

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

RICK HUGHES,

Claimant,

vs.

IMT MUTUAL HOLDING COMPANY,

Employer,

and

CINCINNATI INSURANCE COMPANY,

Insurance Carrier,
Defendants.

File No. 22003564.01

A P P E A L

D E C I S I O N

: Head Notes 1402.40; 1402,60; 1803; 2501
: 2701; 2907; 4000.2

Claimant Rick Hughes appeals from an arbitration decision filed on August 15, 2023. Defendants IMT Mutual Holding Company, employer, and its insurer, Cincinnati Insurance Company, respond to the appeal. The case was heard on April 20, 2023, and it was considered fully submitted in front of the deputy workers' compensation commissioner on June 1, 2023.

In the arbitration decision, the deputy commissioner found claimant sustained an admitted right leg deep vein thrombosis (DVT). However, the deputy commissioner found claimant failed to prove entitlement to either temporary or permanent disability benefits. The deputy commissioner found claimant did prove his past medical expenses are related to the work-related DVT, and the deputy commissioner granted claimant's request for alternate medical care moving forward. Finally, the deputy commissioner denied claimant's request to award penalty benefits because no weekly benefits were awarded in this case.

Claimant asserts on appeal that the deputy commissioner erred in failing to award permanent disability benefits. Claimant asserts that the deputy commissioner inappropriately used agency expertise and evidence outside the evidentiary record to interpret the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, as well as claimant's independent medical evaluation (IME) opinion, resulting in an inappropriate interpretation of permanent impairment and denial of permanent disability

benefits. Claimant further asserts defendants unreasonably denied benefits in this case and the deputy commissioner erred in failing to award penalty benefits.

Defendants assert on appeal that the arbitration decision should be affirmed in its entirety.

Those portions of the proposed arbitration decision pertaining to issues not raised on appeal are adopted as a part of this appeal decision.

I performed a de novo review of the evidentiary record and the detailed arguments of the parties. Pursuant to Iowa Code sections 17A.5 and 86.24, the arbitration decision filed on August 15, 2023, is affirmed in part, and is modified in part.

I affirm the deputy commissioner's finding that claimant failed to prove entitlement to temporary disability, or healing period benefits. I affirm the deputy commissioner's award of past medical expenses as well as his award of alternate medical care. I further affirm the deputy commissioner's assessment of the filing fee as costs against defendants. I also affirm the deputy commissioner's denial of penalty benefits with additional analysis.

With respect to the issue of permanent disability, I respectfully disagree with the deputy commissioner's analysis. I concur with the deputy commissioner about the weight to be given to the respective expert witnesses. Specifically, I affirm the deputy commissioner's finding and rejection of the opinion of Randal Wojciehoski, D.O. I similarly concur with the deputy commissioner's finding that David Lawrence, M.D., in essence deferred to the expertise of a hematologist. I also note Dr. Lawrence did not perform a physical examination of claimant. Ultimately, I discount Dr. Lawrence's opinions and find other medical opinions in this record are more credible and convincing.

In this case, Jasmine Nabi, M.D., is the treating hematologist. Dr. Nabi opines claimant achieved maximum medical improvement (MMI) on March 18, 2022. Perhaps more importantly, Dr. Nabi also opined, "the work-related injury suffered in March 2020 has caused a permanent injury." (Claimant's Exhibit 3, p. 17) I find this is a convincing and credible medical opinion and accept this opinion as accurate. I find claimant sustained a permanent injury as a result of the DVT he sustained at work, and I find claimant achieved MMI from that injury on March 18, 2022.

All parties agree claimant returned to work for defendant-employer and they agree claimant's entitlement to permanent disability is limited to functional disability pursuant to Iowa Code section 85.34(2)(v). Dr. Wojciehoski opined claimant sustained a zero percent permanent impairment as a result of the DVT. Dr. Lawrence concurred with the zero percent permanent impairment rating. I find neither of these opinions to be convincing.

Dr. Nabi did not offer a permanent impairment rating. However, claimant offered a permanent impairment rating prepared by John Kuhnlein, D.O. Dr. Kuhnlein is a certified independent medical evaluator and is well-known to this agency. He provided an in-depth review of the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, to render a permanent impairment for claimant's DVT. Ultimately, Dr. Kuhnlein opined claimant sustained 16 percent permanent impairment of the whole person as a result of the work-related DVT. (Claimant's Exhibit 1, page 9) Dr. Kuhnlein similarly agreed with Dr. Nabi that claimant achieved MMI on March 18, 2022. (Claimant's Exhibit 1, page 9)

The deputy commissioner went through an intensive review of Dr. Kuhnlein's impairment rating. Ultimately, the deputy commissioner found Dr. Kuhnlein's impairment rating was not appropriate and rejected that impairment rating. In this respect, I disagree with the deputy commissioner. I find Dr. Kuhnlein's evaluation and permanent impairment rating to be thoughtful, consistent with, and pursuant to, the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition.

Claimant asserts the deputy commissioner overstepped his authority and utilized evidence outside the evidentiary record and utilized agency expertise to analyze and reject the permanent impairment rating offered by Dr. Kuhnlein. Ultimately, it is unnecessary to evaluate this argument. Rather, I find Dr. Kuhnlein's permanent impairment rating to be consistent with the fact that claimant has an ongoing DVT, consistent with Dr. Nabi's opinion that claimant sustained a permanent disability as a result of the DVT, and convincing as to claimant's permanent functional impairment. I note the rating is calculated pursuant to, and using, the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition. Iowa Code section 85.34(2)(x). I accept Dr. Kuhnlein's permanent impairment rating. I find claimant achieved MMI from the injury on March 18, 2022, and I find claimant proved he sustained 16 percent permanent functional impairment as a result of the work-related DVT.

Claimant's injury is an unscheduled injury. Iowa Code section 85.34(2)(v). Pursuant to the parties' stipulation, this case must be compensated on a functional impairment basis pursuant to Iowa Code section 85.34(2)(v). Pursuant to that statutory section, claimant's functional impairment is calculated based upon a 500-week schedule. Iowa Code section 85.34(2)(v), (w). Sixteen percent of 500 weeks totals 80 weeks. I find claimant is entitled to an award of 80 weeks of permanent partial disability benefits as a result of his DVT injury. Iowa Code section 85.34(2)(v), (w).

Permanent partial disability benefits commence "when it is medically indicated that maximum medical improvement from the injury has been reached and that the extent of loss or percentage of permanent impairment can be determined by use of the guides to the evaluation of permanent impairment." Iowa Code section 85.34(2). In this case, I found that claimant achieved MMI on March 18, 2022. Accordingly, permanent partial disability benefits commence on March 19, 2022.

The final issue for consideration is claimant's penalty benefit claim. Claimant asserts entitlement to penalty benefits for the defendants' denial of permanent disability benefits. Iowa Code section 86.13(4) is the pertinent statutory section that authorizes an award of penalty benefits.

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.

c. In order to be considered a reasonable or probable cause or excuse under paragraph "b," an excuse shall satisfy all of the following criteria:

(1) The excuse was preceded by a reasonable investigation and evaluation by the employer or insurance carrier into whether benefits were owed to the employee.

(2) The results of the reasonable investigation and evaluation were the actual basis upon which the employer or insurance carrier contemporaneously relied to deny, delay payment of, or terminate benefits.

(3) The employer or insurance carrier contemporaneously conveyed the basis for the denial, delay in payment, or termination of benefits to the employee at the time of the denial, delay, 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 stated:

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 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).

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 case, the deputy commissioner expressed concerns about defendants’ handling of this claim. Certainly, their attempt to split the cost of a work-related injury medical expense with a health insurance carrier is concerning. However, the issue of penalty benefits requires specific findings regarding the denial or delay of weekly benefits.

In this case, claimant clearly proved defendants delayed or denied weekly benefits. Iowa Code section 86.13(4)(b)(1). Therefore, the burden of proof shifted to defendants to establish they had a reasonable or probable cause or excuse to deny claimant weekly benefits. Iowa Code section 86.13(4)(b)(2). In this instance, defendants obtained a medical opinion on permanent impairment from Dr. Wojciehoski on July 27, 2020. Iowa Code section 86.13(4)(c)(2). Defendants were clearly conducting an investigation and the opinion of a licensed physician is a reasonable investigation technique. Iowa Code section 86.13(4)(c)(1).

There is not a definitive statement by defendants that they were denying permanent partial disability benefits or that it was specifically in reliance upon Dr. Wojciehoski's opinion regarding permanent impairment. However, defendants did send an e-mail to claimant explaining that Dr. Wojciehoski "assigned no permanent disability as a result of the condition." (Claimant's Exhibit 6, p. 30) This e-mail was sent to claimant August 27, 2020. This e-mail substantially complies with the requirements of Iowa Code section 86.13(4)(c)(3) and it gave claimant notice of the basis for challenging any permanent disability benefits.

Ultimately, I found claimant was not at MMI until 2022. Accordingly, defendants sent notice that Dr. Wojciehoski offered no permanent impairment rating prior to any permanent partial disability benefits being owed. Iowa Code section 85.34(2). Defendants ultimately also convinced a deputy commissioner that no permanent disability benefits are owed. Convincing a neutral decision-maker that no benefits are owed tends to support a finding that the defendants' decision and argument were reasonable. Accordingly, I find the basis and the reason for denial were reasonable. Given that Dr. Wojciehoski's opinion was conveyed to claimant prior to any benefits being owed, I find defendants substantially met their obligations under Iowa Code section 86.13(4). I find no penalty benefits should be awarded.

ORDER

IT IS THEREFORE ORDERED that the arbitration decision filed August 15, 2023, is affirmed in part, and is modified in part.

Defendants shall pay claimant eighty (80) weeks of permanent partial disability benefits at the stipulated weekly rate of one thousand three hundred fifty-two and 22/100 (\$1,352.22) commencing on March 19, 2022.

Defendants 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.

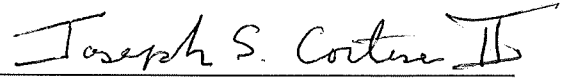
Defendants shall reimburse medical expenses as ordered in the arbitration decision.

Defendants shall provide the alternate medical care ordered in the arbitration decision.

Pursuant to rule 876 IAC 4.33, defendants shall pay claimant's costs of the arbitration proceeding in the amount of one hundred three and 00/100 (103.00) and defendants shall pay the costs of the appeal, including the cost of the hearing transcript.

Pursuant to rule 876 IAC 3.1(2), defendants shall file subsequent reports of injury as required by this agency.

Signed and filed on this 18th day of December, 2023.

Handwritten signature of Joseph S. Cortese II in black ink, featuring a stylized 'J' and 'C'.

JOSEPH S. CORTESE II
WORKERS' COMPENSATION
COMMISSIONER

The parties have been served as follows:

Dillon Besser (via WCES)

Christine Westberg Dorn (via WCES)