BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

LESLIE FINNESTAD,	File No. 5045273
Claimant,	ARBITRATION
vs.	DECISION
LOWE'S HOME CENTERS, INC.,	
Employer, Self-Insured, Defendant.	Head Note No.: 1803

STATEMENT OF THE CASE

Claimant, Leslie Finnestad has filed a petition in arbitration and seeks workers' compensation benefits from Lowe's Home Centers, Inc., employer, self-insured defendant.

This matter was heard by Deputy Workers' Compensation Commissioner Ron Pohlman on September 17, 2014 at Des Moines, Iowa. The record in the case consists of claimant's exhibits 1-4; defendant's exhibits AA-GG; joint exhibits A-M as well as the testimony of the claimant and Michelle Boger.

ISSUES

The parties submitted the following issues for determination:

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

2. Whether the defendant is entitled to credit pursuant to Iowa Code section 85.34(7); and

3. Whether the claimant is entitled to payment of penalties for underpayment of benefits pursuant to Iowa Code section 86.13.

FINDINGS OF FACT

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

The claimant at the time of the hearing was 44 years old. She is married with no dependents. She completed the ninth grade in school and obtained a GED. The claimant has worked as a plumber's helper, apprentice plumber, housekeeper, warehouse worker, team leader, mass transit operator and a delivery driver. The job the claimant was performing at the time she was injured December 3, 2011 was a delivery driver for the employer. This job required that claimant had a commercial driver's license. The physical job requirements were:

Physical Job Requirements

- Ability to move throughout all areas of the store; sales floor, receiving, register areas, lawn and garden, including the outside perimeter of the store.
- Meet physical qualifications for CDL or non-commercial driver's license as appropriate.
- Move objects up to and exceeding 200 pounds with reasonable accommodations.
- Able to wear all necessary personal protective equipment to perform job functions.
- Stand and/or sit continuously and perform job functions for a full shift with meal break.
- Physically able to stand, bend, stoop, kneel, reach, twist, lift, push, pull, climb, balance, crouch, handle and move items weighing up to 50 pounds without assistance.
- Visual acuity corrected to perform job functions. Ability to distinguish color to perform job functions.

(Exhibit DD, page 12)

On December 3, 2011 the claimant was injured when she and her coworker were delivering a 400-pound refrigerator to a customer's house. They were moving the refrigerator up stairs. The claimant's coworker, Steve, was pulling at the top of the refrigerator on the appliance dolly while the claimant was at the bottom pushing. Halfway up the flight of stairs Steve lost his footing and sat down. The claimant held on for as long as she could, but eventually the refrigerator became too heavy for her and pinned her against the wall. The homeowner and Steve pulled the refrigerator off of the claimant. After she was freed the claimant developed a severe headache. The claimant managed to make it through one more delivery after this, but Steve performed most of the work. The claimant awoke the next morning in severe pain and reported the injury to the store manager. She was instructed to go to the emergency room at Mary

Greeley Hospital in Ames, Iowa. After the emergency room treatment the claimant was treated conservatively and underwent a course of physical therapy. The claimant had injuries to her back and shoulders. The claimant did not require surgery for her back injury but did undergo arthroscopic surgeries on both shoulders. The claimant eventually underwent pain management for her back, which included three injections, which provided brief relief. She had an ablation procedure, which provided moderate relief of her right leg pain. Kary Schulte, M.D., who treated the claimant's shoulders and provided surgery opined on July 1, 2014:

> In response to your facsimile dated June 19, 2014 regarding Leslie Finnestad, as requested, an impairment rating was performed suing the AMA Guides to the Evaluation of Permanent Impairment, 5th Edition, 2000. The basis of the impairment rating was Ms. Finnestad's last clinic visit, February 25, 2013. At the time of her last clinic visit, Ms. Finnestad had full range of motion of both shoulders and normal motor strength. According to the Guides, she has no measurable impairment.

(Ex. F, p. 54)

Dr. Schulte also released the claimant for full work duty without restriction on February 25, 2013.

Cassim Igram, M.D. saw the claimant on January 10, 2014 for an independent medical evaluation at defendant's request. Dr. Igram reviewed claimant's MRIs and concluded that she did not have significant nerve impingement and that his exam suggested several nonorganic physical exam findings. He concluded that the claimant was at maximum medical improvement at that time. With respect to permanent impairment Dr. Igram opined:

> As far as permanent partial disability is concerned, she does have ongoing back and RIGHT leg pain. Because of her non-verifiable radicular complaints as indicated by her RIGHT leg pain, I would opine within reasonable medical certainty this patient falls into the DRE lumbar category II, which is a five percent impairment of the person as a whole. I should note that I utilized table 15-3 on page 385 of the AMA Guides to the Evaluation of Permanent Impairment, 5th Edition. As far as use of a walker and inability to drive, as I noted above, this patient does have, in my opinion, many nonorganic physical exam findings that are out of proportion to her radiographic findings. As far as any permanent restrictions are concerned, I would not be inclined to place any on her today.
>
> A more objective measurement of her capabilities may be a functional capacity evaluation. My recommendation to perform that study would be Charles Goodhue. Therefore, my diagnosis on this patient would be a

back strain. For all intents and purposes, this patient should be recovered from a back strain at this time.

(Ex. K, p. 103)

Pursuant to Dr. Igram's suggestion the claimant underwent a functional capacity evaluation on February 10, 2014 performed by Charles Goodhue, M.S., M.P.T. Mr. Goodhue determined that the claimant had given a valid and consistent effort in the evaluation and recommended:

RECOMMENDATIONS:

Based on the results of this FCE, I am unable to determine where Ms. Finnestad would be placed within the U.S. Department of Labor's work category.

There is a strong non-organic component to her ability to successfully perform this FCE, and her subjective complaints clearly outweighed objective findings.

At this time, it is my medical opinion that Ms. Finnestad does need her front-wheeled walker for normal ambulation activities. I also feel she should not drive as her reaction time and pain level may contribute to safety concerns not only for herself but others on the road. This medical opinion is based solely due to her pain levels but not supported by any objective findings.

At this time I feel that my only suggestion is that Ms. Finnestad continue to perform her home exercise program as instructed from her previous physical therapy interventions as well as continued pain control methods that have previously been implemented.

(Ex. L, p. 112)

Dr. Igram commented on Mr. Goodhue's suggestion that the claimant not operate a vehicle because of her pain and functional limitations. Dr. Igram opined that the claimant's inability to operate a vehicle was not causally connected to the work injury because it was first noted in the record 15 months after her injury. The claimant underwent an independent medical evaluation by Sunil Bansal, M.D. on April 11, 2014 at her attorney's request. Dr. Bansal's diagnosis was:

DIAGNOSIS:

RIGHT SHOULDER:

Right shoulder impingement syndrome.

Status post right shoulder arthroscopy with subacromial decompression.

LEFT SHOULDER:

Left shoulder impingement syndrome and full thickness rotator cuff tear.

Status post left shoulder arthroscopy with subacromial decompression.

LUMBAR BACK:

Aggravation of Lumbar Spondylosis

Status post bilateral two-level L4-L5 and L5-S1 radiofrequency denervation.

(Ex. M, p. 128)

With respect to impairment, Dr. Bansal assigned a three percent whole person impairment for the right shoulder; four percent whole person impairment for the left shoulder; and a five percent whole person impairment for the back based on loss of range of motion, guarding, pain and radiculopathic complaints. With respect to restrictions, Dr. Bansal opined:

> I would place a restriction of no lifting greater than 20 pounds occasionally and no frequent lifting over 10 pounds, along with no lifting over 5 pounds over shoulder level with either arm. Doing more causes her considerable pain and would place additional stress on the shoulders and spine.
>
> No frequent bending, squatting, kneeling.
>
> Sitting, standing, and walking as tolerated. Being in any one position for too long causes her discomfort. Specifically, she should avoid sitting for more than 30 minutes, no standing/walking for more than 20 minutes at a time.

(Ex. M, p. 131)

Dr. Igram was asked to comment with respect to permanent restrictions set out in Dr. Bansal's opinion and opined:

> As far as permanent restrictions are concerned, I did indicate in subsequent reports that this patient did undergo a functional capacity evaluation, which was deemed invalid. The patient did have multiple nonorganic findings, and I opined that I could not objectively assign

> permanent restrictions to this patient based on an invalid functional capacity evaluation. Dr. Bansal did feel compelled to assign restrictions to this patient, which I would suggest are somewhat subjective. It is my opinion that I cannot assign permanent restrictions to this patient based on an invalid functional capacity evaluation.

(Ex. K, p. 109)

The claimant underwent two surgeries for rotator cuff injuries prior to coming to work for the employer in 2011. She had permanent restrictions imposed in 2007 as a result of those surgeries, which limited her shoulder reaching, no climbing, 15 pounds occasional lifting. See Exhibit A, page 9. She asked to have them lifted in 2009, and they were. See Exhibit A, page 10.

During claimant's course of treatment for the work injuries in this case she was released to go back to work in the plumbing department at Lowe's. The claimant worked part time in the plumbing department on light duty for most of 2012. She was given a good performance review for her light duty work in the plumbing department. She could not drive company trucks and perform the job she held at the time she was injured, but she was able to drive back and forth to work.

On February 17, 2013 the claimant went to the Boone County Hospital complaining of severe back and leg pain. See Joint Exhibit G, page 55 and Joint Exhibit H, page 60. The emergency room physician took the claimant off of work until she was to be seen by a workers' compensation physician, and effective February 18, 2013 the claimant was back on healing period benefits. The claimant has never returned to work at Lowe's or anywhere else since.

The claimant's current complaints are pain in the base of her neck and spine, to her toes and to her fingers. The worst pain is down the right leg. She describes the pain as constant but worse with activity. She has transient headaches and trouble sleeping for more than two hours at a time. She has difficulty getting around and problems with balance and climbing stairs. She uses a walker for distance, and her spouse helps her get around and drives her to locations. Her spouse also assists her with bathing and hygiene. The claimant at this time would like to drive again but does not think that she could drive for the employer.

REASONING AND CONCLUSIONS OF LAW

The first issue in this case is the extent of claimant's entitlement to permanent partial disability benefits pursuant to Iowa Code section 85.34(2)(u).

Since claimant has an impairment to the body as a whole, an industrial disability has been sustained. Industrial disability was defined in Diederich v. Tri-City 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.

According to her independent medical evaluator, Dr. Bansal, the claimant has significant work restrictions. The physicians who have examined the claimant agree that she has permanent impairment in her bilateral shoulders and her low back. The record shows that the claimant was released by her treating physician for her shoulders without restrictions. The record shows that the claimant worked for a significant period of time on light duty in the defendant's plumbing department without difficulty. The claimant has a limited education, and her work experience has primarily been in work that required heavy physical demand. At this time the claimant presents with severe debilitating pain and limited ability to move. It is not clear why the claimant's condition has so substantially worsened since she was fully released to return to work by Dr. Schulte. The functional capacity evaluation suggests that the claimant should not drive, but it is not established that her inability to drive is related to the work injury as opposed to other conditions that are unrelated to that work injury. Considering these and all other factors of industrial disability it is concluded that the claimant has sustained a 30 percent industrial disability entitling her to 150 weeks of permanent partial disability benefits pursuant to Iowa Code section 85.34(2)(u).

The next issue is whether the defendant is entitled to credit pursuant to Iowa Code section 85.34(7).

Defendant filed an amended answer alleging that the claimant had suffered a serious left shoulder injury in 2006 resulting in permanent impairment and permanent work restrictions and as such asserted application of apportionment or successive disability pursuant to Iowa Code section 85.34(7). Iowa Code section 85.34(7)(a) provides that employers are not liable for compensating an employee's preexisting disability that had arose from causes unrelated to employment. It is unrefuted that the 2006 shoulder injury did not occur at work. Further, it is unrefuted that no compensation was paid to the claimant for that injury. Finally, the record shows that the claimant had restrictions, but those were lifted prior to her hire for this employer. The record shows that the claimant was able to perform this work for the employer without limitation until

the injury on December 3, 2011 when she was pinned by a 400-pound refrigerator. The record indicates that there was no preexisting disability for which the defendant is entitled to credit.

The final issue is whether the claimant is entitled to penalties 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.

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 record shows that the claimant has been paid benefits, but the rate at which she was paid was $37.87 per week under the rate at which the claimant should have been paid. The total underpayment is $5,557.40. Defendant admitted the underpayment and paid the claimant for that underpayment with interest. There is no reason or excuse for the underpayment shown in this record. Defense counsel cites three cases in his brief for the claimant where the employer had been penalized in 2010 and 2004 for late payment of permanent partial disability benefits. The claimant is entitled to a 50 percent penalty on the underpayment of weekly benefits in the amount of $2,750.00.

ORDER

THEREFORE IT IS ORDERED:

Defendant shall pay claimant one-hundred fifty (150) weeks of permanent partial disability benefits commencing January 11, 2014 at the weekly rate of four-hundred fifty-one and 43/100 dollars ($451.43).

Defendant shall receive credit for benefits previously paid.

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

Defendant shall pay claimant two-thousand seven-hundred fifty and 00/100 dollars ($2,750.00) in penalties pursuant to Iowa Code section 86.13.

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

Signed and filed this 19th day of March, 2015.

Ron Pohlman

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.