BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

CORY WURTZEL, Claimant, vs. A+ LAWN & LANDSCAPE, INC., Employer, and COMMERCE & INDUSTRY INSURANCE CO., Insurance Carrier, Defendants.	File No. 5060139 A P P E A L D E C I S I O N Head Notes: 1802, 1803, 2500, 3002, 3400

CORY WURTZEL, Claimant, vs. A+ LAWN & LANDSCAPE, INC., Employer, and AMGUARD INSURANCE CO. Insurance Carrier, Defendants.	File Nos. 5060140, 5066566 A P P E A L D E C I S I O N Head Notes: 1802, 1703, 1803, 2500, 3002 3400

Defendants A+ Lawn & Landscape, Inc. (hereinafter "A+"), employer, and its insurer, Commerce & Industry Insurance Company (hereinafter "Commerce"), appeal from an arbitration decision filed on April 30, 2020, and from two subsequent orders nunc pro tunc filed May 14, 2020, and May 19, 2020, in File No. 5060139, injury date of May 11, 2016. Claimant Cory Wurtzel cross-appeals in File No. 5060139 and appeals in File Nos. 5060140, injury date September 7, 2017, and 5066566, injury date April 26,

2018, against defendants A+ and its insurer in those two files, Am Guard Insurance Company (hereinafter "Am Guard").

In the arbitration decision, the deputy commissioner found claimant's May 11, 2016, injury in File No. 5060139 is the cause of his ongoing symptoms, disability and medical treatment. The deputy commissioner found claimant did not sustain a new injury on September 7, 2017, or on April 26, 2018. As such, the deputy commissioner found claimant shall take nothing in File Nos. 5060140 and 5066566.

Instead, the deputy commissioner found the entirety of claimant's award is attributable to the May 11, 2016, date of injury, for which defendants A+ and Commerce are responsible. The deputy commissioner found claimant sustained 35 percent industrial disability as a result of the May 11, 2016, work injury. The deputy commissioner found claimant is entitled to receive healing period benefits from September 19, 2017, through February 7, 2018, and from April 11, 2019, through October 16, 2019. The deputy commissioner found claimant's commencement date for permanent partial disability (PPD) benefits was February 8, 2018. The deputy commissioner found the medical expenses itemized in Claimant's Exhibit 22 are related to the May 11, 2016, injury. The deputy commissioner found claimant is entitled to receive reimbursement for his independent medical examination (IME). The deputy commissioner found claimant is entitled to receive penalty benefits. The deputy commissioner found claimant's weekly benefit rate to be $352.62.

In a ruling on motion for rehearing and order nunc pro tunc filed on May 14, 2020, the deputy commissioner modified claimant's weekly rate from $352.62 to $416.95, corrected a scrivener's error pertaining to credit, and clarified defendants' obligations for reimbursement for medical expenses.

In a subsequent order nunc pro tunc filed on May 19, 2020, the deputy commissioner corrected another scrivener's error regarding defendants' credit.

On appeal in File No. 5060139, defendants A+ and Commerce assert the deputy commissioner erred in finding that the May 11, 2016, injury was the cause of claimant's ongoing disability. In the alternative, defendants assert the deputy commissioner's industrial disability award is excessive and that the deputy commissioner erred in assigning a commencement date of February 8, 2018, for PPD benefits. Defendants assert the deputy commissioner erred in calculating claimant's weekly rate, in ordering defendants to pay for the entirety of claimant's IME, and in awarding penalty benefits.

On cross-appeal/appeal, claimant asserts the deputy commissioner should have awarded a higher industrial disability and more penalty benefits.

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

I performed a de novo review of the evidentiary record and the detailed arguments of the parties. Pursuant to Iowa Code sections 86.24 and 17A.15, the

arbitration decision filed on April 30, 2020, and orders nunc pro tunc filed on May 14, 2020, and May 19, 2020, are affirmed in part and modified in part.

I turn first to whether claimant's ongoing symptoms, disability, and medical treatment are attributable solely to the May 11, 2016, date of injury or whether claimant's sustained new injuries on September 7, 2017 and/or April 26, 2018. With the following additional analysis, I affirm the deputy commissioner's finding that claimant's ongoing symptoms, disability, and medical treatment are causally related to the May 11, 2016, injury and that claimant did not sustain new injuries on September 7, 2017, or on April 26, 2018.

In making this finding, the deputy commissioner relied upon the opinions of David Boarini, M.D., and Sunil Bansal, M.D., both of whom opined that claimant's ongoing symptoms were attributable to the May 11, 2016, incident. (Joint Exhibit 11, p. 279; Claimant's Ex. 20, pp. 112-13)

On appeal, Defendants A+ and Commerce urge reliance on the opinion of Trevor Schmitz, M.D., who opined there was "no causal connection between [claimant's] current diagnosis and the work injury of May 11, 2016." His opinion is based, at least in part, on the premise that claimant had "good functional recovery from a low back and leg radicular standpoint" upon his return to work in the spring of 2018 after surgery. (JE 7, p. 173)

While claimant did experience some improvement after the surgery, the record does not reflect "good functional recovery." To the contrary, just after Dr. Schmitz released claimant to return to work in January of 2018, claimant called the office in early February requesting restrictions and Gabapentin. (JE 7, p. 146; see Hearing Transcript, p. 86-87) In April of 2018, within a month of returning to his regular duties, claimant began texting his supervisor that he was struggling with pain. (Cl. Ex. 5; Hrg. Tr., pp. 88-90) Thus, the evidence is not indicative of a scenario in which claimant was pain-free or symptom-free before sustaining a new, separate and distinct injury.

Claimant obtained an MRI in May of 2018 that revealed a "recurrent" protrusion. (JE 7, p. 157) Notably, "recurrent" is how both Dr. Boarini and Dr. Bansal described claimant's ongoing condition as well. (JE 11, pp. 278-79; Cl. Ex. 20, p. 112)

I acknowledge Dr. Boarini described the incident on April 26, 2018, as "very minor" while claimant testified hearing his back pop "rather loudly" that day. (JE 11, p. 278; Hrg. Tr,. p. 91) But regardless of how Dr. Boarini characterized the incident, he accurately described that claimant was "in the prone position" when "he had the onset of back and leg pain." (JE 11, p. 278) In other words, Dr. Boarini had an accurate history of the mechanism of claimant's pain on April 26, 2018, yet he still attributed claimant's ongoing symptoms to the May 11, 2016, incident. In fact, as mentioned, he specifically referred to claimant's ongoing condition as a "recurrent" injury. (JE 11, pp. 278-79).

For these reasons, I find the greater weight of the evidence supports the opinions of Dr. Boarini and Dr. Bansal that claimant's ongoing symptoms were recurrent in nature

and related to the original May 11, 2016, incident as opposed to separate and distinct subsequent injuries or aggravations

An employer is liable for "all consequences that naturally and proximately flow from" a work-related accident. DeShaw v. Energy Mfg. Co., 192 N.W.2d 777, 780 (Iowa 1971) (quoting Oldham v. Scofield & Welch, 266 N.W. 480, 482 (Iowa 1936)). Relying on the opinions of Dr. Boarini and Dr. Bansal, I therefore conclude claimant's ongoing symptoms, disability, both temporary and permanent, and medical treatment are related to the May 11, 2016, work injury. Thus, with this additional analysis, the deputy commissioner's finding is affirmed.

I turn next to the extent of claimant's industrial disability, which defendants A+ and Commerce appealed and claimant cross-appealed. I affirm the deputy commissioner's finding that claimant sustained 35 percent industrial disability as a result of the May 11, 2016, incident. I affirm the deputy commissioner's findings, conclusions and analysis regarding this issue in their entirety.

I affirm the deputy commissioner's finding that claimant is entitled to receive healing period benefits in File No. 5060139. Defendants A+ and Commerce assert the correct commencement date for claimant's PPD benefits is January 29, 2018, when Dr. Schmitz released claimant from his care. Claimant does not dispute this argument. I therefore respectfully modify the deputy commissioner's finding that the commencement date for claimant's PPD benefits is February 7, 2018, and instead I find the correct commencement date is January 29, 2018. I therefore find claimant is entitled to receive healing period benefits from September 19, 2017, through January 28, 2018, and from April 11, 2019, through October 16, 2019.

Defendants A+ and Commerce additionally assert the deputy commissioner incorrectly calculated claimant's rate. Defendants assert the deputy commissioner erred by not including additional weeks to reflect payments claimant received when claimant was on winter layoff but remained on call to do snow removal. The deputy commissioner found these payments to be sporadic and not reflective of his customary wages. As such, the deputy commissioner only included the five weeks prior to claimant's May 11, 2016 injury, when he was doing his regular irrigation work, in his rate calculation.

Both parties agree that Iowa Code section 85.36(6) is the applicable subsection in this case. It provides that claimant's rate "shall be computed by dividing by thirteen the earnings . . . of the employee earned in the employ of the employer in the last completed period of thirteen consecutive calendar weeks immediately preceding the injury." The subsection goes on to provide that "[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."

Defendants argue that claimant's sporadic earnings during the winter months for snow removal are "customary" because it is common in the lawn care industry for employees to take a winter layoff.

However, in Griffin Pipe Prods. Co. v. Guarino, the Iowa Supreme Court clarified "that the issue under section 85.36 'is whether the hours of work in any particular workweek are representative of *the hours typically or customarily worked by an employee during a typical or customary full week of work.*'" 663 N.W.2d 862, 866 (Iowa 2003) (quoting agency decision (emphasis in original)). The court went on to provide that "[t]his interpretation is most consistent with the language of the statute, which directs that the basis for computation of the weekly rate is to be the earnings that the 'employee would have been entitled to had the employee *worked* the *customary hours* for the full pay period in which the employee was injured.'" Id. (quoting Iowa Code section 85.36 (emphasis in original)).

Claimant was on layoff in the winter - during which time he received unemployment benefits. Thus, I find the hours worked by claimant in the winter were not representative of the hours typically worked by him during a customary full week of work. See id. Furthermore, claimant's customary hours for the full pay period during which he was injured were the 40-plus hours for his irrigation work. See Iowa Code section 85.36. Like the deputy commissioner, I therefore find the hours of work during claimant's layoff are not representative of the hours claimant typically or customarily worked during his typical or customary full weeks of work. See Griffin Pipe, 663 N.W.2d at 864. With this additional analysis, I affirm the deputy commissioner's finding that the weeks during the winter layoffs should not be included in claimant's rate calculation.

However, the deputy commissioner only included five weeks of pay when the statute instructs the usage of 13 weeks. Iowa Code section 85.36(6). Thus, I find it is appropriate to also include weeks before the 2015-2016 winter layoff.

Date	Salary	Wages	Total	Exhibit
4/29/2016	$560.00	$87.30	$727.30	Ex. 13a, pp 54, 55
4/22/16	$560.00	--	$560.00	Ex. 13a, p. 54
4/15/2016	$560.00	$107.73	$747.73	Ex. 13a, p. 54
4/08/2016	$560.00	$49.13	$606.13	Ex. 13a, p. 53
3/31/2016	$540.00	$97.20	$630.20	Ex. 13a, p. 53
11/25/2015	$540.00	$83.88	$623.88	Ex. 13a, p. 50
11/20/2015	$540.00	$8.19	$548.19	Ex. 13a, p. 50
11/13/2015	$540.00	$37.77	$577.77	Ex. 13a, p. 49
11/06/2015	$540.00	$47.90	$587.90	Ex. 13a, p. 49

10/30/2015	$540.00	$8.95	$548.95	Ex. 13 , pp. 48-49
10/23/2015	$540.00	$22.17	$562.17	Ex. 13a, p. 48
10/09/2015	$540.00	$27.45	$567.45	Ex. 13a, p. 48
10/02/2015	$540.00	$23.77	$563.77	Ex. 13 a, p. 47
		Total:	**$7,851.44**	
		/13 weeks	**$603.96**	
		S-2	**$387.68**	

Using the above-indicated weeks, I find claimant's average weekly wage is $603.96. Using the rate book in effect from July 1, 2015, through June 30, 2016, and considering claimant as single and entitled to two exemptions, I find claimant's weekly benefit rate is $387.68. The deputy commissioner's rate calculation is therefore modified.

The next issue that must be addressed is claimant's entitlement to penalty benefits, which was appealed by defendants A+ and Commerce and cross-appealed by claimant. Defendants A+ and Commerce assert claimant failed to prove his entitlement to penalty benefits or, in the alternative, that any penalty benefits should be split between Commerce and Am Guard. Claimant asserts on cross-appeal that the penalty award should be higher.

With the following additional analysis, the deputy commissioner's finding that claimant is entitled to receive penalty benefits is affirmed, but the amount of the deputy commissioner's award is modified.

Iowa Code section 86.13(4) provides:

> a. If a denial, a delay in payment, or a termination of benefits occurs without reasonable or probable cause or excuse known to the employer or insurance carrier at the time of the denial, delay in payment, or termination of benefits, the workers' compensation commissioner shall award benefits in addition to those benefits payable under this chapter, or chapter 85, 85A, or 85B, up to fifty percent of the amount of benefits that were denied, delayed, or terminated without reasonable or probable cause or excuse.
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> b. The workers' compensation commissioner shall award benefits under this subsection if the commissioner finds both of the following facts:

(1) The employee has demonstrated a denial, delay in payment, or termination in benefits.

(2) The employer has failed to prove a reasonable or probable cause or excuse for the denial, delay in payment, or termination of benefits.

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 explained Iowa Code section 86.13 as follows:

> 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.

The court explained further in Meyers v. Holiday Express Corp., 557 N.W.2d 502 (Iowa 1996):

> (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 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.
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> 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, 557 N.W.2d at 504-505.

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

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).

I find the issue of claimant's rate was fairly debatable. While I did not side with defendants, they set forth their rationale and the figures on which they relied when

performing claimant's rate calculation. Thus, the resulting underpayment of claimant's benefits is not a basis for penalty benefits.

Defendants A+ and Commerce, however, did not pay the impairment rating assigned by Robert Rondinelli, M.D., which was completed in May of 2018, until February 8, 2019. (JE 8, p. 184; Def. Ex. B, p. 5) Furthermore, as set forth in claimant's appeal brief, several of their payments for temporary benefits were significantly delayed. (Cl. Appeal Brief, p. 27)

Defendants A+ and Commerce offer no explanation for these particular delays. I therefore find claimant is entitled to penalty benefits, for which defendants A+ and Commerce are responsible, for the delayed payment of roughly 21 weeks of temporary benefits and 55 weeks of PPD benefits.

The deputy commissioner found the minimum claimant should have been paid in PPD benefits was for a 20 percent whole person impairment. With the following additional analysis, I affirm this finding:

Defendants in this case do not dispute whether claimant sustained an industrial disability during his employment with A+ for which PPD benefits are due; instead, they dispute which insurance carrier is responsible for such benefits. In other words, their investigations after claimant's last alleged date of injury were for purposes of finger pointing - not to evaluate the extent of claimant's disability.

But finger pointing among insurance carriers of the same employer does not absolve defendants' obligations to investigate claims and timely pay benefits. See Curry v. Zook's Harley Davidson, File Nos. 5013417, 5013418 (App. Dec., Jan. 17, 2007)

In a case similar to this one, Curry v. Zook's Harley Davidson, an insurer (Wausau) filed a section 85.21 application but then terminated benefits based on its belief that the other insurer (Federated) was liable - just as defendants A+ and Commerce did in this case. The then-Commissioner held as follows in Curry:

> By filing the petition pursuant to Iowa Code section 85.21, Wausau acknowledged its understandings of the procedures inherent in Iowa Code section 85.21 for reimbursement from another carrier for benefits paid pursuant to the order. The order itself recognizes that at a later date a dispute over liability between Wausau and Federated could occur in which Wausau could have been fully reimbursed for all payments made after the section 85.21 order. It was unreasonable for Wausau to temporarily deny and thus delay additional payment of indemnity benefits after its voluntary entry into the section 85.21 application and subsequent order. As such, it is concluded that a penalty be imposed against Wausau Insurance pursuant to Iowa Code section 86.13 for its unreasonable delay in paying benefits . . . .

File Nos. 5013417, 5013418 (App. Dec., Jan. 17, 2007).

Thus, as in Curry, I find it was unreasonable for defendants A+ and Commerce to deny benefits after their voluntary entry to the section 85.21 order.

With this additional analysis, I affirm the deputy commissioner's finding that defendants A+ and Commerce are responsible for penalty benefits for the underpayment of 45 weeks of PPD benefits. This is in addition to the 76 weeks of delayed temporary and PPD benefits, as discussed above.

Given the length of the delay and the unreasonable conduct, including defendants' failure to offer any explanation other than deferring responsibility to A+ and Am Guard, I find a penalty in the amount of $20,000 to be appropriate. This amounts to roughly 50 percent penalty on the 121 weeks of benefits that were delayed or not paid. The deputy commissioner's penalty award is therefore modified.

Finally, defendants A+ and Commerce argue the deputy commissioner erred by ordering them to pay for the entirety of Dr. Bansal's IME charges because the IME considered of two other injury dates (during which Commerce was not the insurer). Because I affirmed the deputy commissioner's finding that all of claimant's ongoing symptoms, disability, and medical treatment are attributable to the May 11, 2016, incident, I likewise affirm the deputy commissioner's finding that defendants A+ and Commerce are responsible for reimbursing claimant for the entirety of the IME.

ORDER

IT IS THEREFORE ORDERED that the arbitration decision filed on April 30, 2020, and the two subsequent orders nunc pro tunc filed on May 14, 2020, and May 19, 2020, are affirmed in part and modified in part.

File No. 5060140 – alleged injury date of September 7, 2017

Claimant shall take nothing in this matter.

File No. 5066566 – alleged injury date of April 26, 2018

Claimant shall take nothing in this matter.

File No. 5060139 - injury date of May 11, 2016

Defendants A+ and Commerce shall pay claimant healing period benefits from September 19, 2017, through January 28, 2018, and from April 11, 2019, through October 16, 2019.

Defendants A+ and Commerce shall pay claimant one hundred seventy-five (175) weeks of permanent partial disability benefits commencing on January 29, 2018.

All weekly benefits shall be paid at the weekly rate of three hundred eighty-seven and 68/100 dollars ($387.68).

Defendants A+ and Commerce shall receive credit for benefits previously paid.

Defendants A+ and Commerce 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).

Defendants A+ and Commerce shall pay the medical expenses as set forth in the arbitration decision. Defendants A+ and Commerce shall pay claimant one hundred forty-four thousand one hundred seventy-one and 85/100 dollars ($144,171.85) which was paid by claimant's wife's group plan, three thousand five hundred twenty-two and 11/100 dollars ($3,522.11) paid directly by claimant and ten thousand nine hundred twenty-five and 28/100 dollars ($10,925.28) for unpaid balances. Defendants shall receive credit for medical expenses previously paid.

Defendants A+ and Commerce shall pay the medical mileage and lodging costs itemized in Exhibit 26.

Defendants A+ and Commerce shall pay claimant the cost of the IME in the amount of three thousand five hundred seventy-six dollars ($3,576.00).

Defendants A+ and Commerce shall pay claimant penalty benefits of twenty thousand dollars ($20,000.00).

Pursuant to rule 876 IAC 4.33, defendants A+ and Commerce shall pay claimant's costs of the arbitration proceeding in the amount of three hundred fifty-two and 50/100 dollars ($352.50), and those defendants and claimant shall split the costs of the appeal, including the cost of the hearing transcript.

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

Signed and filed on this 11th day of January, 2021.

Joseph S. Cortese II

JOSEPH S. CORTESE II
WORKERS' COMPENSATION
COMMISSIONER

The parties have been served as follows:

Dennis McElwain (via WCES)

Jean Dickson (via WCES)

Kathryn Johnson (via WCES)