BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

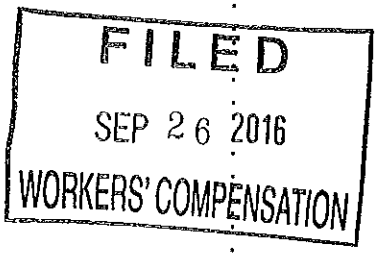
BRADLEY M. BOYLE,

Claimant,

vs.

CITY OF SIOUX CITY,

Employer,
Self-Insured,
Defendant.



File No. 5051858

ARBITRATION

DECISION

Head Note Nos.: 1100; 1403.30; 1803; 2907; 4000.2

STATEMENT OF THE CASE

Bradley Boyle, claimant, filed a petition for arbitration against defendant, City of Sioux City, as the self-insured employer. An in-person hearing occurred on March 29, 2016 in Sioux City, Iowa.

The evidentiary record includes claimant's exhibits 1 through 16 and defendants' exhibits A through H. Claimant called himself, as well as his wife, Kristina Boyle, to testify live at the hearing. Defendant called its risk manager, Donald Trometer, to testify. The evidentiary record closed at the conclusion of the March 29, 2016 hearing.

Counsel for both parties requested the opportunity to draft post-hearing briefs. The parties served post-hearing briefs on May 19, 2016. Thereafter, the Iowa Supreme Court issued a decision in Evenson v. Winnebago Industries, Inc., 881 N.W.2d 360 (Iowa 2016), which had a potential practical effect on pending issues in this case. Claimant filed an amended post-hearing brief on June 8, 2016 and defendant filed a reply brief on June 15, 2016, at which this case was considered fully submitted to the undersigned.

STIPULATIONS

The parties submitted a hearing report at the commencement of the arbitration hearing. In the order section of the hearing report, the undersigned found the hearing report "to be a correct representation of disputed issues and stipulations and the report was approved and accepted into the record of this case." However, for clarity sake, the parties have entered into the following stipulations:

1. The parties stipulate to "[t]he existence of an employer-employee relationship at the time of the alleged injury." (Hearing Report, page 1)

2. The parties stipulate that entitlement to healing period or temporary disability benefits is no longer in dispute. (Hearing Report, p. 1)

3. With respect to the rate of compensation, the parties stipulate that, "[a]t the time of the alleged injury, claimant's gross earnings were $920.23 per week." (Hearing Report, p. 1)

4. With respect to rate of compensation, the parties have stipulated, "[a]t the time of the alleged injury, ... claimant was married." (Hearing Report, p. 1)

5. With respect to the rate of compensation, the parties have stipulated, "[a]t the time of the alleged injury, ... claimant was entitled to 5 exemptions." (Hearing Report, p. 1)

6. Medical benefits are no longer in dispute. (Hearing Report, p. 2)

7. The parties stipulate that "[p]rior to hearing, claimant was paid 115 weeks of compensation at the rate of $626.82 per week." (Hearing Report, p. 2)

8. With respect to the request for specific taxation of costs, the parties stipulate that "[t]he costs listed in the attachment have been paid." (Hearing Report, p. 2)

ISSUES

The parties submitted the following disputed issues for resolution:

1. Whether claimant sustained an injury on July 30, 2012 that arose out of and in the course of his employment with the City of Sioux City.

2. Whether the alleged injury caused permanent disability and, if so, the extent of claimant's entitlement to permanent partial disability benefits.

3. The proper commencement date for permanent partial disability benefits, if any are awarded.

4. Whether defendant has established an affirmative defense for claimant's alleged failure to follow work restrictions and, if so, any legal effect this may have on claimant's entitlement to benefits.

5. Whether interest should be ordered on any past due weekly benefits.

6. Whether claimant has established entitlement to an award of penalty benefits under Iowa Code section 86.13.

7. Whether costs should be assessed against either party and, if so, in what amount.

FINDINGS OF FACTS

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

Bradley Boyle is 40 years old. He works for the City of Sioux City. He alleges that he sustained a low back injury at work on July 30, 2012 and that the injury has caused him a permanent loss of earning capacity. Mr. Boyle has a high school education. He has worked for a number of employers in various positions, including for his father in an automotive repair business. He worked at McDonalds during his high school years.

After high school, claimant worked for Gateway computers assembling computers and loading software on new computers. Next, claimant worked for a car dealership performing routine maintenance on vehicles. Claimant has also worked as a tow truck driver.

In 2000, Mr. Boyle took employment with the City of Sioux City as an auto mechanic. Before commencing his employment, claimant was required to submit to and pass a pre-employment physical. Claimant had no permanent physical restrictions when he commenced working for the City of Sioux City. In his position as an auto mechanic, claimant would work on city equipment such as automobiles, trucks, fire trucks, buses, snow plows, front end loaders, dump trucks, street sweepers, excavators, backhoes, and similar equipment.

Prior to the alleged injury in this case, claimant sustained another work injury in 2010. Specifically, claimant sustained a neck injury, which required a C6-7 discectomy and fusion. (Ex. 1, p. 1) Fortunately, claimant recovered well from that injury and surgery and was released without work restrictions in October 2010. (Ex. 2, p. 1) He returned to work with the City and continued to work without restriction until July 30, 2012. (Claimant's testimony)

On July 30, 2012, claimant climbed up on a piece of equipment to check the mileage. As he climbed down, he slipped and felt a sharp pain in his low back. He reported the injury and the City directed him to seek medical care through Mercy Business Health Services. (Claimant's testimony)

Rodney L. Cassens, M.D., initially evaluated claimant on August 2, 2012. At that evaluation, claimant reported that he had twisted his back while he "was climbing down off a piece of equipment on 07/30/2012." (Ex. 4, p. 2) Dr. Cassens' notes appear to confirm that claimant's low back injury occurred at work and as a result of work activities. Dr. Cassens' notes are consistent with claimant's testimony as to when and how his injury occurred on July 30, 2012. Dr. Cassens ordered some medications and physical therapy. Unfortunately, these modalities did not resolve claimant's symptoms. Dr. Cassens, therefore, referred claimant to a neurosurgeon, Matthew R. Johnson, M.D. (Ex. 4; Claimant's testimony)

Dr. Johnson evaluated claimant and recommended surgical intervention. (Ex. 2, p. 4) Dr. Johnson took claimant to surgery on September 10, 2012 and performed an L5-S1 microdiskectomy. (Ex. 5, p. 1) Claimant appeared to make a good recovery from the surgery and Dr. Johnson released claimant to return to work without restrictions on October 31, 2012. (Ex. 2, p. 9) Dr. Johnson believed claimant had achieved maximum medical improvement by December 4, 2012. (Ex. 2, p. 11)

Unfortunately, claimant's condition was not stable and he experienced a recurrent disk herniation at L5-S1 within a few months. (Ex. 2, p. 17; Ex. 2, p. 58) Dr. Johnson reevaluated claimant and recommended a repeat surgery. On March 18, 2013, Dr. Johnson took Mr. Boyle back to surgery and performed another left L5-S1 microdiskectomy. (Ex. 5, p. 2)

Once again, it appeared that claimant was recovering well from surgery. By May 7, 2013, Dr. Johnson opined that claimant was capable of returning to work without restrictions. (Ex. 2, p. 23) Unfortunately, claimant again experienced difficulties and a re-herniation of his lumbar disc. (Ex. 2, p. 59) Dr. Johnson again recommended surgery. Defendant scheduled an evaluation for a second opinion with another surgeon.

Claimant presented for the second opinion evaluation with Eric D. Phillips, M.D., on July 25, 2013. Dr. Phillips concurred with Dr. Johnson's diagnosis and recommendation for a third surgery. Dr. Phillips specifically returned claimant to Dr. Johnson's care for the third surgery. (Ex. 6)

Dr. Johnson took claimant back for a third low back surgery on August 19, 2013. Dr. Johnson performed an L5-S1 anterior lumbar interbody fusion. (Ex. 5, p. 3) Following the low back surgery, claimant developed some retrograde ejaculation difficulties for which no further treatment is available but which require no work restrictions.

As far as his low back, Dr. Johnson has assigned a 23 percent permanent impairment of the whole person as a result of the injury and three resulting surgeries. Dr. Johnson has adopted the recommendations of a functional capacity evaluation (FCE). (Ex. 2, p. 93) The FCE demonstrated the ability to lift up to 40 pounds on an occasional basis, among other limitations outlined in Exhibit 9, page 22. Claimant is capable of medium category work according to the physical therapist's findings and recommendations. (Ex. 9)

Defendant challenges whether claimant sustained a low back injury that arose out of and in the course of his employment on July 30, 2012. Defendant also asserts an affirmative defense, alleging that claimant exceeded his work restrictions and may have caused himself additional injury. Defendant offered no medical evidence or lay testimony to establish that claimant suffered either another injury at work or an injury at home while exceeding work restrictions. Claimant testified on cross-examination by defendant's counsel that he did not suffer any injuries at work or at home between each

of his three low back surgeries. Claimant's testimony was credible in this regard. Given claimant's testimony and the lack of any evidence from the City on this issue, I find that claimant did not sustain any injuries at work or at home between his three low back surgeries or any injuries (other than the July 30, 2012 work injury) that caused the need for any of his three low back surgeries.

Moreover, Dr. Johnson's causation opinion, permanent impairment rating, and adoption of the FCE recommendations for permanent restrictions are not contradicted in this evidentiary record. Dr. Johnson specifically opined that claimant sustained a permanent injury to his lumbar spine as a result of his work activities for the City of Sioux City on July 30, 2012. (Ex. 2, p., 91) Dr. Johnson's causation opinions, linking all three surgeries to the work injury, as well as his opinions pertaining to permanent impairment and permanent work restrictions are reasonable, credible and accepted as accurate.

Both parties have obtained and submitted vocational expert opinions that analyze claimant's ability to compete in the general labor market and offer competing opinions about his loss of earning capacity. Claimant retained the services of Rick Ostrander, who opines that claimant sustained an 80 percent loss of market access and employability as a result of the work injury. Mr. Ostrander further opines that he believes claimant sustained a 60-70 percent loss of earning capacity as a result of the work injury.

Defendant obtained a vocational analysis performed by Michelle Holtz. Ms. Holtz performed a labor market survey and identified several potential job openings for which claimant qualifies. Ms. Holtz opines that claimant sustained a likely decrease ranging from 13-40 percent in earnings if he were to return to the general labor market. Ms. Holtz opined that she believes claimant sustained a 35 percent loss of earning capacity as a result of the work injury.

In fact, claimant remained employed as an auto mechanic for the City of Sioux City as of the date of hearing. Claimant testified that he remains capable of performing the essential job duties as an Auto Mechanic I for the City of Sioux City but requires assistant when changing or lifting certain larger tires or batteries. Claimant testifies that he gets along well with his supervisor and that his supervisor now understands his restrictions. Claimant has not had to decline any work assignments as a result of his injury or restrictions. (Claimant's testimony)

Claimant earns more now in his position with the City of Sioux City than he did at the time of his work injury. Claimant is in a union-covered job and continues to receive raises pursuant to the union contract with the City of Sioux City.

Since the date of injury, claimant has also obtained part-time employment outside of his City employment. Claimant now works for an auto parts store as a part-time sales manager. He works approximately 18 hours per week at the auto parts store on top of his full-time City position. Claimant and his wife also used to own a business

in which claimant would perform routine maintenance on automobiles and ATV's. (Claimant's testimony)

Claimant and his wife also own rental properties. Claimant performs routine maintenance work on those rental properties and some outside work such as snow removal and lawn care. Such work would appear to be within his work restrictions. However, since his back surgeries, claimant cannot perform more extensive repair or remodeling on the couple's rental properties such as hanging drywall. (Claimant's testimony)

On the other hand, claimant provided uncontroverted testimony that his FCE restrictions would preclude him from returning to his tow truck job, automobile lube technician because he could not replace tires, and would also preclude his job at Gateway. Mr. Boyle also testified without contradiction that he could not return to work at his father's repair shop because he would have to lift in excess of his permanent restrictions. (Claimant's testimony)

Mr. Boyle has looked for openings within the City of Sioux City for alternate jobs but has not looked for job opportunities outside of the City. For various reasons, he disputes whether he could do many of the jobs identified by the defendant's vocational expert during her labor market survey. However, Mr. Boyle admits that he likely could perform some of the jobs identified by Ms. Holtz. (Claimant's testimony)

On cross-examination, claimant also acknowledged that he continues to perform automotive maintenance and repairs on his personal vehicles, including an engine overhaul he performed on a 1968 Camaro since the third low back surgery. Claimant admits this work was beyond his permanent work restrictions but apparently did not cause further injury. Mr. Boyle also acknowledges that he replaced a suspension lift and replaced body panels on a 1993 Jeep Wrangler he owns since the third surgery. Claimant also admits that he went off road driving for a couple of days in August 2014 despite his low back injuries. (Claimant's testimony)

Claimant's wife, Kristina Boyle, testified as to claimant's inability since his low back surgeries to perform tasks he used to perform. For example, Mrs. Boyle testified that claimant is no longer able to till their yard for a garden. He no longer does the snow removal at their personal residence. Claimant is no longer able to do extensive home repairs at their personal residence such as replacing laminate flooring, replacing a hot water heater, or repairing or replacing a deck. Claimant is no longer able to haul concrete or hang drywall. He has hired painting to be done, which is something he used to perform. (Kristina Boyle testimony)

Mr. Boyle no longer rides a bicycle with his family. He no longer participates in recreational activities such as softball or basketball with his family. Claimant no longer works out at the gym like he did before his low back injury. Claimant also has difficulties sitting for long periods of time according to his wife. (Kristina Boyle testimony)

Mr. Boyle clearly remains capable of full-time employment. He is a motivated worker. Considering claimant's age, the situs and severity of his injury, his permanent work restrictions, permanent impairment, his employment and educational backgrounds, his motivation, and all other factors of industrial disability outlined by the Iowa Supreme Court, I find that claimant has proven he sustained a 45 percent loss of future earning capacity as a result of the July 30, 2012 work injury.

Perhaps the most troubling evidence in this case was offered by defendant's risk manager, Donald Trometer. Mr. Trometer provided very candid and credible testimony. However, his candor was damaging to the defendant's case.

Claimant's counsel asked Mr. Trometer to explain why the City of Sioux City denied that claimant's injury arose out of and in the course of his employment. Mr. Trometer explained that the claim had never been disputed. (Donald Trometer testimony)

Claimant's counsel pointed out to Mr. Trometer that the City actually denied that the injury arose out of and in the course of employment in its answer, in its answers to interrogatories, and on the hearing report. Having been provided that information, Mr. Trometer again denied that a denial had ever been issued or that the claim had ever been denied. He specifically admitted that he was not aware of any medical basis for a denial of the alleged injury in either the City's answer or in the hearing report. Nevertheless, the City did not withdraw these allegations and disputed whether the injury arose out of and in the course of employment even in its post-hearing brief.

The City also raised an affirmative defense on the hearing report. Yet, the City provided no medical or lay evidence to support a challenge to the arising out of and in the course of issues or its alleged affirmative defense. The City failed to produce any evidence to support its speculations or defenses in these regards and Mr. Trometer specifically refuted any denial of the claim.

Defendant called Mr. Trometer to testify about certain delays that occurred during the processing and handling of this claim. Mr. Trometer explained that there was a delay in obtaining an impairment rating from the treating back surgeon. Such delays occur and this explanation is accepted.

Mr. Trometer also explained that there was a delay in processing of a permanent partial disability check because issuance of the payment required permission and approval by the city council. Certainly, a delay of some time period could be expected and possibly could be considered reasonable to comply with city requirements and protocols. However, the evidence establishes that Dr. Johnson signed a report providing his permanent impairment rating on October 1, 2014. A request was not submitted to the city council until November 17, 2014 for payment of that rating. (Ex. 16, pp. 45-46) Mr. Trometer could not provide an explanation why there was a six week delay between obtaining the rating and obtaining city council approval for payment. (Transcript, pp. 187-188)

Additionally, the check for claimant's permanent partial disability was issued by the City on November 17, 2014. Yet, it was not mailed until November 24, 2014. (Ex. 16, p. 147a) Mr. Trometer explained that there were routing procedures within the City departments that would cause such a delay. (Donald Trometer testimony) I do not find a seven day delay for the mailing of workers' compensation checks to be reasonable even if considered to be "normal" routing procedures within the City of Sioux City. The total payment delayed by the above procedures totaled $30,714.18. (Ex. 16, pp. 145-146)

After the initial lump-sum check was issued, the entirety of the 23 percent permanent impairment rating had not been issued. The City did not set up weekly payments to be issued to claimant thereafter. This resulted in another 10 week delay and a second lump-sum check being issued in the amount of $6,269.20. The City provided no reasonable explanation or excuse for the delay in payment of these additional 10 weeks.

Also damaging to the defendant's case was Mr. Trometer's candid response to questioning about claimant's loss of earning capacity. As noted above, defendant obtained a vocational expert's opinion in this case. Defendant's vocational expert opined that claimant sustained a 35 percent loss of future earning capacity. On cross-examination, Mr. Trometer admitted that he agrees with this assessment.

Mr. Trometer was then asked why the City did not volunteer additional permanent partial disability above and beyond the 23 percent permanent impairment rating if he concurred with the defendant's vocational expert that the loss of earning capacity was 35 percent. Mr. Trometer could not provide a cogent or convincing response to this inquiry. In reality, having admitted that he concurred on behalf of the City with the 35 percent loss of earning capacity opinion from defendant's own expert, Mr. Trometer provided no viable or reasonable basis upon which the City declined to pay industrial disability benefits at least to the 35 percent level.

Therefore, I find that claimant proved a denial of industrial disability benefits from the 23 percent permanent impairment rating up to the 35 percent level acknowledged by Mr. Trometer. The employer provided no viable or reasonable basis or excuse for not paying up to 35 percent in industrial disability.

I find that the defendant failed to provide a reasonable excuse for a six week delay between receipt of the impairment rating and issuance of a check for permanent partial disability. I find that defendant further failed to provide a reasonable basis or excuse for an additional week delay in actual mailing of the permanent partial disability check. Defendant offered no reasonable basis or excuse for the subsequent 10-week delay in payment of ongoing permanent partial disability benefits.

Claimant has not demonstrated any prior penalty awards or similar conduct by this defendant. Defendant demonstrated some attempt to comply with applicable standards and laws by voluntarily paying permanent partial disability equivalent to the

permanent impairment rating. However, defendant offered no reasonable excuse for not paying the 35 percent its risk manager conceded was owed or for its delay in payment of benefits.

CONCLUSIONS OF LAW

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 Electric 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.

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).

Having found that claimant established by undisputed evidence that he sustained a low back injury as a result of his work activities for the employer, I conclude that

claimant has proven he sustained an injury that arose out of and in the course of his employment with the City of Sioux City on July 30, 2012.

Defendant asserts an affirmative defense they label as "failure to follow work restrictions." Defendant produced no legal authority upon which this defense was asserted and offered no explanation of the statutory section under which this alleged affirmative defense arises. I conclude that defendant failed to establish that an affirmative defense actually exists upon which a legal defense could be founded in Iowa for a "failure to follow work restrictions."

Nevertheless, an analysis of the evidentiary record is indicated given the possibility that such an affirmative defense would later be found to exist by an appellate reviewing authority. 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). In this case, defendant bears the burden to establish that claimant did not follow work restrictions and that the failure somehow caused additional injury or effects that would bar recovery. In this instance, I found that defendant produced no medical or lay evidence to establish that claimant caused himself additional injury as a result of any alleged failure to follow work restrictions. Even if defendant could convince a reviewing appellate authority that an affirmative defense should exist, I conclude that defendant failed to generate necessary evidence to support the alleged defense. Defendant's asserted affirmative defense fails.

Mr. Boyle seeks an award of permanent disability benefits. Under the Iowa Workers' Compensation Act, permanent partial disability is compensated either for a loss or loss of use of a scheduled member under Iowa Code section 85.34(2)(a)-(t) or for loss of earning capacity under section 85.34(2)(u). Claimant has proven an injury to his low back. The low back is not a scheduled injury listed in Iowa Code section 85.34(2)(a)-(t). Instead, low back injuries are compensated industrially 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.

Having considered the relevant industrial disability factors outlined by the Iowa Supreme Court, I found that claimant proved a 45 percent loss of future earning capacity. This entitles claimant to a 45 percent industrial disability award, or 225 weeks of permanent partial disability.

The parties dispute the date upon which permanent partial disability benefits should commence. After this case was tried, the Iowa Supreme Court issued its decision in Evenson v. Winnebago Industries, Inc., 881 N.W.2d 360 (Iowa 2016). The Court explained that permanent partial disability benefits commence as soon as any of the three factors outlined in Iowa Code section 85.34(1) transpire.

Therefore, the initial healing period terminates upon a return to work, medical clearance to return to substantially similar employment, or claimant reaching maximum medical improvement. In this instance, claimant had an initial surgery and returned to work after that surgery on November 5, 2012. Claimant's initial healing period terminated on November 4, 2012. Iowa Code section 85.34(1); Evenson v. Winnebago Industries, Inc., 881 N.W.2d 360 (Iowa 2016). Having determined that the initial healing period terminated November 4, 2012, I conclude claimant's entitlement to permanent partial disability benefits commenced on November 5, 2012. Id.

Claimant is entitled to statutory interest on all unpaid or late-paid weekly benefits pursuant to Iowa Code section 85.30. This includes all time periods between November 5, 2012 and the date when permanent partial disability benefits were actually paid to claimant.

Mr. Boyle asserts that defendant unreasonably delayed and/or denied his weekly benefits in this case and that defendant should be ordered to pay penalty benefits pursuant to Iowa Code section 86.13.

Iowa Code section 86.13(4) provides:

> 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 in 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).

In this instance, I found that the claimant proved a delay in issuance of the initial voluntary permanent partial disability benefits for a period of approximately seven weeks from October 1, 2014 until the check was mailed on November 24, 2014. The employer did not provide a reasonable basis or excuse for the extended delay.

After issuance of the initial lump sum permanent partial disability check, the employer failed to set up weekly payments to the claimant to pay the remainder of the 23 percent impairment rating. This resulted in another 10 week delay in payment of benefits. The employer offered no reasonable excuse or basis for the second delay.

Similarly, claimant proved a delay in payment of additional permanent partial disability above and beyond the 23 percent permanent impairment rating. The employer's representative conceded that claimant was entitled to 35 percent loss of earning capacity, or industrial disability. Yet, the employer only paid the 23 percent impairment rating and essentially denied the remaining 12 percent the City conceded was owed without reasonable cause or excuse. The City discontinued its permanent partial disability benefits as of January 2016. Hearing occurred on March 29, 2016.

Having established three separate periods of delay or denial of benefits, it was incumbent upon the employer to provide a reasonable basis or excuse for the delays. The employer failed to provide reasonable bases or excuses for the three periods of delay or denial of permanent partial disability benefits. Therefore, I conclude that a penalty in some amount is required. Iowa Code section 86.13.

The purpose of Iowa Code section 86.13 is both punishment for unreasonable conduct but also deterrence for future cases. Id. at 237. In this regard, the Commission is given discretion to determine the amount of the penalty imposed with a maximum penalty of 50 percent of the amount of the delayed, or denied, benefits. Christensen v. Snap-On Tools Corp., 554 N.W.2d 254, 261 (Iowa 1996).

In exercising its discretion, the agency must consider factors such as the length of the delays, 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. Meyers v. Holiday Express Corp., 557 N.W.2d 502, 505 (Iowa 1996).

In this case, the employer delayed or denied benefits on three separate occasions without reasonable cause or excuse. On the other hand, the employer has no documented record of past penalties. The employer did voluntarily pay (with delays) the permanent impairment rating.

The initial delay was approximately seven weeks but delayed payment over $30,000.00. The second delay was ten weeks and delayed over $6,000.00. The final delay was almost a couple of months, resulting in delay in payment of approximately $3,000.00. In total, defendant unreasonably delayed on payments totaling approximately $40,000.00. Considering the number of delays, the length of the delays, the amount of the benefits delayed, as well as the purposes of the penalty statute, I conclude that a penalty totaling $5,000.00 is appropriate and sufficient to penalize this employer and to deter similar future conduct.

Claimant seeks an assessment of costs and submitted a statement of costs he seeks. Costs are assessed at the discretion of the agency. Iowa Code section 85.40. Exercising the agency's discretion and recognizing that claimant has prevailed on all disputed issues, claimant's filing fee of $100.00 in each file shall be assessed pursuant to 876 IAC 4.33(7). Similarly, claimant's service fees ($33.18) are taxed pursuant to 876 IAC 4.33(3).

Mr. Boyle seeks assessment of charges submitted by physical therapy specialists for a functional capacity evaluation as well as the expense of a vocational evaluation performed by Rick Ostrander. (Claimant's List Court Costs) Agency rule 876 IAC 4.33(6) permits assessment of "the reasonable costs of obtaining no more than two doctors' or practitioners' reports."

Claimant seeks the assessment of the cost from two practitioners. However, review of the billing statement from Physical Therapy Specialists provides only a flat fee charge for performing the functional capacity evaluation. The Iowa Supreme Court made it clear that the costs subsumed under Rule 4.33(6) include only the cost of preparing a report and not the cost of an examination. Des Moines Area Reg'l Transit Auth. v. Young, 867 N.W.2d 839, (Iowa 2015). I am unable to determine if any portion of the charges from Physical Therapy Specialists was specifically for preparation of a report. I, therefore, reject claimant's request to assess this cost.

Similarly, when I review Mr. Ostrander's billing statement, the majority of his charges are research, testing, and analysis. On his July 28, 2015 statement for services rendered, Mr. Ostrander identifies 0.7 hours as part of his charges for completing a report. I find that claimant has established entitlement to reimbursement for these charges, totaling $91.00, pursuant to 876 IAC 4.33(6).

ORDER

THEREFORE, IT IS ORDERED:

Defendant shall pay claimant two hundred twenty-five (225) weeks of permanent partial disability benefits commencing on November 5, 2012.

All permanent partial disability benefits shall be paid at the stipulated rate of six hundred twenty-six and 82/100 dollars ($626.82) per week.

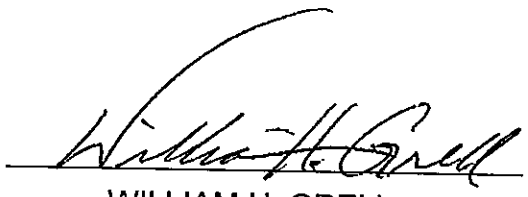
Defendant shall pay interest on all accrued weekly benefits pursuant to Iowa Code section 85.30, including any late-paid permanent partial disability benefits.

Defendant shall pay claimant penalty benefits totaling five thousand dollars ($5,000.00).

Defendant shall reimburse claimant's court costs as noted in the conclusion of law section of this decision in the amount of two hundred twenty-four and 18/100 dollars ($224.18)

Defendant shall file subsequent reports of injury (SROI) as required by this agency pursuant to rules 876 IAC 3.1(2) and 876 IAC 11.7.

Signed and filed this 21st day of September, 2016.



WILLIAM H. GRELL
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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WHG/kjw

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.