BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

LESLIE LYNN HARROD,

Claimant,

vs.

ADVANCE SERVICES, INC.,

Employer,

and

ACE AMERICAN INSURANCE COMPANY,

Insurance Carrier,
Defendants.

File No. 5048596

ARBITRATION DECISION

Head Note No.: 1803

STATEMENT OF THE CASE

Claimant, Leslie Lynn Harrod, has filed a petition in arbitration and seeks workers' compensation benefits from Advance Services, Inc., employer, and Ace American Insurance Company, insurance carrier, defendants.

Deputy workers' compensation commissioner, Stan McElderry, heard this matter in Des Moines, Iowa.

ISSUES

The parties have submitted the following issues for determination:

1. The extent of permanent disability from the injury arising out of and in the course of employment on September 30, 2013;

2. Alternate medical care; and

3. Penalty.

FINDINGS OF FACT

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

The claimant was 22 years old at the time of hearing. She is a high school graduate and has taken some community college courses. Her ultimate wish is to

become a veterinarian. Most of her previous employment history is in low skill, low pay jobs including dietary aide, waitress, cook, agricultural labor, and fur skinner.

Advance Services, is an employment agency. The claimant was placed at Max Yield Elevator in Dickens, Iowa where she unloaded grain trailers and trucks, cleaned up grain spills, and patched holes in bins. The position required some rare lifting of over 60 pounds.

While working at Max Yield the claimant soon noticed that the work was causing pain in her right shoulder down into the arm, and numbness in both arms. The parties stipulated that the injury and/or manifestation date is September 30, 2013. She requested medical care and was sent to Bruce Feldman, M.D., in Spencer, Iowa. (Exhibit 1) Dr. Feldman first diagnosed a right shoulder strain and prescribed physical therapy (PT). When the PT had not helped after 10 weeks, and symptoms were actually getting worse he recommended a shoulder MRI and referral to an orthopedist, Alexander Pruitt, M.D. (Ex. 1, page 7) Dr. Pruitt's records are at exhibits A and 3. After relatively conservative care did not help, Dr. Pruitt recommended a cervical MRI in February of 2014. The MRI showed an injury at C6-7 and some flattening at C5-6 which Dr. Pruitt opined was the cause of the shoulder pain. On July 15, 2014 Dr. Pruitt declared that the claimant had reached maximum medical improvement (MMI) July 11, 2014 and had a five percent permanent impairment. (Ex. A2; Ex. 3, p. 29) Lifting the restriction of 25 pounds imposed on May 23, 2014 was not changed. (Ex. A1) That rating of five percent made on July 15, 2014 was not paid by the defendants until December 19, 2014.

Since her symptoms and pain had not ended, the claimant requested a referral to a spinal surgeon. The request was denied. Advance Services eventually let the claimant go as they could not accommodate the restrictions. She eventually got a job for Rembrandt Enterprises but was laid off because of a bird flu outbreak. She did not return when recalled, at least in part, because she found the work too demanding due to the work injury suffered at Advance Services. At the time of hearing she was working with cats and dogs at a humane society for $8.75 per hour as opposed to the $12.00 at Advance Services.

Sunil Bansal, M.D. performed an independent medical evaluation/examination (IME) on October 29, 2014. (Ex. 5) Dr. Bansal opined a 15 percent permanent body as a whole impairment rating. (Ex. 5, p. 10) He also believed that restrictions of lifting no more than 25 pounds occasionally, 10 pounds frequently, and no lifting over 10 pounds above shoulder height were necessary. Also no frequent over shoulder level activity. (Ex. 5, p. 11) He also believed that more treatment such as additional medications, epidural injections or nerve ablation, a TENS unit, and a pain specialist would be of benefit. (Ex. 5, p. 11) The claimant requests an order for alternate medical care.

Given the claimant's youth, it is at best speculative to consider whether she will further her education. In her present state, considering the claimant's medical impairments, training, permanent restrictions, daily pain, as well as all other factors of industrial disability, the claimant has suffered a 40 percent loss of earning capacity.

On the date of injury the claimant had gross weekly earnings of $591.00, was single, and entitled to 1 exemption. As such, her weekly benefit rate is $367.96. The commencement date for permanent disability was stipulated as July 15, 2014.

REASONING AND CONCLUSIONS OF LAW

The first issue is the extent 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 Rule of Appellate Procedure 6.14(6).

The claimant has the burden of proving by a preponderance of the evidence that the alleged injury actually occurred and that it both arose out of and in the course of the employment. Quaker Oats Co. v. Ciha, 552 N.W.2d 143 (Iowa 1996); Miedema v. Dial Corp., 551 N.W.2d 309 (Iowa 1996). The words "arising out of" referred to the cause or source of the injury. The words "in the course of" refer to the time, place, and circumstances of the injury. 2800 Corp. v. Fernandez, 528 N.W.2d 124 (Iowa 1995). An injury arises out of the employment when a causal relationship exists between the injury and the employment. Miedema, 551 N.W.2d 309. The injury must be a rational consequence of a hazard connected with the employment and not merely incidental to the employment. Koehler Elec. v. Wills, 608 N.W.2d 1 (Iowa 2000); Miedema, 551 N.W.2d 309. An injury occurs "in the course of" employment when it happens within a period of employment at a place where the employee reasonably may be when performing employment duties and while the employee is fulfilling those duties or doing an activity incidental to them. Ciha, 552 N.W.2d 143.

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.

While a claimant is not entitled to compensation for the results of a preexisting injury or disease, its mere existence at the time of a subsequent injury is not a defense. Rose v. John Deere Ottumwa Works, 247 Iowa 900, 76 N.W.2d 756 (1956). If the claimant had a preexisting condition or disability that is materially aggravated, accelerated, worsened or lighted up so that it results in disability, claimant is entitled to recover. Nicks v. Davenport Produce Co., 254 Iowa 130, 115 N.W.2d 812 (1962); Yeager v. Firestone Tire & Rubber Co., 253 Iowa 369, 112 N.W.2d 299 (1961). Total disability does not mean a state of absolute helplessness. Permanent total disability occurs where the injury wholly disables the employee from performing work that the employee's experience, training, education, intelligence, and physical capacities would otherwise permit the employee to perform. See McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Diederich v. Tri-City R. Co., 219 Iowa 587, 258 N.W. 899 (1935).

Based on the finding that the claimant has suffered a 40 percent loss of earning capacity, she has sustained a 40 percent permanent partial industrial disability entitling her to 200 weeks of permanent partial disability pursuant to Iowa Code section 85.34(2)(u).

Alternate medical care.

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

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

> [T]he words "reasonable" and "adequate" appear to describe the same standard.
>
> [The New Mexico rule] requires the employer to provide a certain standard of care and excuses the employer from any obligation to provide

other services only if that standard is met. We construe the terms "reasonable" and "adequate" as describing care that is both appropriate to the injury and sufficient to bring the worker to maximum recovery.

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

The claimant is still in pain, and Dr. Pruitt was unable to offer anything that worked, but he was not a spine specialist. The claimant requires additional treatment from a qualified spine specialist to see what additional care may be necessary.

Penalty.

Iowa Code section 86.13(4) provides:

4. a. If a denial, a delay in payment, or a termination of benefits occurs without reasonable or probable cause or excuse known to the employer or insurance carrier at the time of the denial, delay in payment, or termination of benefits, the workers' compensation commissioner shall award benefits in addition to those benefits payable under this chapter, or chapter 85, 85A, or 85B, up to fifty percent of the amount of benefits that were denied, delayed, or terminated without reasonable or probable cause or excuse.

b. The workers' compensation commissioner shall award benefits under this subsection if the commissioner finds both of the following facts:

(1) The employee has demonstrated a denial, delay in payment, or termination of benefits.

(2) The employer has failed to prove a reasonable or probable cause or excuse for the denial, delay in payment, or termination of benefits.

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 seeks penalty benefits on the basis of benefits being late in that defendants own doctor's rating of 5 percent made on July 15, 2014 was not paid until December 19, 2014. No excuse was offered for the late payment. $9,199.00 was paid late. Defendants shall pay a penalty of $4,500.00 which is in the range of, but short of, the maximum of 50 percent allowable.

ORDER

THEREFORE IT IS ORDERED:

That the defendants shall pay the claimant two hundred (200) weeks of permanent partial disability commencing July 15, 2014 at the weekly rate of three hundred sixty-seven and 96/100 dollars ($367.96).

Alternate medical care as detailed above is granted.

Defendants shall pay a penalty of four thousand five hundred and 00/100 dollars ($4,500.00) all of which is accrued.

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

Accrued benefits shall be paid in lump sum together with interest pursuant to Iowa Code section 85.30 with subsequent reports of injury pursuant to rule 876 IAC 3.1.

Signed and filed this 12th day of September, 2016.

STAN MCELDERRY
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.