factors involved in determining industrial disability, it is the determination of this deputy claimant has an industrial disability in the amount of 70 percent. Defendants shall pay unto claimant 350 weeks of benefits at the stipulated weekly benefit rate of $798.25 per week.

Said permanency benefits shall commence from February 4, 2013. This is the date Dr. Abernathey determined claimant had an excellent healing of his fusion graft and claimant could return to his usual activities. (Ex. E, p. 1)

In arbitration proceedings, interest accrues on unpaid permanent disability benefits from the onset of permanent disability. Farmers Elevator Co., Kingsley v. Manning, 286 N.W.2d 174 (Iowa 1979); Benson v. Good Samaritan Ctr., File No. 765734 (Ruling on Rehearing, October 18, 1989).

The next issue for resolution is the matter of penalty benefits 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."
>
> 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).

Claimant maintains penalty benefits should be imposed because defendants underpaid weekly benefits from July 2012 through August 2014 for a total of 108 weeks. The parties admit the weekly benefit rate was calculated in error and paid at the rate of $643.74 per week. The rate should have been $798.25 per week. Defendants admitted on March 23, 2015, they had paid claimant at an incorrect rate. Immediately thereafter, defendants tendered the underpayment with interest to claimant. The underpayment totaled $14,015.38. The interest paid equaled $5,327.89.

Defendants had access to all of claimant's payroll records. There was no reasonable cause or excuse for the underpayment. Penalty benefits are in order. It is the determination of the undersigned defendants shall pay unto claimant $4,000.00 in penalty benefits pursuant to Iowa Code section 86.13.

Claimant is requesting penalty benefits because defendants terminated permanency benefits on August 17, 2014. No penalty benefits are awarded because defendants terminated permanency benefits on August 17, 2014. The amount of permanency benefits to which claimant was entitled was clearly a debatable issue. Whether claimant had sustained any loss of earning capacity is a factual issue which is determined by the trier of fact at hearing. No penalty benefits are awarded for the termination of permanency benefits on August 17, 2014.

ORDER

THEREFORE, IT IS ORDERED:

Defendant shall pay unto claimant, three hundred-fifty (350) weeks of permanency benefits at the stipulated weekly benefit rate of seven hundred ninety eight dollars and 25/100 ($798.25) per week and commencing from February 4, 2013.

Accrued benefits shall be paid in a lump sum with interest as provided by law.

Defendants shall take credit for all benefits paid prior to the filing of this decision.

Defendants shall pay unto claimant four thousand dollars and no/100 ($4,000.00) in penalty benefits pursuant to Iowa Code section 86.13 and interest on unpaid penalty benefits shall commence from the date of the filing of this decision.

Costs are assessed to defendant.

Defendant shall file all reports as required by this division.

Signed and filed this 2nd day of September, 2015.

Michelle A. McGovern

MICHELLE A. MCGOVERN
DEPUTY WORKERS' COMPENSATION
COMMISSIONER

Copies to:

Mr. Chadwyn D. Cox
Attorney at Law
P.O. Box 239
Dubuque, IA 52004-0239
cox@rkenline.com

Mr. Chris J. Scheldrup
Attorney at Law
PO Box 36
Cedar Rapids, IA 52406-0036
cscheldrup@scheldruplaw.com

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.