BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JUANA HERNANDEZ,

Claimant,

vs.

IOWA SELECT FARMS, INC.,

Employer,

and

AMERICAN ZURICH INSURANCE COMPANY,

Insurance Carriers,
Defendants.

File No. 5051210

ARBITRATION DECISION

Head Note Nos.: 1801; 1802; 1803; 4000.2

STATEMENT OF THE CASE

This is a proceeding in arbitration. The contested case was initiated when claimant, Juana Hernandez, filed her original notice and petition with the Iowa Division of Workers' Compensation. The petition was filed on October 10, 2014. Claimant alleged she sustained a work-related injury on December 17, 2013. (Original notice and petition) Later claimant amended the injury date to December 16, 2013.

Iowa Select Farms, Inc., is insured for purposes of workers' compensation by American Zurich Insurance Company. Defendants filed their answer on November 12, 2014. They admitted the occurrence of the work injury.

The hearing administrator scheduled the case for hearing on September 21, 2015 at 1:00 p.m. The hearing took place in Des Moines, Iowa at the Iowa Workforce Development Building. The undersigned appointed Ms. Susan Frye as the certified shorthand reporter. She is the official custodian of the records and notes. Mr. Rafael Geronimo was sworn in as the Spanish interpreter.

Claimant testified on her own behalf. Mr. William Foley, CFO, for Iowa Select Farms, Inc., testified for defendants.

The parties offered exhibits. Claimant offered exhibits marked 1 through 12. Defendants offered exhibits marked A through G. Claimant objected to Exhibit G and it was not allowed as evidence in the case. Defendants were allowed to make an offer of proof with respect to Exhibit G. Exhibits A through F were admitted.

Post-hearing briefs were filed on October 23, 2015. The case was deemed fully submitted on that date.

STIPULATIONS

The parties completed the designated hearing report for this file number. The various stipulations are:

1. There was the existence of an employer-employee relationship at the time of the alleged injury;

2. Claimant sustained an injury on December 16, 2013, which arose out of and in the course of her employment;

3. Claimant sustained a permanent disability;

4. If permanent benefits are due, the commencement date is July 31, 2015;

5. The parties believe the weekly benefit rate to be $409.88 per week;

6. Defendants have withdrawn any affirmative defenses they may have had available; and

7. Prior to the hearing, defendants paid unto claimant; approximately 55 weeks of permanent partial disability benefits at the weekly benefit rate of $409.88 per week; and

8. The parties are able to stipulate to the costs to litigate the claim.

ISSUES

The issues presented are:

1. Did claimant's work injury result in a temporary disability?

2. If so, what is the extent of those temporary benefits?

3. What is the nature and extent of the permanent disability?

4. Is claimant entitled to the payment of an independent medical examination pursuant to Iowa Code section 85.39?

5. Is claimant entitled to alternate medical care pursuant to Iowa Code section 85.27? and;

6. Is claimant entitled to penalty benefits pursuant to Iowa Code section 86.13?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This deputy, after listening to the testimony of claimant and the other witness, after judging their credibility, and after reading the evidence and the post-hearing briefs, makes the following findings of fact and conclusions of law:

The party who would suffer loss if an issue were not established has the burden of proving the issue by a preponderance of the evidence. Iowa Rule of Appellate Procedure 6.14(6).

Claimant is 54 years old and left-hand dominant. Claimant is approximately 5 feet tall and about 150 pounds. She is a very pleasant single woman who lives in Clarion, Iowa with her daughter and her family. Claimant attended school in Mexico, but had to terminate her education because she was so poor she could no longer afford to attend school. Claimant has a minimal grasp of the English language. She cannot read or write English. Only Spanish is spoken in her home.

Claimant commenced her employment with the present defendant in 2004. Initially, claimant was hired to clean hog farrowing spaces with power hoses. Later, claimant was promoted to a farm technician who cared for newborn piglets. She had other duties such as pushing carts with approximately 40 pounds of animal waste material in them. Claimant testified she worked 8 to 10 hours per day and her daily tasks involved bending, stooping, lifting, pushing and pulling. Claimant described bending as the most physically demanding task she had to complete.

LEFT HAND INJURY

In 2008, claimant sustained an injury to her left hand. The injury resulted in surgery. Zehui Han, M.D. repaired the left side of a distal radius fracture. (Exhibit 1, page 1) Claimant was able to return to her full duties after she reached maximum medical improvement. No work restrictions were imposed.

Claimant sustained her work injury on December 16, 2013 when she was pushing a cart full of placenta. The cart became stuck on the ice. It started rolling backwards toward claimant. As a consequence, claimant stopped the cart with her left hand, she slipped backwards but did not fall to the ground. Immediately, claimant felt pain in her back and left hand. The cart did fall to the ground. Claimant reported the incident to her supervisor.

On December 18, 2013, claimant presented to Benjamin Paulson, M.D., at Iowa Ortho. Claimant reported sudden pain with her left wrist as well as numbness and

tingling in her fingers following the work incident on the 16th. Claimant was advised to use "an off-the-shelf splint as needed for comfort." (Ex. 1, p. 7) Dr. Paulson diagnosed claimant with a sprain of the left wrist and evidence of carpal tunnel syndrome. (Ex. 1, p. 7) Dr. Paulson restricted claimant from lifting more than five pounds. (Ex. 1, p. 7) MRI test results showed good position of the left wrist hardware and no significant pathology. (Ex. 1, p. 10)

Claimant returned to Dr. Paulson on January 30, 2014 for another examination. (Ex. 1, p. 8) Claimant had a corticosteroid injection. (Ex. 1, p. 9) Hand therapy was initiated. (Ex. 1, p. 9) Claimant returned to Dr. Paulson on March 24, 2014. (Ex. 1, pp. 10-11) At that time, the orthopedic surgeon released claimant to return to work without any work restrictions for her left upper extremity. (Ex. 1, p. 11)

Claimant testified she continued to work following her work injury, although she could not perform all of her regular duties. There were several days when claimant performed only light duty. Then for two weeks, claimant testified, her co-employees assisted her with many of her assigned tasks. Claimant explained to her supervisors she was having a difficult time using her left upper extremity but her supervisors told her she could not receive assistance from her co-workers. Claimant testified credibly that her work duties aggravated her left hand. According to her testimony, claimant asked her supervisors if she could take time away from work to rest her left hand and spine. The supervisors denied claimant's request.

On April 7, 2014, claimant presented a note to members of management. The note stated:

> I Juana Hernandez am resigning to my job voluntarily the reason is to recuperate from my hand. I hope that in the future it will be possible to return to work with you. Thank you.
>
> Attentively Juana Hernandez

(Ex. 8, p. 1)

A supervisor, by the name of John, told claimant to leave immediately. She was not allowed to remain on site at Iowa Select Farms, Inc. Claimant testified but for the injury, she would not have terminated her employment.

A functional capacity evaluation occurred on April 29, 2014. Claimant gave maximal consistent effort. (Ex. 1, p. 39) Charles E. Goodhue, M.S., M.P.T., opined:

1. Based on the results of this FCE, Ms. Hernandez falls within the U.S. Department of Labor's upper end of the light work category.

2. Ms. Hernandez should perform all lifting, carrying, and pushing/pulling work tasks within the recommended abilities/restrictions as outlined on the FCE Recommended Abilities/Restrictions form.

3. Ms. Hernandez should continue to perform her daily home exercise program as instructed from her current physical therapy intervention.

4. Ms. Hernandez is able to work at Iowa Select Farms if her employer is able to accomendate [*sic*] for her lifting, carrying and push/pull abilities/restrictions.

(Ex. 1, p. 41)

On May 14, 2014, Dr. Paulson examined claimant. The orthopedic surgeon opined claimant had reached maximum medical improvement with respect to her left wrist. (Ex. 1, p. 13) Dr. Paulson rated claimant as having an eight percent permanent impairment to the left upper extremity according to the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition. (Ex. 1, p. 14)

Dr. Paulson also restricted claimant's activities with the left upper extremity. Claimant was instructed to "work that falls within the U.S. Department of Labor's upper end of the light work category." Dr. Paulson's restrictions were consistent with the findings by this functional capacity evaluation." (Ex. 1, p. 15) Dr. Paulson had no explanation for claimant's "diffuse wrist pain over her entire dorsal wrist." (Ex. 1, p. 17)

BACK INJURY

Claimant also sought treatment for her upper and lower back. (Ex. 1, p. 18) As early as December 19, 2013, claimant sought treatment for her thoracic and lumbar spine, as well as for tenderness in her buttocks region. (Ex. 1, p. 19) Teresa J. Lees, PA-C, diagnosed claimant with lumbago and an unspecified backache. (Ex. 1, pp. 19-20) Ms. Lee placed claimant on modified duty.

Claimant returned to the physician's assistant on January 7, 2014. (Ex. 1, p. 24) Claimant was also examined by Charles D. Mooney, M.D., on the same date. (Ex. 1, p. 22) Dr. Mooney determined the spinal condition was work related. He restricted claimant from lifting more than 20 pounds; from engaging in bending or twisting; from stooping or crouching; and from pushing and pulling greater than 20 pounds. (Ex. 1, pp. 23-24) Dr. Mooney treated claimant conservatively, including physical therapy, and multiple medications.

Effective December 17, 2014, Dr. Mooney opined the following with respect to claimant's condition:

OBJECTIVE:

Examination reveals a short statured, overweight, deconditioned appearing Hispanic female.

Examination reveals thoracolumbar range of motion to be well preserved. She is able to get fingertips within 10 cm of the floor. She has 20 degrees of extension, 20 degrees of lateral bending. She is able to squat, recover, heel and toe walk without difficulty. She demonstrates normal deep tendon reflexes at the knee and ankle, and has no neural tension findings in the seated position. She does not demonstrate significant hip height abnormality. Is mildly tender over the SI joint and right-sided PSIS. Upper extremities reveal normal range of motion. She has no neural deficits. She is tight in the right trapezius. She does not demonstrate evidence of myospasm.

ASSESSMENT:

Symptoms of now chronic back pain, including lower back and mid back pain. She has had a waxing and waning course, and it appears at this time that the majority of her symptoms are directly related to the activities at Iowa Select which requires quite a bit of bending over, working with small pigs. She reports that when she is not working she is significantly less symptomatic, and is poorly tolerant to this activity on a daily basis.

PLAN:

I had a lengthy discussion with her through the provided interpreter.

It is my opinion that she is approaching maximum medical improvement as it relates to her work-related injury, and that the majority of her symptoms appear to be intolerant to the work activities rather than directly related to the injury.

I have provided her tramadol ER 200 mg 1 daily, which she may take in addition to the Voltaren and amitriptyline.

It is my opinion that prior to any consideration of any additional intervention that a trial of full unrestricted duty should be provided, and have recommended same. Additional workup could include lumbar X-rays. I do not see that imaging is otherwise necessary.

(Ex. 1, pp. 33-34)

Even though Dr. Mooney did not recommend imaging, MRI testing was done on April 21, 2015. (Ex. 1, p. 36) Jeffrey Zorn, M.D., interpreted the results. The radiologist noted:

> L4-5: There is mild disc space narrowing. There is broad-based disc protrusion. There is mild facet arthropathy. There is mild resultant spinal canal stenosis. There is mild right-sided neural foraminal stenosis. There is mild-to-moderate left-sided neural foraminal stenoses.
>
> . . .
>
> **IMPRESSION:**
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> Degenerative changes of the lower lumbar spine resulting in mild spinal canal and mild-to-moderate neuroforaminal stenosis as described above.

(Ex.1, pp. 36-37)

On June 25, 2015, claimant underwent another functional capacity evaluation. (Ex. 2, pp. 3-4) Todd Schemper, PT, DPT, OCS, administered the FCE. Mr. Schemper made the following recommendations with respect to claimant's physical capabilities:

1. These projections are for 8 hours per day and 40 hours per week at the levels indicated on the FCE Test Results and Interpretation grid.

2. The client's capabilities are within the light category (lifting up to 20 pounds on a rare basis and 15 pounds on an occasional basis) of physical demand characteristics. Specific capabilities are noted with the FCE Test Results and Interpretation grid.

3. Her ability with waist to crown lifting is within the sedentary category at 10 pounds rarely and 5 pounds occasionally.

(Ex. 2, p. 4)

Claimant commenced treatment with Daniel C. Miller, M.D., at Occupational Medicine Plus, P.C. (Ex. 1, p. 49) Primarily claimant complained of pain in the lumbar spine, especially on the right side. (Ex. 1, p. 53) Dr. Miller opined claimant had a five percent permanent impairment to the whole body because of her back condition. The impairment rating was based on the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition. (Ex. 1, pp. 53-54) Dr. Miller opined claimant could work her full duties without any restrictions. (Ex. 1, p. 55)

Claimant also saw Arnold R. Parenteau, M.D. at the Mary Greeley Pain Clinic in Ames, Iowa. Dr. Parenteau diagnosed claimant with "Right-sided myofascial back

pain." (Ex. 1, p. 56) In July 2015, the pain specialist did not believe an epidural steroid application was appropriate. (Ex. 1, p. 56)

Pursuant to a request from claimant's counsel, claimant exercised her right to an independent medical examination as provided by Iowa Code section 85.39. John D. Kuhnlein, D.O., examined claimant on July 13, 2015. Dr. Kuhnlein issued his report on August 10, 2015. Dr. Kuhnlein opined the work injury on December 16, 2013 aggravated claimant's pre-existing 2008 left wrist injury. (Ex. 4, p. 9) The evaluating physician deemed claimant to be at maximum medical improvement with respect to the left wrist on May 14, 2014. (Ex. 4, p. 9) With respect to rating the left wrist, Dr. Kuhnlein wrote in his report:

> **Impairment Rating**
>
> Based upon the reasonably demonstrable objective findings, and using the *AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition,* I would assign impairment as follows:
>
> Turning to Figures 16-28, and 16-31, and when comparing the left to the unaffected right wrist, she has a total of 1% left upper extremity impairment for decrements in range of motion. There is no objective deficit in strength that can be explained physiologically related to this injury. The sensory examination suggests that it is not neurodiagnostic or neuropathic pain and needs to be confirmed at this point. Impairment ratings must be based on objective findings and at this point this is the only objective finding on examination.
>
> With respect to her lumbar spine, she is not yet at maximum medical improvement, and so impairment rating at this time is not appropriate.
>
> **Restrictions**
>
> I reviewed the functional capacity evaluation, and it appears to be reasonable with respect to her left wrist, and would also be advisable for her low back condition. Ms. Hernandez relates that she does work within these limitations outlined as well.

(Ex. 4, p. 10)

On August 31, 2015, Dr. Kuhnlein modified his opinions in a report that is dated, August 31, 2015. In the subsequent report, Dr. Kuhnlein assigned a six percent permanent impairment rating to the lumbar spine according to Table 15-3, page 384 of the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition. (Ex. 4, p. 14) Dr. Kuhnlein placed claimant at maximum medical improvement with respect to the back on July 30, 2015. (Ex. 4, p. 14) Dr. Kuhnlein agreed with the restrictions imposed by Mr. Schemper after the FCE on June 25, 2015. (Ex. 4, p. 15) In other words,

claimant was capable of working in the light physical demand level of work. (Ex. 4, p. 15)

Philip Davis, M.S., a vocational specialist, interviewed claimant, and provided a vocational assessment in his report of July 27, 2015. (Ex. 3, p. 1) Mr. Davis also reviewed a number of claimant's medical records. Mr. Davis concluded claimant had no ability to obtain employment in any of her past full time occupations. (Ex. 3, p. 6) The vocational specialist opined claimant was working in a "makeshift" job. (Ex. 3, p. 5)

Claimant did not re-apply for her job as a farm technician at Iowa Select Farms, Inc. She stated she was told once she left her employer, she would never be able to return there. Claimant testified she applied for one outside job, but it was not possible physically for her to perform the duties.

Claimant testified she now works for her son-in-law sorting sows at Iowa Select Farms, Inc. The son-in-law contracts with Iowa Select Farms, Inc. Claimant works 2 to 3 days per week. She earns $100.00 to $120.00 per day. Claimant also has her own cottage industry. She makes and sells Mexican cuisine on weekends. Her earnings are unpredictable. A reasonable estimate of her gross earnings is $300.00 per month. When claimant is not working for her son-in-law, she assists with caring for her 2 grandchildren, especially the youngest child, who is 8.

Mr. William Charles Foley, Chief Financial Officer for Iowa Select Farms, Inc., testified on behalf of defendants. Mr. Foley testified Exhibit 9, page 1 was the job description for claimant's position as a farm technician. (Ex. 9, p. 1) According to the minimum qualifications for the position of farm technician, claimant was required to lift 40 pounds and to step over a 4-foot gate. (Ex. 9, p. 1) Mr. Foley testified he was familiar with the restrictions imposed on claimant and Iowa Select Farms, Inc., could and did accommodate claimant up until the time claimant voluntarily resigned on April 7, 2014. Mr. Foley also testified the company could have accommodated claimant in the workplace with the restrictions that had been imposed after the functional capacity evaluation on May 14, 2014.

RATIONALE AND CONCLUSIONS OF LAW

When an expert's opinion is based upon an incomplete history it is not necessarily binding on the commissioner or the court. It is then to be weighed, together with other facts and circumstances, the ultimate conclusion being for the finder of the fact. Musselman v. Central Telephone Company, 154 N.W.2d 128, 133 (Iowa 1967); Bodish v. Fischer, Inc., 257 Iowa 521, 522, 133 N.W.2d 867 (1965).

Dr. Kuhnlein rated the left wrist as 1 percent to the left upper extremity. Dr. Paulson rated the left wrist as 8 percent to the left upper extremity. Claimant was placed in the upper end of the light duty category of work. Lifting restrictions were encouraged in the 5 to 25 pound range.

This deputy is persuaded by the opinions of both Dr. Miller and Dr. Kuhnlein; claimant has a permanent impairment to her back. Dr. Miller deemed claimant's permanent impairment to be five percent to the body as a whole. Dr. Kuhnlein rated claimant as having a six percent body as a whole impairment. The impairment ratings are at the low end of the rating spectrum. While Dr. Mooney did not supply an impairment rating, he did acknowledge claimant's back condition was related to her work injury.

Mr. Schemper, the physical therapist, conducted the FCE, which he deemed to be valid. He placed claimant in the light category of physical labor for most lifting. (Ex. 2, p. 4)

Since claimant has 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.

A loss of earning capacity due to voluntary choice or lack of motivation to return to work is not compensable. See: Copeland v. Boone Book and Bible Store, File No. 1059319 (App. November 6, 1997); Snow v. Chevron Phillips Chemical Co., File No. 5016619 (App. October 25, 2007).

Unfortunately, claimant voluntarily terminated her employment while she was actively treating for her left wrist and her back. During her occupational therapy session on April 16, 2013, claimant reported, "I think I am going to quit my job." (Ex. 1, p. 29) No physician advised claimant to stop working or to reduce the number of hours she should work. Claimant's decisions to reduce her hours and to sever her employment relationship with Iowa Select Farms, Inc., were decisions claimant made on her own.

Claimant's lifting restrictions do preclude her from returning to Iowa Select Farms, Inc., as a farm technician according to the job description prepared by the company. However, Mr. Foley testified claimant could be accommodated in the workplace if she applied for her job. Claimant believes she would never be rehired there.

Claimant is an older worker who does not speak even conversational English. She only attended school in Mexico through the sixth grade. Retraining is not a realistic possibility. Claimant is working for her son-in-law on a part time basis. She is paid by the day. Her unique job situation allows her to take breaks when necessary. Claimant also has her catering business which generates some income and allows claimant to work at her own pace and in her family home.

The record reflects there is a loss of actual wages in this case. The loss is directly attributable to claimant's voluntary termination of her employment. It is fortunate claimant is able to work for family members who are willing to accommodate claimant.

This deputy is not persuaded by the opinions expressed by Mr. Davis. The vocational expert failed to take into consideration several crucial factors. Firstly, claimant voluntarily terminated her employment. Secondly, no medical provider indicated claimant should not work, and thirdly, claimant was not especially motivated to seek employment outside of her family. She only applied for one other job.

After reviewing all of the factors involving industrial disability, it is the determination of the undersigned; claimant has a permanent partial disability to her body as a whole in the amount of 25 percent. Claimant is entitled to 125 weeks of permanent partial disability benefits at the stipulated weekly benefit rate of $409.88 per week and commencing from July 31, 2015.

Defendants shall take credit for all weekly benefits paid prior to the date of the filing of this decision.

In arbitration proceedings, interest accrues on unpaid permanent disability benefits from the onset of permanent disability. Farmers Elevator Co., Kingsley v. Manning, 286 N.W.2d 174 (Iowa 1979); Benson v. Good Samaritan Ctr., File No. 765734 (Ruling on Rehearing, October 18, 1989).

The next issue for resolution is the matter of healing period benefits for the period from April 7, 2014, the date claimant voluntarily terminated her employment through July 30, 2015, the date claimant reached maximum medical improvement.

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 is not entitled to healing period benefits for the requested period. Claimant was working at the time she was receiving medical treatment. She had not been removed from work. No physician indicated claimant could not work during this time frame. Suitable work was provided to claimant. She voluntarily resigned her employment. No healing period benefits are due.

Claimant is requesting penalty benefits in the amount of 50 percent in the present case.

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 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).

Defendants do not owe penalty benefits in the instant case. Claimant was working at the time she terminated her employment. No physician determined claimant should be removed from work. Suitable work was provided to claimant.

Pursuant to Iowa Code section 85.39, defendants shall reimburse claimant for the cost of one independent medical examination and one report as well as the cost of the Spanish interpreter to attend the independent medical examination.

The final issue is costs to litigate the claim. The deputy workers' compensation commissioner has discretion to tax costs. Dickenson v. John Deere Products Engineering, 395 N.W. 2d 644, 647 (Iowa Ct. App. 1986).

The following costs are assessed to defendants:

Filing fee	$100.00
Report of vocational specialist	$1,010.00
Cost of interpreter	$170.00

ORDER

THEREFORE, IT IS ORDERED:

Defendants shall pay unto claimant one hundred twenty-five (125) weeks of permanent partial disability benefits commencing from July 30, 2015, and payable at the rate of four hundred nine and 88/100 dollars ($409.88) per week.

Accrued benefits shall be paid in a lump sum, together with interest at the rate allowed by law.

Defendants shall take credit for all permanency benefits previously paid at the rate of four hundred nine and 88/100 dollars ($409.88) per week.

Costs are assessed to defendants as listed in the body of the decision.

Defendants shall file all reports as required by this division.

Signed and filed this 21st day of March, 2016.

Michelle A. McGovern

MICHELLE A. MCGOVERN
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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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.