

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JODY WILSON,

Claimant,

vs.

J & L INVESTMENTS, INC.,

Employer,

and

AMERICAN FAMILY INSURANCE CO.,

Insurance Carrier,
Defendants.

File No. 5060690.02

RULING ON CLAIMANT'S
APPLICATION FOR REHEARING

An appeal decision was issued in this matter on July 22, 2022. On July 28, 2022, claimant Jody Wilson filed a motion for reconsideration or rehearing under 876 Iowa Administrative Code 4.24. Defendants have not yet responded.

On rehearing, claimant contends the appeal decision did not address one of claimant's three claims for penalty benefits.

The appeal decision affirmed the deputy commissioner's finding that defendants should be assessed a penalty in the amount of \$2,651.78 for delayed temporary benefits, and a penalty in the amount of \$1,894.13 for delayed permanent partial disability benefits. On rehearing, claimant asserts she is entitled to additional penalty benefits that accrued from October 7, 2020, through May 14, 2021, after she underwent bilateral knee replacements in August 2020. Claimant asserts the appeal decision does not address her claim for additional penalty benefits. Claimant is correct.

Iowa Code section 86.13 governs compensation payments. Under the statute's plain language, if there is a delay in payment absent "a reasonable or probable cause or excuse," the employee is entitled to penalty benefits, of up to fifty percent of the amount of benefits that were denied, delayed, or terminated without reasonable or probable cause or excuse. Iowa Code § 86.13(4); see also Christensen v. Snap-On Tools Corp., 554 N.W.2d 254, 260 (Iowa 1996) (citing an earlier version of the statute). "The application of the penalty provision does not turn on the length of the delay in making the correct compensation payment." Robbennolt v. Snap-On Tools Corp., 555 N.W.2d

229, 236 (Iowa 1996). If a delay occurs without a reasonable excuse, the commissioner is required to award penalty benefits in some amount to the employee. Id.

The statute requires the employer or insurance company to conduct a “reasonable investigation and evaluation” into whether benefits are owed to the employee, the results of the investigation and evaluation must be the “actual basis” relied on by the employer or insurance company to deny, delay, or terminate benefits, and the employer or insurance company must contemporaneously convey the basis for the denial, delay, or termination of benefits to the employee at the time of the denial, delay, or termination of benefits. Iowa Code § 86.13(4). An employer may establish a “reasonable cause or excuse” if “the delay was necessary for the insurer to investigate the claim,” or if “the employer had a reasonable basis to contest the employee’s entitlement to benefits.” Christensen, 554 N.W.2d at 260. “A ‘reasonable basis’ for denial of the claim exists if the claim is ‘fairly debatable.’” Burton v. Hilltop Care Ctr., 813 N.W.2d 250, 267 (Iowa 2012). “Whether a claim is ‘fairly debatable’ can generally be determined by the court as a matter of law.” Id. The issue is whether the employer had a reasonable basis to believe no benefits were owed to the claimant. Id. “If there was no reasonable basis for the employer to have denied the employee’s benefits, then the court must ‘determine if the defendant knew, or should have known, that the basis for denying the employee’s claim was unreasonable.’” Id.

Benefits must be paid beginning on the 11th day after the injury, and “each week thereafter during the period for which compensation is payable, and if not paid when due,” interest will be imposed. Iowa Code § 85.30. In Robbennolt, the Iowa Supreme Court noted, “[i]f the required weekly compensation is timely paid at the end of the compensation week, no interest will be imposed As an example, if Monday is the first day of the compensation week, full payment of the weekly compensation is due the following Monday.” Robbennolt, 555 N.W.2d at 235. A payment is “made” when the check addressed to the claimant is mailed, or personally delivered to the claimant. Meyers v. Holiday Express Corp., 557 N.W.2d 502, 505 (Iowa 1996) (abrogated by Keystone Nursing Care Ctr. v. Craddock, 705 N.W.2d 299 (Iowa 2005) (concluding the employer’s failure to explain to the claimant why it would not pay permanent benefits upon the termination of healing period benefits did not support the commissioner’s award of penalty benefits)).

When considering an award of penalty benefits, the commissioner considers “the length of the delay, the number of the delays, the information available to the employer regarding the employee’s injuries and wages, and the prior penalties imposed against the employer under section 86.13.” Schadendorf v. Snap-On Tools Corp., 757 N.W.2d 330, 336 (Iowa 2008). The purposes of the statute are to punish the employer and insurance company and to deter employers and insurance companies from delaying payments. Robbennolt, 555 N.W.2d at 237.

Claimant underwent bilateral total knee replacements in August 2020. Defendants did not commence paying permanency benefits until June 23, 2021, when they paid benefits for the period of November 26, 2020, through May 14, 2021. Claimant asserts defendants never conveyed the reasons why benefits were not paid in the interim. However, claimant did not introduce any evidence in this matter to establish she requested payment of permanency benefits at any time between November 26, 2020, and June 23, 2021.

Claimant asserts the fact defendants did not receive Jason Stanford, D.O.'s permanency rating until June 10, 2021, is not a reasonable cause or excuse because defendants knew long before claimant had undergone bilateral total knee replacements that the minimum rating for a knee replacement is 37 percent, citing to Harrell v. Denver Findley & Sons, Inc., File No. 5066742, 2020 WL 6037536 (Iowa Workers' Comp. Comm'n Oct. 6, 2020). In Harrell, the claimant testified he underwent a prior knee replacement surgery for purposes of claimant's claim against the Second Injury Fund of Iowa (the Fund). The parties did not present an impairment rating involving the knee or any medical evidence of the knee replacement surgery. The deputy commissioner found assigning an impairment to the prior knee replacement surgery for purposes of determining the credit due the Fund required the use of lay opinion or agency expertise to apply the minimum compulsory impairment rating that could be assigned as a result of the surgical procedure. On appeal in Harrell, I disagreed and I found the Fund was entitled to a credit of 81.4 weeks for the 37 percent permanent partial disability caused by claimant's left total knee replacement, which pre-existed the April 23, 2018, work injury.

Without deciding whether agency expertise was involved, the Iowa Court of Appeals reversed the decision in Harrell, in part, finding the commissioner's 37 percent impairment determination was inconsistent with the prohibition on the use of "lay testimony" to determine "loss or percentage of permanent impairment" under Iowa Code section 85.34(2)(x) when no physician or other expert testified about a total knee replacement surgery, no medical records were entered as exhibits regarding the knee replacement surgery, and the only evidence of a total knee replacement surgery was Harrell's own testimony. Harrell v. Denver Findley & Sons, Inc., File No. 21-0827, 2022 WL 2824746 (Iowa Ct. App. July 20, 2022)

I do not find claimant's argument and reliance on Harrell persuasive. Claimant in this case asserts defendants should have known she was entitled to permanency benefits of at least the minimum 37 percent for each knee when she underwent her bilateral knee surgeries in August 2020. The penalty statute does not impose such a requirement on defendants.

On November 25, 2020, Dr. Stanford found claimant reached maximum medical improvement and he released claimant without restrictions. (JE 6, p. 46) Dr. Stanford did not give an opinion on permanency using the Guides to the Evaluation of Permanent Impairment (AMA Press, 5th Ed. 2001) ("AMA Guides") until May 17, 2021. (JE 6, p. 47)


In the February 10, 2022, ruling on claimant's application for rehearing, the deputy commissioner found defendants received Dr. Stanford's impairment rating on June 10, 2021, and defendants commenced paying permanency benefits on June 23, 2021. I find defendants acted reasonably in this case and I find no additional penalty should be awarded for the period between the date Dr. Stanford placed claimant at maximum medical improvement and the date when defendants commenced paying claimant permanent partial disability benefits, which was from November 26, 2020, through June 23, 2021, because no impairment rating was issued during that time period and because claimant did not request payment of permanency benefits during that period.

ORDER

IT IS THEREFORE ORDERED:

Claimant's application for rehearing is granted. Claimant is not entitled to additional penalty benefits for the period of October 7, 2020, through May 14, 2021.

Signed and filed on this 1st day of August, 2022.



JOSEPH S. CORTESE II
WORKERS' COMPENSATION
COMMISSIONER

The parties have been served as follows:

Benjamin Roth (via WCES)

Charles Showalter (via WCES)

Kelsey Paumer (via WCES)