BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

DEBRA HOPPE, Claimant, vs. MENARD, INC., Employer, and XL INSURANCE AMERICA, INC., Insurance Carrier, Defendants.	File No. 1634100.01 ARBITRATION DECISION Headnotes: 3003, 4000.2

STATEMENT OF THE CASE

Claimant, Debra Hoppe, filed a petition in arbitration seeking workers' compensation benefits from Menard, Inc. (Menards), employer, and XL Insurance Company, insurer, both as defendants. This matter was heard on September 3, 2021, with a final submission date of November 12, 2021.

The record in this case consists of Joint Exhibits 1 through 8, Claimant's Exhibits 1 through 14, Defendants' Exhibits A through C, and the testimony of claimant.

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. The commencement date of permanent partial disability benefits.

2. Rate.

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

The Second Injury Fund of Iowa (Fund) participated in the hearing in this case. After hearing, the Fund settled with claimant. As a result, issues identified in the

Hearing Report and in the record pertaining to the Fund are not addressed in this decision.

In the Hearing Report, the parties indicated that claimant's entitlement to reimbursement for an Independent Medical Evaluation (IME) and payment of medical expenses as issues in dispute. In Defendants' Post-Hearing Brief, defendants indicated they paid for claimant's IME and also paid the one medical bill at issue. (Defendants' Post-Hearing Brief, p. 8) As a result, those two issues are not addressed in this decision. If these bills have not been paid, claimant may file an application for rehearing to address those two issues.

FINDINGS OF FACT

Claimant began working at Menards in March 2015 on a part-time basis. Claimant's job required her to unload pallets and stock shelves. (Hearing Transcript, pp. 12-14)

On February 15, 2017, claimant injured her left knee when she tripped over a pallet and fell on her left knee. (TR p. 16)

Claimant was assessed as having a tear of the medial meniscus in the left knee. (Joint Exhibit 6, pp. 19-20) On July 6, 2017, claimant underwent a partial medial meniscectomy. Surgery was performed by Thomas Gorsche, M.D. (JE 5, pp. 13-14)

Claimant was off work for surgery. She returned to work on September 5, 2017. (TR p. 18; JE 6, pp. 23-24) Claimant was found to be at maximum medical improvement (MMI) on September 13, 2017. (JE 6, p. 24) On October 3, 2017, Dr. Gorsche opined claimant had a 2 percent permanent impairment to the left lower extremity. (JE 6, p. 27)

Claimant testified her knee condition worsened after her return to work at full duty. (TR p. 18)

Claimant saw Dr. Gorsche on November 13, 2017, with complaints of continued left knee pain. Claimant was given an injection and limited in her use of ladders or climbing. (JE 6, p. 29)

On March 26, 2018, Dr. Gorsche recommended a total knee replacement. (JE 6, p. 35) Claimant testified that defendants did not authorize Dr. Gorsche to initially provide the surgery. (TR p. 19; Claimant's Exhibit 6, p. 38)

In a May 4, 2018, report, Dr. Gorsche opined that claimant's work injury and subsequent need for partial medial meniscectomy was a major contributing cause for claimant's left knee complaints. He also opined that claimant's need for a total knee replacement was related to the work injury. (JE 6, p. 40)

Claimant underwent an IME at defendants' request with David Tearse, M.D., on June 8, 2018. In an August 10, 2018 report, Dr. Tearse opined that claimant's need for the medial meniscectomy surgery was causally connected to her February 2017 work injury. He also opined that claimant's need for a total knee replacement was also related to her February 2017 work injury. (JE 7, pp. 65-67)

Claimant testified she was off work for an extended period of time because Menards could not accommodate her restrictions of sit-down work only. (TR p. 19)

The record indicates claimant was off work from April 24, 2018 through April 29, 2018, May 5, 2018 through May 21, 2018, and from May 24, 2018 through August 29, 2018. (TR p. 19; JE 6, pp. 36, 39, 42-43; Ex. 4, p. 41) Defendants did not pay temporary benefits for these periods until September 5, 2018. (TR p. 19; Ex. 11, p. 76; Defendant's Exhibit B, p. 5)

On October 12, 2018, Dr. Gorsche performed a total knee replacement. (JE 5, p. 17) Claimant was off work until February 4, 2019, when she returned to work at 2 hours a day with no use of a ladder. (JE 6, p. 49)

The records indicate claimant had difficulty with range of motion of the left knee. On April 8, 2019, Dr. Gorsche performed manipulation under anesthesia to aid with range of motion. (JE 6, pp. 49-51; JE 5, p. 18)

On April 23, 2019, Dr. Gorsche returned claimant to 2 hours of work per day. Claimant was allowed to return to 4-hour work shifts on May 6, 2019. (JE 6, p. 54)

On October 8, 2019, claimant returned to Dr. Gorsche. Claimant had improved range of motion, but still did not have full range of motion. Claimant was released from Dr. Gorsche's care on that date. (JE 6, p. 58)

On October 11, 2019, Dr. Gorsche found that claimant was at MMI on October 8, 2019. He opined that claimant had 50 percent permanent impairment to the left lower extremity. That report was not faxed to the defendants until December 23, 2019. (JE 6, p. 60)

In a February 12, 2020 report, Sunil Bansal, M.D., gave his opinions of claimant's condition following an IME. He found claimant had a 50 percent permanent impairment to the left lower extremity. He restricted claimant to kneeling or squatting rarely, no use of ladders, no lifting over 20 pounds. (Ex. 1, pp. 13-14)

In a subsequent report, Dr. Bansal restricted claimant to walking or standing up to 30 minutes. (Ex. 1, p. 17)

Claimant was terminated from Menards on July 24, 2020, as the employer could not accommodate claimant's restrictions. (Ex. 7, p. 53; Ex. 10, p. 76)

CONCLUSION OF LAW

The first issue to be determined is the commencement dates of permanent partial disability benefits.

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. 6.904(3).

Permanent partial disability benefits commence when healing period benefits terminate. Iowa Code section 85.34(1); Evenson v. Winnebago Industries, Inc., 881 N.W.2d 360, 372 (Iowa 2016).

Temporary total, temporary partial, and healing period benefits can be interrupted or intermittent. Teel v. McCord, 394 N.W.2d 405 (Iowa 1986); Stourac-Floyd v. MDF Endeavors, File No. 5053328 (App. Sept. 11, 2018); Stevens v. Eastern Star Masonic Home, File No. 5049776 (App. Dec. Mar. 14, 2018). Permanent partial disability benefits may also be intermittent. Walston v Jackie Spencer Farms, File Nos 5031210 and 5031211 (App. Dec. April 9, 2012)

In this case, claimant had a partial meniscectomy by Dr. Gorsche on July 6, 2017. Claimant returned to work on September 5, 2017. (TR pp. 17-18; JE 6, pp. 23-24) Claimant is due 4.4 weeks of permanent partial disability benefits for the left lower extremity due to the medial meniscectomy commencing on September 5, 2017 (2 percent x 220 weeks).

Claimant eventually returned to work. When claimant developed continued left lower extremity problems, Dr. Gorsche and Dr. Tearse both recommended left total knee replacement. Claimant underwent surgery for the total knee replacement on October 12, 2018. Both Dr. Gorsche and Dr. Bansal found that claimant had a 50 percent permanent impairment to the left lower extremity due to the total knee replacement. Claimant is due permanent partial disability benefits for the left total knee replacement commencing on October 11, 2019. (JE 6, p. 60)

In brief, given the facts of this case, claimant is due two periods of permanent partial disability benefits. The first period is in regard to the left knee meniscectomy. Claimant returned to work for over a year. The second period is for the left total knee replacement.

The next issue to be determined is rate. The parties stipulate the claimant's rate for permanent partial disability benefits is $213.78. (Hearing Report) The parties dispute the rate for claimant's temporary benefits. The difference in the rates for permanent partial disability benefits and temporary benefits is based upon claimant's part-time status and Iowa Code section 85.33(5) and section 85.34(2).

Claimant contends that Iowa Code section 85.36(9) should be used to determine her temporary benefit rate. Defendants contend that section 85.36(9) is inapplicable as claimant failed to show proof she earned less than the usual weekly earnings of a full-time laborer in her job. As a result, defendants contend that Iowa Code section 85.36(6) should apply in determining claimant's temporary benefit rate.

Iowa Code section 85.36(9) states in relevant part:

> 9. If an employee earns either no wages or less than the usual weekly earnings of the regular full-time adult laborer in the line of industry in which the employee is injured in that locality, the weekly earnings shall be one-fiftieth of the total earnings which the employee has earned from all employment during the twelve calendar months immediately preceding the injury.

The record indicates claimant worked 4-hour shifts at the time of injury. Claimant contends this makes her a part-time employee and the rate should be determined under Iowa Code section 85.36(9).

This issue was addressed in Swiss Colony, Inc. v. Deutmeyer, 789 N.W.2d 129, 134-135 (Iowa 2010). In Deutmeyer, claimant worked as a part-time employee. Neither party offered evidence if claimant's earnings were higher or lower than that of a full-time laborer in a similar industry as claimant. On intra-agency appeal, the workers' compensation commissioner decided claimant was a part-time employee based on a belief the majority of all industries in Iowa viewed 40 hours as full-time work. (Deutmeyer, 789 N.W.2d at 135) The Iowa Supreme Court rejected that analysis, indicating that because there was no evidence in the record of the usual weekly earnings of a full-time employee in claimant's work, the commissioner's findings that Iowa Code section 85.36(9) applied was not supported by substantial evidence. Id.

See also Menard, Inc. v. Jones, 12-0027, filed September 6, 2012 (Iowa Ct. App) unpublished, 822 N.W.2d 122 (table).

Claimant offered no evidence at hearing if claimant's earnings were lower than a full-time employee in a job similar to her position at Menards. In the Post-Hearing Brief, claimant did reference to statistics kept by Iowa Workforce Development. (Claimant's Post-Hearing Brief, p. 8) However, since these statistics were not made a part of the record at hearing, I believe it is prejudicial to defendants' defense of this matter to reference these statistics in the analysis regarding claimant's rate for temporary benefits.

No evidence was offered at hearing whether claimant's earnings were less than the usual weekly earnings of full-time laborers in her field of work. As a result, calculation of claimant's temporary benefit rate under Iowa Code section 85.36(9) is inapplicable. Claimant's rate should be calculated under Iowa Code section 85.36(6). Claimant's gross earnings in relation to the temporary benefits was $195.06. Claimant's rate for temporary benefits is $179.37 per week.

I am empathetic to claimant's position regarding this issue. Claimant worked on average 20 hours per week and earned $9.25 per hour. It would seem that alone would suffice to find claimant earned less than other full-time workers at Menards and businesses similar to Menards. However, case law in Deutmeyer and Jones indicates that there must be some evidence in the record to show that claimant's rate should be calculated under Iowa Code section 85.36(9).

The next issue to be determined is whether 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."

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).

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, 594 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).

Claimant seeks penalty for late payments of temporary total disability benefits, temporary partial disability benefits and permanent partial disability benefits. Claimant also seeks a penalty for the incorrect weekly rate paid for permanent partial disability benefits.

Regarding temporary total disability benefits, claimant was due temporary total disability benefits for the periods of April 24, 2018 through April 29, 2018, May 5, 2018 through May 21, 2018, and from May 24, 2018 through August 29, 2018. (TR p. 19; JE 6, pp. 36, 39, 42-43; Ex. 4, p. 41) Defendants did not pay temporary benefits through these periods until September 5, 2018. (TR p. 19; Ex. 11, p. 77; Ex. B, p. 5)

This period covers 17.286 weeks. Defendants offered no explanation for the delay of temporary benefits. A 50 percent penalty is appropriate. Claimant is due a penalty for the delay in payment of temporary benefits for the periods detailed above of $1550.30 (17.286 weeks x $179.37 x 50 percent).

Regarding temporary partial disability benefits, the record indicates claimant was due temporary partial disability benefits from February 4, 2019 through April 6, 2019. (JE 6, pp. 49-52) Claimant was paid those benefits, on average, 2-3 weeks after the applicable pay period. (Ex. 11, p. 78) Defendants offered no explanation for delay of payment of temporary partial disability benefits. Claimant's total temporary partial disability benefits paid was $710.28. A 50 percent penalty is appropriate. Defendants are liable for $355.14 in penalty for delay of payment of temporary partial disability benefits.

Regarding permanent partial disability benefits, on October 3, 2017, Dr. Gorsche opined claimant had a 2 percent permanent impairment due to the medial meniscectomy injury. Defendants began payment of permanent partial disability benefits on October 18, 2017. (Ex. 11, p. 77; Ex. B, p. 5) Given this record, a penalty is not appropriate for the 2 percent rating for the medial meniscectomy.

Regarding the total knee replacement, Dr. Gorsche's opinion that claimant had a permanent impairment for the total knee replacement was not received by defendants until December 22, 2019. (JE 6, p. 60) Defendants began payment of permanent partial disability benefits for the total knee replacement on December 10, 2019. (Ex. 11, p. 78; Ex. B, p. 3) Given this record, a penalty is not appropriate for any alleged delay of the payment of permanent partial disability benefits for the total knee replacement.

Claimant also seeks penalty for defendants' alleged delay of permanent partial disability benefits.

The record indicate defendants stopped payment of permanent partial disability benefits for several weeks for the period of November 19, 2020 through December 23, 2020. (Ex. 2, pp. 31-32; Ex. 11, p. 79) Defendants offered no explanation for the stoppage of benefits. Given this record, a 50 percent penalty is appropriate. The period at issue covers approximately 5 weeks. Defendants are liable for a penalty of $534.45 ($213.78 x 5 weeks x 50 percent).

Claimant also contends defendants underpaid claimant for approximately 10 weeks of benefits. The parties stipulated claimant's rate for permanent partial disability benefits was $213.78 per week. Defendants paid 5.571 weeks of permanent partial disability benefits for October 3, 2017 through November 6, 2017 at a rate of $206.60. (Ex. 11, p. 77) Defendants also underpaid permanent partial disability benefits from October 14, 2017 through November 17, 2017 at the rate of $206.60. (Ex. 11, p. 78) The total periods at issue equal 10.57 weeks. Defendants offered no rationale for the underpayment of permanent partial disability benefits for these periods of time. A 50 percent penalty is appropriate. Defendants are liable for a penalty of $37.95 for the underpayment of permanent partial disability benefits for these periods as detailed above (10.57 weeks x $7.18 x 50 percent).

ORDER

THEREFORE IT IS ORDERED:

That claimant's rate for temporary benefits is one hundred seventy-nine and 39/100 dollars ($179.39) per week.

That defendants shall pay claimant four point four (4.4) weeks (2 percent x 220 weeks) of permanent partial disability benefits at the rate of two hundred thirteen and 78/100 dollars ($213.78) per week for the left knee meniscectomy commencing on November 5, 2017.

That defendants shall pay one hundred five point six (105.6) weeks of permanent partial disability benefits at the rate of two hundred thirteen and 17/100 dollars ($213.17) for the total knee replacement commencing on October 11, 2019.

Defendants shall pay accrued weekly benefits in a lump sum together with interest at the rate of ten percent for all weekly benefits payable and not paid when due which accrued before July 1, 2017, and all interest on past due weekly compensation benefits accruing on or after July 1, 2017, shall be payable 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. See Gamble v. AG Leader Technology File No. 5054686 (App. Apr. 24, 2018)

That defendants shall pay claimant the following amounts for penalty:

1. $1550.30 for the delay of payment of temporary benefits;
2. $355.14 for the delay in payment of temporary partial disability benefits;
3. $534.45 for the delay in payment of permanent partial disability benefits;
4. $37.95 for the underpayment of permanent partial disability benefits.

This results in a total penalty of $2477.84 ($1550.30 + $355.14 + $534.45 + $37.95).

That defendants shall pay costs.

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

Signed and filed this 4th day of February, 2022.

JAMES F. CHRISTENSON
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Benjamin Roth (via WCES)

Kent Smith (via WCES)

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 filed via Workers' Compensation Electronic System (WCES) unless the filing party has been granted permission by the Division of Workers' Compensation to file documents in paper form. If such permission has been granted, the notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 150 Des Moines Street, Des Moines, Iowa 50309-1836. The notice of appeal must be received by the Division of Workers' Compensation 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 legal holiday.