BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

FILED
JAN 30 2018
WORKERS' COMPENSATION

STEVEN R. ALMENDINGER, Claimant, vs. KAS INVESTMENT COMPANY, INC., d/b/a SWANSON GLASS, INC., Employer, and SFM MUTUAL INSURANCE COMPANY, Insurance Carrier, Defendants.	File No. 5062518 ARBITRATION DECISION Head Note Nos.: 1402.30; 1803; 2501; 2502; 3003; 4000.2

STATEMENT OF THE CASE

Claimant, Steven Almendinger, filed a petition in arbitration seeking workers' compensation benefits from KAS Investment Company, Inc., d/b/a Swanson Glass, Inc., (Swanson), employer and SFM Mutual Insurance Company, insurer, both as defendants. This case was heard in Cedar Rapids, Iowa, on September 20, 2017 with the final submission date of October 10, 2017.

The record in this case consists of joint exhibits 1 through 6, claimant's exhibits 1 through 6, defendants' exhibits A through H, (excluding Exhibit D, pages 1-3, Exhibit A, page 1, and Exhibit G, pages 11-19) and the testimony of claimant and Kevin Swanson.

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 sustained a mental injury that arose out of and in the course of employment.

2. The extent of claimant's entitlement to permanent partial disability benefits.

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3. Rate.

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

5. Whether claimant is entitled to alternate medical care.

6. Whether defendants are liable for penalty under Iowa Code section 86.13.

7. Whether defendants are entitled to a credit for an overpayment.

FINDINGS OF FACT

Claimant was 44 years old at the time of hearing. Claimant graduated from high school. Claimant received a welding certificate in 2004-2005. From 2005-2013, claimant worked as a laborer/glazer for Midwest Glazing. (Exhibit 5, Deposition pages 9-10) Claimant worked as an iron worker for several construction companies. (Ex. 5, Dep. pp. 14-15) Claimant also worked at a tire and muffler shop as a mechanic and later as a shop manager. (Ex. 5, Dep. pp. 18-19)

Claimant's medical history is relevant. In 2011, claimant had a right knee injury while working for Midwest Glazing. (Ex. 5, Dep. p.12) Claimant was assessed as having a torn meniscus. Claimant had three knee surgeries for this injury. Claimant testified he was released to return to work full duty as a glazer. (Ex. 5, Dep. p. 12) Claimant also had a tooth implant while working for Midwest. (Ex. 5, Dep. p. 22)

In 2006, claimant sought mental health counseling. Claimant was assessed as having a Mood Disorder. (Joint Exhibit 1)

Claimant began employment with Swanson as a glazer in June of 2013. On October 20, 2014, claimant was unloading glass from a truck when he felt his left knee pop.

In December of 2014, claimant underwent a partial medial meniscectomy. (Cl. Ex. 1, p. 5)

Records suggest claimant returned to work after the first surgery. In January of 2015, claimant was climbing a ladder and felt knee pain. Diagnostic testing showed a tear of the medial meniscus. In March of 2015, claimant had a second knee surgery consisting of a partial medial meniscectomy and a chrondroplasty. (Cl. Ex. 1, p. 5)

Following surgery, claimant's left knee did not get better. Claimant was referred to the University of Iowa Hospitals and Clinics (UIHC). At the UIHC claimant was recommended to have an unloader brace for the left knee and to have work hardening and physical therapy. (Cl. Ex. 1, p. 5)

Claimant testified while he was doing physical therapy, he was required to do an overhead lift. Claimant testified he felt his left shoulder give during physical therapy.

Claimant was assessed as having a full thickness tear of the supraspinatus tendon. (Cl. Ex. 1, p. 6)

Claimant had a third knee surgery on September 23, 2015 consisting of a tibial opening wedge osteotomy and a left knee arthroscopy. (Cl. Ex. 1, p. 6)

On January 6, 2016, claimant underwent a left shoulder rotator cuff repair with bicep tenodesis and distal clavicle excision. Surgery was performed by Matthew Bollier, M.D. (Cl. Ex. 1, p. 6)

On May 19, 2016, claimant was evaluated by Dr. Bollier at the UIHC. Claimant was limited to lifting, pushing, and pulling up to 25 pounds. (Jt. Ex. 5, p. 12)

In a June 23, 2016 e-mail, claimant indicated to his employer he was willing to return to work but would not be "... participating in any kind of carrying or lifting of anything that would jeopardize my recovery." Claimant indicated he was also limited in using ladders and stairs, and kneeling. Claimant indicated he was looking forward to discussing options with his employer and potential continued employment. (Ex. E, p. 1)

Claimant testified when he sent the e-mail, he meant the e-mail to read that he had restrictions, but that he wanted to return to work. Claimant said he had hoped he could return to work with Swanson given his restrictions.

On June 30, 2016, claimant returned in follow up with Dr. Bollier. A functional capacity evaluation (FCE) was discussed. Claimant was not interested in undergoing an FCE. Claimant was found to be at maximum medical improvement (MMI). He was returned to work with no restrictions. (Jt. Ex. 5, p. 6, 13)

In a July 6, 2016 letter, Kevin Swanson indicated he received claimant's June 23, 2016 e-mail. Mr. Swanson testified he is the owner of Swanson. In the letter, Mr. Swanson indicated the employer had work available for a crew leader/supervisor in a number of locations. Crew leaders were required to oversee projects and to lift, install frames and glass, unload trucks, and haul materials. Crew leaders were also required to climb ladders, stairs, and scaffolding. (Ex. E, p. 2)

The letter indicates that Mr. Swanson considered the June 23, 2016 e-mail as a refusal of work. (Ex. E, p. 2)

Mr. Swanson said that at the time he wrote the July of 2016 letter, he was not aware of what claimant's permanent restrictions were. He testified he believed claimant could not return to work given the restrictions detailed in the June of 2016 e-mail. Mr. Swanson testified he did not hire claimant back after the June of 2016 e-mail.

On August 2, 2016, claimant underwent an FCE. Claimant was found to have given consistent effort. The FCE found claimant could engage in a floor to waist lift of up to 30 pounds and overhead lifting of no more than 30 pounds. (Cl. Ex. 1, p. 7)

In an August 11, 2016 note, Dr. Bollier gave claimant permanent restrictions based on the August 2, 2016 FCE. (Ex. 5, pp. 7, 14)

In an August 11, 2016 report, Dr. Bollier found claimant had a 4 percent permanent impairment to the body as a whole based upon a permanent impairment to the left upper extremity. He also found claimant had a 25 percent permanent impairment to the left lower extremity. He gave claimant permanent restrictions based on the FCE of August 2, 2016. (Jt. Ex. 5, p. 8)

In a February 8, 2017 report, Mark Taylor, M.D., gave his opinions of claimant's condition following an independent medical evaluation (IME). Claimant had continued left knee pain with some shoulder pain depending on activity. Using the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, Dr. Taylor found claimant had an 11 percent permanent impairment to the body as a whole based upon the combined values of the permanent impairments for his left lower extremity. He found claimant had a 10 percent permanent impairment to the body as a whole based upon the shoulder injury. Using the combined value charts for the left shoulder and the left knee resulted in claimant having a 20 percent permanent impairment to the body as a whole. Dr. Taylor limited claimant to lifting up to 30 pounds from floor to waist occasionally. (Cl. Ex. 1, pp. 4-11)

In an April 6, 2017 letter, Scott Piper, M.D., indicated that he had been treating claimant for approximately four years. Prior to the October 2014 work injury, claimant was treated with pain medications for chronic pain due primarily to a lower back injury. Dr. Piper noted claimant was originally on 20-45 hydrocodone tablets per month. Due to claimant's pain in both knees and shoulders, claimant currently required pain medication of 100-120 tablets per month. (Ex. 2, p. 3)

Dr. Piper indicated that prior to his work injury, claimant was not using medication for anxiety, depression, or insomnia. As a result of stressors from his injuries, claimant's anxiety had increased and claimant had developed depression. Claimant was prescribed and taking medications for those conditions. (Ex. 2, pp. 3-4)

In answers to interrogatories, defendants indicated Dr. Piper was authorized to treat claimant for his work injury. (Ex. 3, p. 6)

In a May 16, 2017 report, James Carroll, M.Ed., C.R.C., gave his opinions of claimant's vocational opportunities. Using the FCE work restrictions, Mr. Carroll opined claimant had a 13 percent loss in occupations. By using Dr. Taylor's work restrictions, he found that claimant had a 25 percent loss of access to employment. Based upon claimant's earnings pre and post injury, he found that claimant had a 30 percent loss of earning capacity. (Ex. G)

On August 1, 2017, claimant underwent an independent psychological evaluation performed by Paul Ascheman, Ph.D. Dr. Ascheman opined that claimant had adjustment disorder with mixed disturbance of emotions and conduct. Dr. Ascheman noted:

> The claimant's current adjustment disorder appears to be, in part, related to his physical injuries, some of which predate his October 21, 2014 injury.... Given the other facets of his behavioral health presentation..., it is difficult to determine to what degree his mood symptoms were aggravated by the injury itself.

(Ex. F, p. 21)

Dr. Ascheman did not believe claimant had a permanent impairment for his mental health condition. He did not believe claimant had any restrictions regarding his mental health condition. (Ex. F, p. 22)

At the time of hearing, claimant worked for Cedar Rapids Toyota as a car salesman. Claimant testified that he is paid a base salary of $3,000.00 per month with commissions. There is also a volume incentive involved. Claimant testified he has only sold enough cars to earn a volume bonus of $1,200.00 on one occasion. He said that he works over 50 hours every week, including Saturdays. Claimant testified he has applied for jobs with other glazers and trucking companies, but has not gotten any jobs with other employers.

Claimant testified he did not believe he could return to work at Swanson's given his lifting restrictions and his restrictions on squatting. He said he loved his job as a glazer with Swanson. Claimant said that since being terminated by Swanson, he is worried, depressed, and does not believe he could return to work as a glazer.

Claimant testified he usually earned $28.00 per hour working for Swanson. He said that he worked a job in Madison, Wisconsin and he received $46.90 per hour. Claimant testified he worked the Wisconsin job from mid-March 2014 through September 2014.

Mr. Swanson testified that claimant worked approximately 14 jobs for Swanson. He said that on only one job, in Madison, Wisconsin, that claimant was paid $46.90 per hour. At the time of injury, claimant was earning $28.00 per hour. Mr. Swanson testified that $11.22 of the amount paid for the Wisconsin job was for the payment of

benefits. He said he believed claimant's base rate for the Wisconsin job was $36.23 per hour. Mr. Swanson testified that claimant was paid $46.90 per hour while working on the Madison, Wisconsin job.

Claimant was paid biweekly for work with Swanson. Claimant's pay for the 14 weeks prior to his injury are as follows:

Week	Pay Period Ending	Hours	Rate	Earnings
1&2	10/11/2014	79	$28.00	$2,212.00
3&4	9/27/2014	60	$28.00	$1,680.00
5&6	9/13/2014	68	$31.44	$2,137.92
7&8	8/30/2014	73.5	$46.90	$3,447.15
9&10	8/16/2014	75	$46.90	$3,517.50
11&12	8/2/2014	80	$46.90	$3,752.00
13&14	7/19/2014	75	$46.90	$3,517.50

(Ex. 4, p. 3)

CONCLUSIONS OF LAW

The first issue to be determined is did claimant have a mental injury that arose out of and in the course of employment.

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).

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).

Claimant contends that as a result of his physical injuries, he suffers from depression and worsening anxiety.

Dr. Piper indicated that he has treated claimant for four years. Dr. Piper indicates that prior to the October 2014 work injury, claimant was only taking medication for attention deficit disorder (ADD). He said that claimant was not taking meds for anxiety and depression at that time. Dr. Piper opines that due to stressors related to the knee and shoulder injuries, claimant now takes medication for mood disorders. (Ex. 2, pp. 3-4)

Dr. Ascheman opined that claimant suffered from an adjustment disorder with mixed disturbance and emotion. Dr. Ascheman notes that claimant's disorder is related, in part, to physical injuries predating the October 2014 injury. This suggests that claimant's injury to the left knee and shoulder contributes somewhat to claimant's adjustment disorder and his depression. (Ex. F, p. 21)

Dr. Piper opined that claimant's mental injury is due to his October 2014 injury. Dr. Ascheman opines that claimant's mental injury is due, in part, to a knee and shoulder injury. Given this record, claimant has carried his burden of proof his mental injury arose out of and in the course of employment.

Dr. Ascheman opined that claimant's mental injury is not permanent. There is no opinion contradicting this opinion. Based on this, it is found that while claimant's mental injury arose out of and in the course of employment, the mental injury is not a permanent impairment.

The next issue to be determined is the extent of claimant's entitlement to permanent partial disability benefits.

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.

Claimant was 44 years old at the time of hearing. He graduated from high school. Claimant has spent most of his work life as a laborer/glazer. Claimant has worked as an iron worker in construction. Claimant also worked as a mechanic and as a manager of a tire and muffler shop.

Two experts have opined regarding the permanent impairment from claimant's left knee and right shoulder.

Dr. Taylor saw claimant once for an IME. Dr. Taylor opined that claimant had a 20 percent permanent impairment to the body as a whole from the combined values to the left knee and shoulder injuries. (Cl. Ex. 1, p. 11)

Dr. Bollier treated claimant for an extended period of time. He performed claimant's left shoulder surgery. He found that claimant had a 25 percent rating for the left lower extremity and a 6 percent rating to the left upper extremity. A 6 percent permanent impairment to the upper extremity converts to a 4 percent permanent impairment to the body as a whole. (Jt. Ex. 5, p. 8) According to the Guides, Table 17-3, a 25 percent permanent impairment to the lower extremity converts to a 10 percent

permanent impairment to the body as a whole. The combined values of Dr. Bollier's ratings result in a 14 percent permanent impairment to the body as a whole. (Guides, pp. 604-605)

The opinions of treating physicians are not to be given greater weight as a matter of law. Gilleland v. Armstrong Rubber Company, 524 N.W.2d 404, 408 (Iowa 1994). However, as a factual matter, Dr. Bollier has a far greater familiarity with claimant's medical history and his medical presentation than did Dr. Taylor. Based upon this, it is found that Dr. Bollier's permanent impairment rating is 14 percent as for the body as a whole is more convincing.

Claimant underwent a FCE in August 2016. Based on the FCE, Dr. Bollier gave claimant permanent restrictions that included, but not limited to, a two-handed floor to waist lift of up to 30 pounds, and a two-handed lift of no more than 30 pounds occasionally overhead. (Jt. Ex. 5, p. 7)

There is some confusion in the record as to whether claimant was fired or whether claimant quit his job. Claimant's credible testimony was that he meant his e-mail in Exhibit E to indicate that he had some restrictions, but wanted to return to work at Swanson. It appears that Mr. Swanson took the e-mail, found at Exhibit E, as a refusal of work and terminated claimant.

Mr. Swanson equivocates whether claimant could have returned to work at Swanson as a crew leader/glazer. Part of his testimony seems to suggest that claimant could have returned to work with Swanson as a crew leader. Other parts of this testimony suggest that claimant could not have returned to work given his restrictions. (Tr. pp. 71-73) Claimant worked one job as a crew leader for Swanson. (Tr. p. 83) The testimony was that when claimant worked the job as a crew leader, he was required to do the physical work as a glazer. (Tr. pp. 84-85, Ex. E, p. 2) Defendants response to discovery indicate that claimant's permanent restrictions prevented him from working at Swanson in the same capacity that he worked prior to October 2014. (Cl. Ex. 3, p. 2) Given this record, it is found given claimant's permanent restrictions, claimant could not have returned to work with Swanson.

Mr. Carroll opined claimant had a 30 percent loss of earning capacity. (Ex. G, p. 15) Mr. Carroll's opinion is based, in part, on an understanding that claimant earned approximately $25.00 per hour working for Swanson. (Ex. G, p. 9) Records indicate that for more than half of the 14 weeks previous to claimant's injury, claimant earned over $46.00 per hour. (Cl. Ex. 4) At the time of the hearing, claimant was working selling cars. Claimant earned $3,000.00 per month along with commissions for selling cars.

Based upon the factors detailed above, it is found claimant has a 40 percent loss of earning capacity or industrial disability.

The next issue to be determined is 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 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 that fairly represent the employee's customary earnings, however. Section 85.36(6).

The clear words and phrases of the statute are to be given their plain meaning. If a statute's meaning is unclear or ambiguous, it will be construed in a way that favors workers and their dependents. Hartman v. Clarke County Homemakers, 520 N.W.2d 323 (Iowa App. 1994).

Iowa Code section 85.36, in its unnumbered introductory paragraph, states that the basis of compensation is the weekly earnings of the employee at the time of the injury. The paragraph then defines weekly earnings as the gross salary, wages, or earnings to which the employee would have been entitled had the employee worked his or her customary hours for the full pay period in which injured, as the employer regularly required.

Iowa Code section 85.36(6) provides:

> 6. In the case of an employee who is paid on a daily or hourly basis, or by the output of the employee, the weekly earnings shall be computed by dividing by thirteen the earnings, **not including overtime or premium pay**, of the employee earned in the employ of the employer in the last completed period of thirteen consecutive calendar weeks immediately preceding the injury. If the employee was absent from employment for reasons personal to the employee during part of the thirteen calendar weeks preceding the injury, the employee's weekly earnings shall be the amount the employee would have earned had the employee worked when work was available to other employees of the employer in a similar occupation. A week which does not fairly reflect the employee's customary earnings shall be replaced by the closest previous week with earnings that fairly represent the employee's customary earnings. (Emphasis added)

Prior agency decisions have interpreted the term "premium pay" to include shift differential. Burmeister v. Iowa Beef Processors, 2 Iowa Indus. Comm'r Rep. 59, 64 (App. 1982).

The agency has also dealt with the issue if federally funded projects with a required prevailing wage are considered "premium pay" under the statute. In Smith v Cedar Valley Asphalt Co., File No. 879898 (Arb April 15, 1991) the agency held:

> Where an employer pays at a higher hourly rate for a federally-funded public works project in order to comply with the Davis-Bacon Act, the higher pay does not constitute premium pay....

The record indicates that in March 2014 claimant began to work in a job with Swanson that paid $46.90 per hour. Claimant continued to work on this job until approximately September of 2014. (Tr. p. 80, Cl. Ex. 4, p. 3)

Mr. Swanson testified this increase in pay was based upon a wage requirement dictated by Wisconsin's prevailing wage laws. (Tr. pp. 76-77) Mr. Swanson testified that the actual base rate for the Madison, Wisconsin job was $36.23. (Tr. pp. 77-78)

Defendants contend the prevailing wage claimant was paid while on the Wisconsin job is actually a "premium wage". Defendants argue this "premium wage" should be excluded under Iowa Code section 85.36(6). In the alternative, defendants contend that claimant was actually paid $36.23 per hour in Wisconsin and that the additional $11.22 per hour was actually in the fringe benefits that should have been excluded from the calculation. (Defendants post-hearing brief, p. 7-8; Tr. pp. 77-78)

It is noted that as a part of the explanation of defendants position, defendants have attached Exhibit A, page 1 to defendants' post-hearing brief. Exhibit A, page 1 was excluded and not made a part of the record in this case. (Tr. p. 90) As a result, Exhibit A, page 1, attached to defendants post-hearing brief, is not considered in reaching the determination on rate.

The record indicates that from approximately March 2014 to early September 2014 claimant was paid $46.90 per hour. This is due to either a state or municipal requirement that claimant be paid a prevailing wage. A prevailing wage in this case is like a federally mandated wage as detailed in the Smith case. As such, it is found that weeks 7 through 14 of claimant's rate calculation will be at the $46.90 rate.

Claimant earned $20,264.07 for the fourteen weeks preceding his accident. This results in an average weekly wage of $1,447.43 per week. ($20,264.07 ÷ 14) Claimant was married with four exemptions. His rate is $902.78 per week.

The next issue to be determined is if 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).

Claimant seeks medical expenses as detailed in Exhibit 6 and the attachment to the hearing report. Expenses detailed in Exhibit 6 and the hearing report appear to be expenses associated with pain medication and anti-depressant medication. These medications were prescribed by Dr. Piper. Medical expenses also include office visits with Dr. Piper. According to answers to interrogatories, Dr. Piper was an authorized medical provider. (Cl. Ex. 3, p. 6) As noted, claimant's mental injury is found to have arisen out of and in the course of employment. As claimant's mental injury is related to his work injury, and Dr. Piper appears to be an authorized treater, defendants are liable for the claimed medical expenses.

The next issue to be determined is whether claimant is entitled to alternate medical care.

Iowa Code section 85.27(4) provides, in relevant part:

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

An application for alternate medical care is not automatically sustained because claimant is dissatisfied with the care he has been receiving. Mere dissatisfaction with the medical care is not ample grounds for granting an application for alternate medical care. Rather, the claimant must show that the care was not offered promptly, was not reasonably suited to treat the injury, or that the care was unduly inconvenient for the claimant. Long v. Roberts Dairy Co., 528 N.W.2d 122 (Iowa 1995).

There is no evidence in the record that claimant has communicated his dissatisfaction with the care that was provided by defendants. As a result, claimant has failed to prove entitlement to the requested alternate medical care.

The next issue to be determined is if defendants are 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."
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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.
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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 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 record indicates that defendants initially paid claimant temporary benefits based upon a weekly rate of $700.98 per week. This calculation excluded what defendants believed to be premium pay, excluded under Iowa Code section 85.36(6). In a letter dated August 2, 2016, claimant's counsel requested claimant's rate be paid at the prevailing wage as dictated by the Wisconsin law. Defendants paid the temporary benefits and the permanent partial disability benefits based upon claimant's wage calculation. (Cl. Ex. 4, p. 1; Cl. Ex. 3, p. 2; Def. Ex. C) Given this record, penalty is not appropriate.

The final issue to be determined is if defendants are entitled to a credit for an overpayment of benefits. As noted above, defendants have paid benefits at the rate of $902.78 per week. Claimant's rate is found to be $902.78 per week. Based upon this record, defendants are not due a credit for an overpayment.

ORDER

THEREFORE, IT IS ORDERED:

That defendants pay claimant two hundred (200) weeks of permanent partial disability benefits at the rate of nine hundred two and 78/100 dollars ($902.78) per week commencing on June 30, 2016.

That defendants shall pay accrued weekly benefits in a lump sum.

That defendants shall pay interest on the unpaid weekly benefits as ordered above and as set forth in Iowa Code section 85.30.

That defendants shall receive a credit for benefits previously paid.

That defendants shall pay claimant's medical bills as detailed above.

That defendants shall pay costs.

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

Signed and filed this 30th day of January, 2018.

JAMES F. CHRISTENSON
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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JFC/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.