

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

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RAMIZ NORTHLAND,

Claimant,

vs.

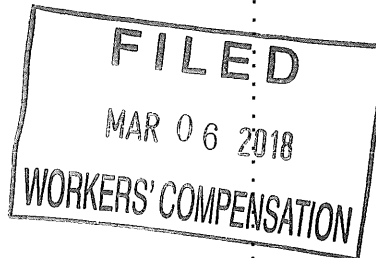
FS EXPRESS, L.L.C.,

Employer,

and

UNKNOWN

Insurance Carrier,  
Defendants.



File No. 5057486

ARBITRATION

DECISION

Head Note Nos.: 1802; 1803; 2501;  
3003; 4000.2

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STATEMENT OF THE CASE

Claimant, Ramiz Northland, filed a petition in arbitration seeking workers' compensation benefits from FS Express, LLC, no insurance carrier named.

This case was heard in Des Moines, Iowa, on February 27, 2018. Defendants were given adequate notice of the hearing, but failed to appear or participate. The record in this case consists of claimant's exhibits 1 through 6. The hearing was recorded digitally. The digital recording of this hearing serves as official recording of this hearing.

ISSUES

1. Whether the injury is the cause of temporary disability.
2. Whether the injury is the cause of permanent disability; and if so,
3. The extent of claimant's entitlement to permanent partial disability benefits.
4. Rate.
5. Whether there is a causal connection between the injury and the claimed medical expenses.
6. Whether defendants are liable for penalty under Iowa Code section 86.13.

In a request for admissions, defendants were asked to admit or deny that claimant was an employee of FS Express, and to admit or deny whether claimant sustained an injury that arose out of and in the course of employment on August 10, 2016. Defendants did not answer the request for admissions.

Rule 876 IAC 4.35 makes the Iowa Rules of Civil Procedure applicable before this agency. Iowa Rule of Civil Procedure 1.510(2) states that a matter is admitted unless within 30 days after service the party to whom the requests were directed serve a written response. Iowa R. Civ. P. 1.511 states that any matter admitted under rule 1.510(2) is conclusively established in an action unless the court on motion permits withdrawal or amendment of the admission.

In this case, defendants failed to admit or deny claimant was an employee of FS Express, and whether claimant sustained an injury that arose out of and in the course of employment on August 10, 2016. Based on defendants failure to respond to the request for admissions in this case, claimant has carried his burden of proof he was an employee of FS Express and that he sustained an injury on August 10, 2016 that arose out of and in the course of employment. (Exhibit 5)

#### FINDINGS OF FACT

Claimant was 52 years old at the time of the hearing. Claimant worked as a truck driver for FS Express.

On August 10, 2016, claimant was driving a truck for FS Express in Wisconsin. Claimant swerved to avoid hitting animals in the road. Claimant's truck struck an exit sign. Claimant sustained fractured ribs. Claimant received emergency care at ThedaCare Hospital in Neenah, Wisconsin. Claimant was released from care on August 10, 2016. (Ex. 1, Ex. 2, p. 5)

Claimant underwent EMG and nerve conduction studies on November 3, 2016. Testing showed a severe ulnar neuropathy at the elbow on the right and a median neuropathy consistent with a carpal tunnel syndrome. Testing also showed a possible rotator cuff syndrome. (Ex. 2, pp. 1-5) Claimant was recommended to have an MRI of the cervical spine and right shoulder. (Ex. 2, pp. 1-6)

On November 9, 2016, claimant underwent an MRI of the right shoulder. Claimant complained of neck pain radiating into the right upper extremity and right hand numbness. The MRI showed a rotator cuff tendinopathy with a partial thickness tear. (Ex. 2, pp. 7-8)

On the same date, claimant also underwent a cervical MRI. A posterior disc bulge was found at C5-6. (Ex. 2, pp. 9-10)

In a November 10, 2010 letter, Ivo Bekavac, M.D., noted he evaluated claimant on that date. Dr. Bekavac assessed claimant as having a severe right ulnar neuropathy at the elbow, a carpal tunnel syndrome on the right, a right rotator cuff syndrome, and a right cervical sensory radiculopathy. He recommended physical therapy and massage. (Ex. 2, p. 11)

Claimant returned to Dr. Bekavac in January and February 2017 in follow up care. Claimant was continued in physical therapy. (Ex. 2, pp. 12-13)

Claimant returned to Dr. Bekavac on March 13, 2017. Claimant was still assessed as having severe right ulnar neuropathy of the elbow, carpal tunnel syndrome on the right, rotator cuff syndrome and a right cervical sensory radiculopathy. Claimant was released from care and instructed to continue therapy on his own. (Ex. 2, p. 14)

On May 19, 2017, defendants were sent 26 requests for admissions. Requests for admissions including a request to admit or deny claimant was injured in the course of employment for defendants; that the work injury was the cause of claimant's numerous injuries to his ribs, back, neck, and the care of those injuries; that claimant was an employee of defendants; and that claimant made \$1,237.50 per week for an average weekly wage. The record does not indicate that defendants responded to any of those requests for admission. (Ex. 5)

### CONCLUSIONS OF LAW

The first issue to be determined is the extent of claimant's entitlement to temporary 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. 6.14(6).

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

Claimant was injured on August 10, 2016. He received medical care until March 13, 2017. Given this record, claimant is due healing period benefits from August 10, 2016 through March 13, 2017.

The next issue to be determined is if claimant's injury is the cause of permanent disability.

Claimant was involved in a truck accident on August 10, 2016. Claimant was assessed as having fractured ribs, a severe right ulnar neuropathy on the elbow, a carpal tunnel syndrome on the right, a right rotator cuff syndrome, and a right cervical sensor radiculopathy. Claimant was assessed as having those conditions over seven months after the date of injury. Given this record, it is found claimant has carried his burden of proof he has a permanent disability from the August 10, 2016 date of injury.

The next issue to be determined is the extent of claimant's entitlement to permanent partial disability benefits.

Since claimant has an impairment to the body as a whole, an industrial disability has been sustained. Industrial disability was defined in Diederich v. Tri-City R. Co., 219 Iowa 587, 258 N.W. 899 (1935) as follows: "It is therefore plain that the legislature intended the term 'disability' to mean 'industrial disability' or loss of earning capacity and not a mere 'functional disability' to be computed in the terms of percentages of the total physical and mental ability of a normal man."

Functional impairment is an element to be considered in determining industrial disability which is the reduction of earning capacity, but consideration must also be given to the injured employee's age, education, qualifications, experience, motivation, loss of earnings, severity and situs of the injury, work restrictions, inability to engage in employment for which the employee is fitted and the employer's offer of work or failure to so offer. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963); Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961).

Compensation for permanent partial disability shall begin at the termination of the healing period. Compensation shall be paid in relation to 500 weeks as the disability bears to the body as a whole. Section 85.34.

Claimant was injured on August 10, 2016. The record indicates that by March 2017, over seven months after the date of injury, claimant had not returned to work as a driver for FS Express. There is no evidence in the record that claimant returned to work as a truck driver for any employer. Claimant has been assessed as having right ulnar neuropathy at the elbow, carpal tunnel syndrome on the right, right rotator cuff syndrome, right cervical sensor radiculopathy, and a posterior disc bulge at the C5-C6 level. Considering all relevant facts, it is found claimant has a 20 percent loss of earning capacity or industrial disability.

The next issue to be determined is rate.

Section 85.36 states the basis of compensation is the weekly earnings of the employee at the time of the injury. The section defines weekly earnings as the gross salary, wages, or earnings to which an employee would have been entitled had the

employee worked the customary hours for the full pay period in which injured as the employer regularly required for the work or employment. The various subsections of section 85.36 set forth methods of computing weekly earnings depending upon the type of earnings and employment.

If the employee is paid on a daily or hourly basis or by output, weekly earnings are computed by dividing by 13 the earnings over the 13-week period immediately preceding the injury. Any week that does not fairly reflect the employee's customary earnings that fairly represent the employee's customary earnings, however. Section 85.36(6).

Claimant's average weekly wage was \$1,237.50 per week. Claimant was single with two exemptions. Claimant's rate is \$725.33. (Ex. 5, p. 4)

The next issue to be determined is if there is a causal connection between the injury and claimed medical expenses.

The employer shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance, and hospital services and supplies for all conditions compensable under the workers' compensation law. The employer shall also allow reasonable and necessary transportation expenses incurred for those services. The employer has the right to choose the provider of care, except where the employer has denied liability for the injury. Section 85.27. Holbert v. Townsend Engineering Co., Thirty-second Biennial Report of the Industrial Commissioner 78 (Review-Reopening October 1975).

Defendants admit they have not paid any of the medical charges for claimant's work injury. (Ex. 5, p. 4) The medical expenses shown in the record are related to claimant's treatment for his August 2016 work injury. There is no evidence in the record that the charges made by providers were not fair and reasonable. Given this record, defendants are liable for the medical charges detailed in claimant's exhibit 3.

The next issue to be determined is if 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 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 have not paid claimant any healing period benefits or any permanent partial disability benefits. (Ex. 5, p. 1) Defendants offered no reason for their failure to pay benefits. Given this record, defendants are liable for a penalty of 50 percent for failure to pay healing period benefits and permanent partial disability benefits.

Claimant is due healing period benefits from August 10, 2016 to March 13, 2017. This is a period of approximately 31 weeks. Defendants are liable for penalty of \$11,242.62 (31 weeks x \$725.33 x 50 percent).

Claimant is found to be entitled to 100 weeks of permanent partial disability benefits. Defendants are liable for a penalty of \$36,266.50 for failure to pay claimant any permanent partial disability benefits. (100 weeks x \$725.33 x 50 percent)

#### ORDER

THEREFORE, IT IS ORDERED:

That defendant shall pay claimant healing period benefits commencing on August 10, 2016 to March 13, 2017 at the rate of seven hundred twenty-five and 33/100 dollars (\$725.33) per week.

That defendant shall pay claimant one hundred (100) weeks of permanent partial disability benefits at the rate of seven hundred twenty-five and 33/100 dollars (\$725.33) commencing on March 18, 2017.

That defendant shall pay accrued weekly benefits in a lump sum.

That defendant shall pay interest on unpaid weekly benefits as ordered above and as set forth in Iowa Code section 85.30.

That defendant shall pay claimant's medical expenses as detailed in Exhibit 3.

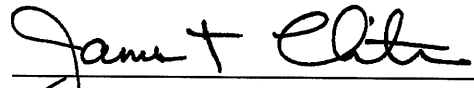
That defendant shall pay a penalty of eleven thousand two hundred forty-two and 62/100 dollars (\$11,242.62) for failure to pay claimant any healing period benefits.

That defendant shall pay claimant penalty of thirty-six thousand two hundred sixty-six and 50/100 dollars (\$36,266.50) for the failure to pay any permanent partial disability benefits.

That defendant shall pay costs.

That defendant shall file subsequent reports of injury as required by this agency under rule 876 IAC 3.1(2)

Signed and filed this 16<sup>th</sup> day of March, 2018.

  
JAMES F. CHRISTENSON  
DEPUTY WORKERS'  
COMPENSATION COMMISSIONER

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