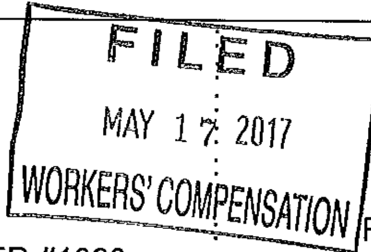
BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER



FANNIE COMSTOCK, Claimant, vs. WALMART SUPERCENTER #1393, Employer, and NEW HAMPSHIRE INSURANCE COMPANY, Insurance Carrier, Defendants.	File Nos. 5054555, 5061032 ARBITRATION DECISION Head Note No.: 1803

STATEMENT OF THE CASE

Claimant, Fannie Comstock, has filed petitions in arbitration and seeks workers' compensation benefits from Walmart Super Center #1393, employer, and New Hampshire Insurance Company, insurance carrier, defendants.

Deputy workers' compensation commissioner, Stan McElderry, heard this matter in Des Moines, Iowa.

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

The parties have submitted the following issues for determination:

File No. 5054555:

1. The extent of permanent disability for the injury arising out of and in the course of employment on January 2, 2015;

2. Temporary benefits;

3. Independent medical evaluation (IME) pursuant to Iowa Code section 85.39; and

4. Penalty.

File No. 5061032:

1. The extent of permanent disability for the left arm injury arising out of and in the course of employment on January 22, 2016;

2. Independent medical evaluation (IME) pursuant to Iowa Code section 85.39; and

3. Penalty

FINDINGS OF FACT

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

The claimant was 63 years old at the time of hearing. She is a high school graduate. She obtained a CNA in 1989. Her previous work history includes being a nurse's aide at several locations. She retired as a CNA when she was 59. She began working for Walmart as a cashier in August of 2012.

On January 2, 2015, when carrying glass bottles of alcohol to another register a bottle fell and her hand came down on the broken glass. She was taken by ambulance to Mahaska Health Partnership emergency room and then transported by ambulance to Mercy Hospital in Des Moines, Iowa. Her injuries included cut tendons in her hand, a broken humerus bone, and an injury to her left shoulder. Dr. Gainer provided treatment for the hand and Dr. Galles treated the shoulder. After hand surgery she began a regime of occupational therapy. She was provided an immobilizer for the shoulder and pain medication. Some weeks later she returned to accommodated work at Walmart as a greeter. She missed work from January 3-19, 2015. She returned to her regular hours on January 20, 2015.

On June 17, 2015, Dr. Galles assigned a permanent restriction of a 15 pound lifting limit with the left arm/shoulder and no lifting over shoulder level. On July 7, 2015, Dr. Gainer imposed a 5 pound lifting restriction for the claimant's left hand. The claimant has a claw deformity to the hand, which was obvious at hearing. She also credibility testified as to ongoing pain to the hand and shoulder. Claimant is right-hand dominant. Dr. Galles assigned a 13 percent impairment to the left upper extremity for the shoulder and Dr. Gainer assigned 40 percent for the left upper extremity for the left hand.

On January 22, 2016, the claimant bumped into a wall at work and fell and fractured her left wrist. After surgery, Dr. Han released the claimant back to work with the restrictions as imposed by Dr. Gainer. The claimant testified that her left wrist now hurts when it is cold or raining. Dr. Han assigned a four percent impairment to the left upper extremity for the January 22, 2016 injury.

On September 16, 2016, the claimant attended an IME with Sunil Bansal, M.D. Dr. Bansal opined that the claimant reached maximum medical improvement (MMI) for the January 2, 2015 injury, and reached MMI on July 7, 2015 for her left hand. He opined that future medical treatment of injections, medications, and home therapy would be needed. For the January 7, 2016 injury he assigned a 7 percent body as a whole (BAW) impairment, and 4 percent of the left upper extremity (2 percent BAW) for the left hand. For the January 22, 2016 injury he opined a May 11, 2016 date for MMI. He also assigned a 3 percent (2 percent BAW) of the left upper extremity rating.

The claimant is no longer actively treating for any of these injuries. She continues in accommodated work at Walmart making more now than she did at the time of the injuries. Since Walmart has other greeters it considers the work as non-accommodated. It is accommodated as with the claimant's left arm restrictions she cannot perform all the job functions without some assistance. She had retired from being a CNA and had no desire or attention to return to it. The loss of industrial capacity is not yet total, but is very substantial. Considering the claimant's medical impairments, training, permanent restrictions, as well as all other factors of industrial disability, the claimant has suffered a 80 percent loss of earning capacity for the January 2, 2015 injury. The injury of January 22, 2016 was limited to the left upper extremity. The functional loss of 4 percent by Dr. Han is accepted for that injury.

On the dates of injury the claimant had gross weekly earnings of $307.00, was married, and entitled to 2 exemptions. As such, her weekly benefit rate is $222.16 for both injury dates. The commencement date for permanent benefits was stipulated as July 7, 2015 for the 2015 injury and May 11, 2016 for the 2016 injury. Claimant seeks payment/reimbursement of the Dr. Bansal IME fee of $2,790.00. She seeks penalty for unnecessary delay and underpayment of benefits. Commencement of benefits took over 6 months from defendants own doctors ratings. Benefits which were unreasonably unpaid or underpaid at the time of hearing were over $5,000.00.

REASONING AND CONCLUSIONS OF LAW

First issue is extent of permanent disability for the injury.

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 Rule of Appellate Procedure 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 Elec. 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.

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.

While a claimant is not entitled to compensation for the results of a preexisting injury or disease, its mere existence at the time of a subsequent injury is not a defense. Rose v. John Deere Ottumwa Works, 247 Iowa 900, 76 N.W.2d 756 (1956). If the claimant had a preexisting condition or disability that is materially aggravated, accelerated, worsened or lighted up so that it results in disability, claimant is entitled to recover. Nicks v. Davenport Produce Co., 254 Iowa 130, 115 N.W.2d 812 (1962); Yeager v. Firestone Tire & Rubber Co., 253 Iowa 369, 112 N.W.2d 299 (1961). Total disability does not mean a state of absolute helplessness. Permanent total disability occurs where the injury wholly disables the employee from performing work that the employee's experience, training, education, intelligence, and physical capacities would otherwise permit the employee to perform. See McSpadden v. Big Ben Coal Co., 288

N.W.2d 181 (Iowa 1980); Diederich v. Tri-City R. Co., 219 Iowa 587, 258 N.W. 899 (1935).

Based on the finding that the claimant has suffered an 80 percent loss of earning capacity from the January 2, 2015 injury, she has sustained an 80 percent permanent partial industrial disability entitling her to 400 weeks of permanent partial disability pursuant to Iowa Code section 85.34(2)(u).

Extent of permanent disability.

The courts have repeatedly stated that for those injuries limited to the schedules in Iowa Code section 85.34(2)(a-t), this agency must only consider the functional loss of the particular scheduled member involved and not the other factors which constitute an "industrial disability." Iowa Supreme Court decisions over the years have repeatedly cited favorably the following language in the 81-year-old case of Soukup v. Shores Co., 222 Iowa 272, 277; 268 N.W. 598, 601 (1936):

> The legislature has definitely fixed the amount of compensation that shall be paid for specific injuries . . . and that, regardless of the education or qualifications or nature of the particular individual, or of his inability . . . to engage in employment . . . the compensation payable . . . is limited to the amount therein fixed.

Our court has even specifically upheld the constitutionality of the scheduled member compensation scheme. Gilleland v. Armstrong Rubber Co., 524 N.W.2d 404 (Iowa 1994). Permanent partial disabilities are classified as either scheduled or unscheduled. A specific scheduled disability is evaluated by the functional method; the industrial method is used to evaluate an unscheduled disability. Graves, 331 N.W.2d 116; Simbro v. DeLong's Sportswear 332 N.W.2d 886, 887 (Iowa 1983); Martin v. Skelly Oil Co., 252 Iowa 128, 133, 106 N.W.2d 95, 98 (1960).

When the result of an injury is loss to a scheduled member, the compensation payable is limited to that set forth in the appropriate subdivision of Code section 85.34(2). Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961). "Loss of use" of a member is equivalent to "loss" of the member. Moses v. National Union C. M. Co., 194 Iowa 819, 184 N.W. 746 (1921). Pursuant to Iowa Code section 85.34(2)(u) the workers' compensation commissioner may equitably prorate compensation payable in those cases wherein the loss is something less than that provided for in the schedule. Blizek v. Eagle Signal Co., 164 N.W.2d 84 (Iowa 1969).

Evidence considered in assessing the loss of use of a particular scheduled member may entail more than a medical rating pursuant to standardized guides for evaluating permanent impairment. A claimant's testimony and demonstration of difficulties incurred in using the injured member and medical evidence regarding general loss of use may be considered in determining the actual loss of use compensable. Soukup, 222 Iowa 272, 268 N.W. 598. Consideration is not given to what effect the

scheduled loss has on claimant's earning capacity. The scheduled loss system created by the legislature is presumed to include compensation for reduced capacity to labor and to earn. Schell v. Central Engineering Co., 232 Iowa 421, 4 N.W.2d 339 (1942).

The right of a worker to receive compensation for injuries sustained which arose out of and in the course of employment is statutory. The statute conferring this right can also fix the amount of compensation to be paid for different specific injuries, and the employee is not entitled to compensation except as provided by statute. Soukup, 222 Iowa 272, 268 N.W. 598.

I found that the claimant suffered a 4 percent permanent loss of use of her left upper extremity due to the January 22, 2016 injury. Based on such a finding, the claimant is entitled to 10 weeks of permanent partial disability benefits under Iowa Code section 85.34(2)(o), which is 4 percent of 250 weeks, the maximum allowable weeks of disability for a upper extremity (arm).

Temporary benefits

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

Claimant was off work from January 3-20, 2016 for the work injury of 2015. She is entitled to healing period benefits for these missed days. After that she returned to work with the same scheduled, but variable hours, as she did pre-injury.

IME

Independent Medical Examination.

Section 85.39 permits an employee to be reimbursed for subsequent examination by a physician of the employee's choice where an employer-retained physician has previously evaluated "permanent disability" and the employee believes that the initial evaluation is too low. The section also permits reimbursement for reasonably necessary transportation expenses incurred and for any wage loss occasioned by the employee attending the subsequent examination.

Defendants are responsible only for reasonable fees associated with claimant's independent medical examination. Claimant has the burden of proving the reasonableness of the expenses incurred for the examination. See Schintgen v. Economy Fire & Casualty Co., File No. 855298 (App. April 26, 1991). Defendants' liability for claimant's injury need not ultimately be established before defendants are obligated to reimburse claimant for an independent medical examination.

The claimant chose to get an evaluation/examination to get a rating of permanent impairment or disability after the defendants had received ratings. The claimant got that exam from Dr. Bansal, who charged a reasonable fee of $2,970.00 for the rating. Defendants shall pay/reimburse the fee as appropriate.

Penalty

The issues to be resolved are whether claimant is entitled to penalty benefits under Iowa Code section 86.13 and, if so, how much.

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.
>
> (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 Schadendorf v. Snap-on Tools Corp., 757 N.W.2d 330, 335 (Iowa 2008) the court held that the delay in paying the award did allow the imposition of a penalty after the defendant no longer had a reasonable excuse for non-payment. The court in Schadendorf affirmed an award of penalty when the defendants did not reasonably pay benefits after an award of benefits.

If the employer fails to show reasonable cause or excuse for the delay or denial, the commissioner shall impose a penalty in an amount up to 50 percent of the amount unreasonably delayed or denied. Christensen v. Snap-on Tools Corp., 554 N.W.2d 254 (Iowa 1996). The factors to be considered in determining the amount of the penalty include the length of the delay, the number of delays, the information available to the employer and the employer's past record of penalties. Robbennolt v. Snap-on Tools Corp., 555 N.W.2d 229, 238 (Iowa 1996).

Benefits which were unreasonably unpaid or underpaid at the time of hearing were over $5,000.00. This employer has history of penalties and thus a penalty in the range of the maximum allowable 50 percent is in order. The defendants shall pay a penalty of $2,500.00, which is in the range of 50 percent.

Defendants request a credit on the scheduled injury on the earlier industrial case herein. The injuries are not payable under the same subsection of the code, and therefore such a credit is not allowable. Iowa Code section 85.34(7)(b)(1).

ORDER

THEREFORE IT IS ORDERED:

That the defendants pay claimant healing period benefits from January 3-19, 2015 at the weekly rate of two hundred twenty-two and 16/100 dollars ($222.16).

That the defendants pay claimant four hundred (400) weeks of permanent partial disability at the weekly rate of two hundred twenty-two and 16/100 dollars ($222.16) commencing July 7, 2015.

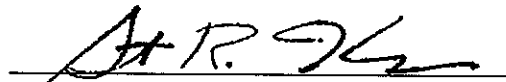
That the defendants pay claimant ten (10) weeks of permanent partial disability at the weekly rate of two hundred twenty-two and 16/100 dollars ($222.16) commencing May 11, 2016.

That defendants pay a penalty of two thousand five hundred and 00/100 dollars ($2,500.00), all of which is accrued.

Costs are taxed to the defendants pursuant to rule 876 IAC 4.33.

Accrued benefits shall be paid in lump sum together with interest pursuant to Iowa Code section 85.30 with subsequent reports of injury pursuant to rule 876 IAC 3.1.

Signed and filed this 17th day of May, 2017.



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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.