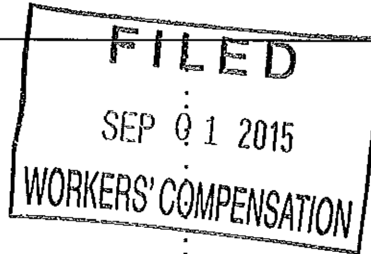
BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER



BRADLEY A. DOSE, Claimant, vs. CASEY'S MARKETING COMPANY, Employer, and EMCASCO INSURANCE COMPANY, Insurance Carrier, Defendants.	File No. 5047571 ARBITRATION DECISION Head Note No.: 1803

STATEMENT OF THE CASE

Claimant, Bradley Dose, filed a petition in arbitration and seeks workers' compensation benefits from Casey's Marketing Company, employer, and EMCASCO Insurance Company, insurance carrier defendants.

This matter was heard by Deputy Workers' Compensation Commissioner Ron Pohlman, on June 23, 2015 at Des Moines, Iowa. The record in this case consists of joint exhibits 1 through 39 as well as the testimony of Rick Ostrander, the claimant, Delores Dose, and Marvin McGinnis.

ISSUES

The parties submitted the following issues for determination:

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

2. Whether the claimant is entitled to penalties pursuant to Iowa Code section 86.13.

FINDINGS OF FACT

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

The claimant at the time of the hearing was 55 years old. He graduated from high school and completed truck driving training at Western Iowa Technical College. The claimant has also had training as a professional bartender and attended the Southwest School of Electronics in Austin, Texas where he completed 900 hours of training as an electronics technician. The claimant has had a variety of jobs in his work history some unskilled and some skilled. He has worked as a laborer, manager, sales person, housekeeper, computer assembler, installer, processor, traffic recorder and truck driver. He even owned his own trucking business from 1999 to 2000. In May 2006 the claimant was hired for the employer as a fuel truck driver. He remained in that job until September 12, 2013 when his family medical leave act time had expired and the employer could no longer hold his job open for him. The claimant obtained employment as a substitute school bus driver from October 2014 through February 2015.

The injury in this case occurred February 20, 2012 and concerns claimant's right knee and hip as a result of slipping on an icy step while getting out of his truck. The claimant also filed a petition with a bilateral shoulder claim with an injury date of March 31, 2013. There was a motion to consolidate these cases, but Deputy Heitland denied that in a ruling dated March 19, 2015.

The claimant has subsequently had surgery on his right knee and his right hip both of these were arthroscopic surgeries. The treating physician for the hip, Christopher Nelson, M.D., had the claimant undergo a functional capacity evaluation on April 3, 2014 which was considered valid and placed the claimant in the medium-heavy physical demand classification. Dr. Nelson indicated that this would restrict the claimant to occasional lifting of 75 pounds, frequent lifting of 35 pounds, and constant lifting of 15 pounds, but Dr. Nelson felt that the claimant would be better served with a medium work description which would place the claimant at occasional lifting of 50 pounds, frequent lifting of 25 pounds, and constant lifting of 10 pounds. See Exhibit 8. The defendants had the claimant see Huy Trinh, M.D., on June 6, 2014 for an independent medical evaluation. Dr. Trinh agreed with Dr. Nelson's functional restrictions and opined that the claimant would have a 2 percent permanent impairment for the knee of the right lower extremity and 5 percent of the right lower extremity for the hip or 7 percent of the right lower extremity total.

The claimant had another functional capacity evaluation on July 29, 2014 at the request of the claimant's vocational evaluator Rick Ostrander. This functional capacity evaluation placed the claimant in the light category.

Based upon his review of the second functional capacity evaluation, Dr. Nelson opined that the claimant had sustained a 6 percent permanent impairment to the whole body for the knee and right hip and agreed that the second functional capacity evaluation would represent the claimant's work restrictions for that work injury.

The claimant obtained an independent medical evaluation with Sunil Bansal, M.D., on April 13, 2015. Dr. Bansal opined the claimant had a 4 percent permanent impairment to the body as a whole and agreed with the second functional capacity evaluation insofar as the claimant's restrictions are concerned.

Defendants had the claimant undergo a vocational evaluation with Michelle Holtz who concluded that the claimant could successfully secure alternate employment despite his age and restrictions if he wished to do so. Further, she concluded that the claimant would be able to find those jobs within the labor market where he resides. See Exhibit 24.

The claimant sought a vocational evaluation with Rick Ostrander who concluded that the claimant had sustained substantial loss of earning capacity but was still employable. He maintained that opinion throughout the hearing in this matter.

REASONING AND CONCLUSIONS OF LAW

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

Since claimant has an impairment to the body as a whole, an industrial disability has been sustained. Industrial disability was defined in Diederich v. Tri-City R. Co., 219 Iowa 587, 258 N.W. 899 (1935) as follows: "It is therefore plain that the legislature intended the term 'disability' to mean 'industrial disability' or loss of earning capacity and not a mere 'functional disability' to be computed in the terms of percentages of the total physical and mental ability of a normal man."

Functional impairment is an element to be considered in determining industrial disability which is the reduction of earning capacity, but consideration must also be given to the injured employee's age, education, qualifications, experience, motivation, loss of earnings, severity and situs of the injury, work restrictions, inability to engage in employment for which the employee is fitted and the employer's offer of work or failure to so offer. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963); Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961).

Compensation for permanent partial disability shall begin at the termination of the healing period. Compensation shall be paid in relation to 500 weeks as the disability bears to the body as a whole. Section 85.34.

The claimant is not totally disabled. Both of the vocational evaluators who were familiar with the claimant's functional capacity evaluations and medical history have each concluded that the claimant is still capable of participating in the labor market. However, the record indicates that the claimant has substantial physical limitations. Since the last functional capacity evaluation the claimant underwent was adopted by the claimant's treating physician, it is concluded that this represents the claimant's work

restrictions as a result of this work injury. Based upon those restrictions, the claimant is not going to return to his former employment and is precluded from many of the jobs that he has held in the past that would have required greater physical demand. Claimant has significant permanent restrictions.

The claimant has shown that he is capable of retraining and adapting to different work environments. In fact, the claimant's work history is significant evidence that the claimant's ability to adapt, change and move on whenever he needed to, as he put it, to better himself. This level of adaptability represents a significant lowering of the barrier for the claimant to return to full time gainful employment. The claimant's earning capacity loss is substantial, however. Considering these and all factors of industrial disability, it is concluded that the claimant has sustained a 60 percent industrial loss entitling him to 300 weeks of permanent partial disability benefits pursuant to Iowa Code section 85.34(2)(u).

The next issue is whether the claimant is entitled to penalties pursuant to Iowa Code section 86.13.

In Christensen v. Snap-on Tools Corp., 554 N.W.2d 254 (Iowa 1996), and Robbennolt v. Snap-on Tools Corp., 555 N.W.2d 229 (Iowa 1996), the supreme court said:

> Based on the plain language of section 86.13, we hold an employee is entitled to penalty benefits if there has been a delay in payment unless the employer proves a reasonable cause or excuse. A reasonable cause or excuse exists if either (1) the delay was necessary for the insurer to investigate the claim or (2) the employer had a reasonable basis to contest the employee's entitlement to benefits. A "reasonable basis" for denial of the claim exists if the claim is "fairly debatable."
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> Christensen, 554 N.W.2d at 260.
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> The supreme court has stated:
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> (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.

(3) Reasonable causes or excuses include (a) a delay for the employer to investigate the claim, Christensen, 554 N.W.2d at 260; Kiesecker v. Webster City Meats, Inc., 528 N.W.2d at 109, 111 (Iowa 1995); or (b) the employer had a reasonable basis to contest the claim—the "fairly debatable" basis for delay. See Christensen, 554 N.W.2d at 260 (holding two-month delay to obtain employer's own medical report reasonable under the circumstances).

(4) For the purpose of applying section 86.13, the benefits that are underpaid as well as late-paid benefits are subject to penalties, unless the employer establishes reasonable and probable cause or excuse. Robbennolt, 555 N.W.2d at 237 (underpayment resulting from application of wrong wage base; in absence of excuse, commissioner required to apply penalty).

> If we were to construe [section 86.13] to permit the avoidance of penalty if any amount of compensation benefits are paid, the purpose of the penalty statute would be frustrated. For these reasons, we conclude section 86.13 is applicable when payment of compensation is not timely . . . or when the full amount of compensation is not paid.

Id.

(5) For purposes of determining whether there has been a delay, payments are "made" when (a) the check addressed to a claimant is mailed (Robbennolt, 555 N.W.2d at 236; Kiesecker, 528 N.W.2d at 112), or (b) the check is delivered personally to the claimant by the employer or its workers' compensation insurer. Robbennolt, 555 N.W.2d at 235.

(6) In determining the amount of penalty, the commissioner is to consider factors such as the length of the delay, the number of delays, the information available to the employer regarding the employee's injury and wages, and the employer's past record of penalties. Robbennolt, 555 N.W.2d at 238.

(7) An employer's bare assertion that a claim is "fairly debatable" does not make it so. A fair reading of Christensen and Robbennolt, makes it clear that the employer must assert facts upon which the commissioner could reasonably find that the claim was "fairly debatable." See Christensen, 554 N.W.2d at 260.

Meyers v. Holiday Express Corp., 557 N.W.2d 502 (Iowa 1996).

Weekly compensation payments are due at the end of the compensation week. Robbennolt, 555 N.W.2d 229, 235.

Penalty is not imposed for delayed interest payments. Davidson v. Bruce, 593 N.W.2d 833, 840 (Iowa App. 1999). Schadendorf v. Snap-On Tools Corp., 757 N.W.2d 330, 338 (Iowa 2008).

When an employee's claim for benefits is fairly debatable based on a good faith dispute over the employee's factual or legal entitlement to benefits, an award of penalty benefits is not appropriate under the statute. Whether the issue was fairly debatable turns on whether there was a disputed factual dispute that, if resolved in favor of the employer, would have supported the employer's denial of compensability. Gilbert v. USF Holland, Inc., 637 N.W.2d 194 (Iowa 2001).

The claimant seeks penalties for an underpayment of the rate and failure to pay the initial waiting period. The defendants calculated the claimant's average weekly wage of $1,278.44 with a married individual with three dependents calculated rate of $816.07. The claimant's attorney, using information provided by the defendants in discovery, calculated that the defendants own wage records would reflect an average weekly wage of $1,330.17 with a proper rate of $846.28. Defendants agreed in September 2014 that their initial calculations were correct, and then on April 23, 2015 adopted the claimant's calculations and made payments to the claimant of $3,638.06 for the underpaid rate, failure to pay the three-day waiting period from February 21, 2012 to February 24, 2012 together with interest. Claimant argues that a penalty in the amount of 50 percent of this underpayment is an appropriate penalty. Further, the defendants in May 2013 paid the claimant $291.41 for underpaid temporary partial disability and the claimant seeks a penalty for that. The information upon which the correct calculations were based was in the possession of the defendants. There is no excuse for the failure to calculate the rate nor is there for failure to pay the initial three-day waiting period. It is noted that the defendants did voluntarily adjust their calculation and made a payment, but even that was several months after they became aware specifically that they had made this calculation error. The undersigned agrees that the claimant is entitled to a penalty in the range of 50 percent and in this case a penalty of $3,700.00 is imposed.

Finally, the claimant seeks costs in this matter. Specifically, the claimant seeks the filing fee, the certified mail cost for the service of the arbitration petition, professional charges for the functional capacity evaluation requested by Mr. Ostrander, and the report of Mr. Ostrander. The defendants agree that the claimant is entitled to the cost of the filing fee and certified mail charges and those are awarded pursuant to rule 876 IAC 4.33. Defendants do dispute the functional capacity evaluation and vocational evaluation fees. The Iowa Supreme Court ruled in Young v. Des Moines Area Region Transit Authority, No. 14-0231 (Iowa June 5, 2015) addressed the costs permitted to be taxed for providers reports under Iowa Code section 86.40 and rule 876 IAC 4.33(6). Pursuant to the Young decision, the claimant is not entitled to the cost of

Mr. Ostrander's report as Mr. Ostrander testified live at hearing. Likewise, the claimant is not entitled to the cost for the functional capacity evaluation as the claimant failed to meet his burden of proof to establish which portion of those charges are taxable as costs under rule 876 IAC 4.33(6).

ORDER

THEREFORE, IT IS ORDERED:

Defendants shall pay claimant three hundred (300) weeks of permanent partial disability benefits commencing April 5, 2014 at the weekly rate of eight hundred forty-six and 28/100 dollars ($846.28).

Defendants shall receive credit for sixty-one (61) weeks of permanent partial disability benefits paid at the weekly rate of eight hundred forty-six and 28/100 dollars ($846.28).

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

Defendants shall pay claimant a penalty of three thousand seven hundred and no/100 dollars ($3,700.00) pursuant to Iowa Code section 86.13.

Costs of this action in the amount of one hundred thirty and 02/100 dollars ($130.02) are taxed to the defendants pursuant to rule 876 IAC 4.33.

Signed and filed this 1st day of September, 2015.

RON POHLMAN
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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RRP/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.