BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

DONALD TASY, Claimant, vs. PYLE TRANSPORTATION, INC., Employer, Defendant.	:	File No. 21700893.01 ARBITRATION DECISION Head Notes: 1801, 2501, 3003, 4000.2

STATEMENT OF THE CASE

Claimant, Donald Tasy, filed a petition in arbitration seeking workers' compensation benefits from Pyle Transportation, Inc., (Pyle), uninsured employer. This matter was heard on July 28, 2022, with a final submission date of August 18, 2022.

The record in this case consists of Joint Exhibits 1 through 3, Claimant's Exhibits 1 through 6, and the testimony of claimant.

The parties filed a hearing report at the commencement of the arbitration hearing. On the hearing report, the parties entered into various stipulations. All of those stipulations were accepted and are hereby incorporated into this arbitration decision and no factual or legal issues relative to the parties' stipulations will be raised or discussed in this decision. The parties are now bound by their stipulations.

ISSUES

1. Whether claimant is entitled to a running award of temporary benefits.

2. Whether there is a causal connection between the injury and the claimed medical expenses.

3. Rate.

4. Whether defendant is liable for a penalty under Iowa Code section 86.13.

5. Costs.

FINDINGS OF FACT

Claimant was 69 years old at the time of hearing. Claimant testified he spent most of his work life as a truck driver. (Hearing Transcript, pages 10-11)

Claimant began with Pyle in 2020. Claimant was hired as an over-the-road truck driver. (Tr., p. 11)

On July 30, 2021, claimant was driving for Pyle when he lost control of the steering of his truck while on the interstate. Claimant was outside of Nebraska City, Nebraska. Claimant's truck ended up in a ditch. (Tr., pp. 12-13; Claimant's Exhibit 1) Claimant said he was later told by state troopers that the axle had broken on the truck. (Tr., p. 13)

Claimant said that after the accident, he felt pain in his left hand, arm, and shoulder. (Tr., pp. 14-15)

Claimant said an ambulance wanted to take him to St. Joseph, Missouri, for treatment. Claimant eventually called his daughter, who came and got him and drove him back to Sioux City, Iowa. Claimant said he tried to contact Pyle after the accident, but received no answer. (Tr., p. 15) Claimant said he eventually was able to reach the owner of Pyle. He said that the owner did not offer or direct him to medical care. (Tr., pp. 18-19) Claimant testified Pyle eventually hauled the truck away and took his personal belongings that were in the truck as well. Claimant lost property as described in Claimant's Exhibit 4. (Tr., pp. 20-21) Claimant said Pyle also failed to pay him for his last week of work. (Tr., p. 21)

On August 2, 2021, claimant was evaluated by Tyson Allen, P.A. Claimant was assessed as having a left distal radius intra-articular fracture with widening and a left fourth metacarpal shaft fracture. Claimant's left arm was put in a cast, and he was treated with medication. (Joint Exhibit 2, pages 1-2)

On August 10, 2021, claimant was taken off driving as a long-haul truck driver. (JE 2, p. 6)

On August 16, 2021, claimant underwent surgery on his left arm. Surgery consisted of an open reduction and internal fixation of a left distal radius fracture, open reduction and internal fixation of the left ring finger metacarpal fracture, and casting the arm in a splint. The surgery was performed by Yorell Manon-Matos, M.D. (JE 1)

On September 23, 2021, claimant was seen by Dr. Manon-Matos in follow-up care. Claimant had been doing physical therapy and home therapy. Claimant had swelling and stiffness. Claimant was assessed as having bilateral carpal tunnel and cubital tunnel syndrome. He also had cervical spine pain. Claimant was advised to have testing done for the carpal tunnel and cubital tunnel syndrome. He was referred to Michael Esperitu, M.D., for his spine. (JE 2, pp. 14-15)

Claimant saw Dr. Esperitu on September 28, 2021, for neck pain and bilateral arm numbness and pain. Claimant was recommended to have an MRI of the cervical spine and left shoulder. (JE 2, pp. 17-18)

On October 19, 2021, claimant saw Dr. Esperitu in follow-up. The MRI for claimant's left shoulder showed a full thickness tear at the supraspinatus and infraspinatus. The MRI of the neck showed severe foraminal stenosis at C3-4 and a disc protrusion at C4-5. Claimant was limited to lifting up to 10 pounds. He was given a cervical injection. He was referred to a sports medicine clinic for a possible left rotator cuff repair. (JE 2, pp. 20-21, 23)

Claimant was evaluated by Frederick Fisher, M.D., at the Dunes Surgical Hospital on October 25, 2021, for cervical neuritis. Claimant was given an epidural steroid injection at the C6-7 level. (JE 3)

Claimant saw Joseph Carreau, M.D., on October 28, 2021. Claimant had left shoulder weakness. Overhead use of the shoulder, reaching or lifting from the left was difficult. Claimant was assessed as having rotator cuff arthropathy on the left. Dr. Carreau recommended against rotator cuff surgery due to advanced atrophy of the rotator cuff. Claimant was recommended to undergo physical therapy. He was kept at a 10-pound lifting restriction. (JE 2, pp. 24-26)

Claimant underwent electrodiagnostic testing on both upper extremities on December 3, 2021. Testing indicated bilateral carpal tunnel syndrome, left cubital tunnel syndrome and a severe right ulnar neuropathy. (JE 2, pp. 27-28)

Claimant was evaluated by Trisha Anderson, P.A., on December 9, 2021. Claimant was told to continue a home exercise program and continue with the restrictions as detailed on October 28, 2021. (JE 2, pp. 30-31)

Claimant was seen by Dr. Manon-Matos on January 4, 2022. He was assessed as having bilateral carpal tunnel syndrome, bilateral cubital tunnel syndrome, left shoulder pain and cervical pain. Surgery was chosen as a treatment option for the left carpal tunnel and left cubital tunnel syndrome. (JE 2, pp. 33-34)

On January 31, 2022, claimant underwent left carpal tunnel and left cubital tunnel syndrome release. Claimant was released on light duty as of February 17, 2022, until March 21, 2022. (JE 2, pp. 37-38)

Claimant testified he had to sign up for Medicare because his employer would not pay for his medical costs. He testified that all medical care has been paid through Medicare. (Tr., p. 21)

Claimant testified he has had two surgeries to his right wrist. He said he had a surgery scheduled for August 10, 2022, for his left thumb. (Tr., p. 23) He testified doctors have told him that he may require a left shoulder replacement. (Tr., p. 26)

Claimant testified Pyle has not offered him any light duty work. (Tr., pp. 39-40) He said that given his physical condition with his arms, neck, and left shoulder, he could not return to work as a truck driver. (Tr., p. 40)

CONCLUSIONS OF LAW

The first issue to be determined is whether claimant's injury resulted in a temporary 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. 6.904(3).

When an injured worker has been unable to work during a period of recuperation from an injury that did not produce permanent disability, the worker is entitled to temporary total disability benefits during the time the worker is disabled by the injury. Those benefits are payable until the employee has returned to work, or is medically capable of returning to work substantially similar to the work performed at the time of injury. Section 85.33(1).

Healing period compensation describes temporary workers' compensation weekly benefits that precede an allowance of permanent partial disability benefits. Ellingson v. Fleetguard, Inc., 599 N.W.2d 440 (Iowa 1999). Section 85.34(1) provides that healing period benefits are payable to an injured worker who has suffered permanent partial disability until the first to occur of three events. These are: (1) the worker has returned to work; (2) the worker medically is capable of returning to substantially similar employment; or (3) the worker has achieved maximum medical recovery. Maximum medical recovery is achieved when healing is complete and the extent of permanent disability can be determined. Armstrong Tire & Rubber Co. v. Kubli, Iowa App., 312 N.W.2d 60 (Iowa 1981). Neither maintenance medical care nor an employee's continuing to have pain or other symptoms necessarily prolongs the healing period.

Claimant sustained a work-related injury on July 30, 2021. That injury has affected his bilateral upper extremities, his left shoulder, and his cervical spine. Claimant has not returned to work since that time. Claimant has been given work restrictions. Claimant is allowed to return to work at light duty. Defendant-employer has made no effort to return claimant to light-duty work. Claimant is not yet at maximum medical improvement (MMI) Claimant's credible testimony is that, given his numerous physical limitations, he cannot return to work as an over-the-road truck driver. Given this record, claimant has carried his burden of proof he is entitled to a running award of temporary total disability benefits commencing on July 31, 2021, and continuing until

claimant has been found to have returned to work, is medically capable of returning to work, or is at MMI.

The next issue to be determined is whether there is a causal connection between the injury and the claimed medical expenses.

The employer shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance, and hospital services and supplies for all conditions compensable under the workers' compensation law. The employer shall also allow reasonable and necessary transportation expenses incurred for those services. The employer has the right to choose the provider of care, except where the employer has denied liability for the injury. Section 85.27. Holbert v. Townsend Engineering Co., Thirty-second Biennial Report of the Industrial Commissioner 78 (Review-Reopening October 1975).

Defendant failed to authorize or offer any medical care for claimant's work-related injuries. As a result, claimant has had to seek medical treatment on his own. Claimant had to get signed up for Medicare for insurance. There is no evidence that the expenses detailed in Claimant's Exhibit 2 and Exhibit 5 are not related to claimant's July 30, 2021, work injury. There is no evidence that the expenses as set forth for medical care are not fair and reasonable. Given this record, defendant is found to be liable for the medical expenses detailed in Claimant's Exhibits 2 and 5. Defendant is also liable for any medical liens with Medicare as detailed in Exhibit 2.

The next issue to be determined is claimant's rate.

Section 85.36 states the basis of compensation is the weekly earnings of the employee at the time of the injury. The section defines weekly earnings as the gross salary, wages, or earnings to which an employee would have been entitled had the employee worked the customary hours for the full pay period in which the employee was injured as the employer regularly required for the work or employment. The various subsections of section 85.36 set forth methods of computing weekly earnings depending upon the type of earnings and employment.

If the employee is paid on a daily or hourly basis or by output, weekly earnings are computed by dividing by 13 the earnings over the 13-week period immediately preceding the injury. Any week that does not fairly reflect the employee's customary earnings is excluded, however. Section 85.36(6).

Claimant testified that he was told when he started employment with Pyle that he would be paid 48 cents per mile. Claimant testified he was actually paid less than 48 cents per mile. (Tr., pp. 31-32)

The only evidence in the record regarding rate indicates claimant was paid $1,757.74 on March 13, 2021. Claimant testified this pay record was for the period of time from February 22, 2021, through March 1, 2021. (Tr., p. 30) The record indicates that claimant was paid 43 cents per mile and traveled 4,018 miles during that week.

(Ex. 3) There is little evidence to dispute that claimant's average weekly wage was $1,757.74 per week. Claimant was single with one exemption. Claimant's rate is $1,015.53 per week.

The next issue to be determined is whether defendant is liable for a penalty under 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.
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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 Custom 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, 594 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 was injured in a work-related accident on July 30, 2021. This occurred when the axle broke on the truck he was driving for Pyle. Claimant has not been able to return to work since that accident due to his numerous physical limitations. Claimant's unrebutted testimony is that he cannot return to work as a truck driver. Defendant did not offer claimant any light-duty work. Defendant gave no rationale as to why claimant was not paid temporary benefits for the period of time that he was off work. The period of time claimant has been off work since July 30, 2021, to the time of hearing is approximately 52 weeks. A 50 percent penalty is appropriate. Defendant is liable for a penalty of $26,404.00 ($1,015.53 x 52 weeks x 50 percent).

The next issue to be determined is costs. Costs are awarded at the discretion of the agency. Claimant has prevailed on all issues in this matter. As a result, costs should be awarded to claimant.

ORDER

THEREFORE IT IS ORDERED:

That defendant shall pay claimant temporary total disability benefits at the rate of one thousand fifteen and 53/100 dollars ($1,015.53) per week commencing on July 31, 2021, and continuing until such time as claimant has reached MMI.

That defendant shall pay accrued weekly benefits in a lump sum together with interest at an annual rate equal to the one-year treasury constant maturity published by the federal reserve in the most recent H15 report settled as of the date of injury, plus two percent.

That defendant shall pay claimant's medical bills as detailed in Claimant's Exhibits 2 and 5.

That defendant is liable for the health insurance subrogation claims as detailed in Claimant's Exhibit 2.

That defendant shall pay claimant twenty-six thousand four hundred four dollars ($26,404.00) in penalty for failure to pay temporary total disability benefits.

That defendant shall pay costs.

That defendant shall file subsequent reports of injury as required by this agency under rule 876 IAC 3.1(2).

That this case is referred to the Iowa Workers' Compensation Commissioner for determination of whether further investigation or action is necessary in accordance with Iowa Code section 87.19.

Signed and filed this 24th day of October, 2022.

JAMES F. CHRISTENSON
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Al Sturgeon (via WCES)

David Jennett (via WCES)

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 filed via Workers' Compensation Electronic System (WCES) unless the filing party has been granted permission by the Division of Workers' Compensation to file documents in paper form. If such permission has been granted, the notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 150 Des Moines Street, Des Moines, Iowa 50309-1836. The notice of appeal must be received by the Division of Workers' Compensation 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 legal holiday.