BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

FILED
JAN 26 2017
WORKERS' COMPENSATION

MARTIN AMADOR, Claimant, vs. OSCEOLA FOODS, Employer, Self-Insured, Defendants.	:	File Nos. 5054475, 5054476 ARBITRATION DECISION Head Note No.: 1402.30, 1403.30, 1802, 1803, 2501, 2502

STATEMENT OF THE CASE

Claimant, Martin Amador, filed petitions in arbitration seeking workers' compensation benefits from Osceola Foods, self-insured employer (Osceola). This matter was heard in Des Moines, Iowa on October 10, 2016 with a final submission date of November 9, 2016.

The record in this case consists of claimant's exhibits 1-20, defendant's exhibits A through J, and the testimony of claimant, Taungia Higdon, Roberto Luna and Jim Cooley.

ISSUES

Regarding File No. 5054476 (date of injury January 28, 2014):

1. Whether claimant sustained an injury that arose out of and in the course of employment.

2. Whether claimant's claim for benefits is barred by application of Iowa Code section 85.23.

3. Whether the injury is a cause of permanent disability; and if so

4. The extent of claimant's entitlement to permanent partial disability benefits.

5. Rate.

6. Whether there is a causal connection between the injury and the claimed medical expenses.

7. Whether claimant is due reimbursement for an independent medical evaluation (IME) under Iowa Code section 85.29.

For File No. 5054475 (date of injury June 26, 2015):

1. Whether claimant sustained an injury that arose out of and in the course of employment.

2. Whether the injury is a cause of temporary disability.

3. Whether the injury is a cause of permanent disability; and if so

4. The extent of claimant's entitlement to permanent partial disability benefits.

5. Whether claimant's award of benefits is diminished based on the theory of mitigation.

6. Whether there is a causal connection between the injury and the claimed medical expenses.

7. Whether or not claimant is due reimbursement for an IME.

8. Whether defendant is liable for penalty under Iowa Code section 86.13.

FINDINGS OF FACT

Claimant was 54 years old at the time of hearing. Claimant graduated from high school. Claimant has worked for a lumber company and performed basic maintenance on trucks at a truck dealership. Claimant has worked in construction as a janitor. He worked as a supervisor/translator for a short time for Monsanto. (Exhibit 10, pages 65-66)

Claimant started at Osceola Foods through a temporary service in October of 2011. Claimant began working as an employee for Osceola in February of 2012. (Ex. 10, pp. 65-66)

At Osceola claimant worked as a machine operator, a forklift driver, and as a floor-service person, or service operator. In the floor person job, claimant got supplies for production lines, picked up garbage and cleaned. Claimant also was required to pick up 50-100-pound rolls of plastic wrap. As a machine operator claimant moved sections of meat weighing between 10 to 35 pounds. (Ex. 10, p. 65)

Claimant testified that in late 2013, early 2014 he began having pain in his abdominal area. Claimant testified he told the plant nurse he was having stomach pains, and the nurse gave him Tums. Claimant said initially the Tums helped with the

stomach pain. He testified as his job became more physical, he began to experience more and more stomach pain. He said the pain moved to his abdominal area.

Claimant testified he mentioned to his supervisor, Jim Cooley, he thought picking up trash bags was causing abdominal pain. He said he also complained again to the plant nurse regarding stomach pain. He said a nurse, Taungia Higdon, eventually told him to see a doctor.

A February 4, 2014 note written by plant nurse, Taungia Higdon indicates on that date claimant told Nurse Higdon of groin pain and swelling. Claimant was offered a ride to the emergency room. Claimant signed a note denying medical care. (Ex. D, pp. 1-2; Tr. pp. 112-113)

On February 11, 2014 claimant was evaluated by George Fotiadis, M.D. for a bump in the left groin present for approximately two months. Claimant was assessed as having a left inguinal hernia. A surgery consult was recommended. (Ex. 1)

On February 20, 2014 claimant was seen by Timothy Mayfield, M.D. Claimant felt sharp pain in the left groin three to four weeks prior while lifting at work. Claimant was assessed as having a left inguinal hernia. Surgery was discussed. Claimant was to talk to his HR department about the timing of the surgery and call back to schedule surgery. (Ex. 2, pp. 4-7)

Claimant testified at hearing he chose not to have the surgery at that time for three reasons. First, claimant said the hernia was not bothering him too badly in February of 2014. He testified he was concerned about losing time at work and might lose his job. Claimant also did not want to undergo surgery, as he was frightened that he might die from it. Claimant testified he was afraid about being put under anesthesia. (Tr. pp. 34-35, 92-93)

Claimant testified at hearing he told his employer of his hernia and specifically notified Jim Cooley. He said as a result, Mr. Cooley put him on physically lighter work temporarily. (Tr. pp. 29, 36; Ex. G, p. 17; Deposition pp. 66-67; Ex. 15, pp. 98-99)

Claimant testified at hearing he told Nurse Higdon in 2014 his hernia was caused by work. (Tr. p. 95) In deposition claimant testified he did not recall if he told Nurse Higdon his hernia was work related. (Ex. G, p. 17; Depo. p. 68)

In a recorded statement, claimant said he went to the nurse's office and showed a bulge in his groin to supervisors or coworkers who were named Edward, Martin, and Will. He also showed the bulge in his groin to a supervisor named Otto. He said these men explained claimant's condition to a nurse named Marissa. (Ex. 15, pp. 95-96) Claimant also indicated in the statement he spoke with Nurse Higdon regarding his condition. He said he told Nurse Higdon and a supervisor named Tony McCallahan the doctor told him to do lighter work and claimant was put on a forklift. (Ex. 15, pp. 101-103)

At hearing, Nurse Higdon testified she was a nurse at the Osceola plant during the period of time claimant worked for Osceola. Nurse Higdon testified at hearing she specifically asked claimant if his condition was related to his employment. She testified claimant told him his hernia was not work related. She said claimant never told her his hernia was work related. (Tr. pp. 115-118, 122; Ex. 9, p. 62)

Jim Cooley testified he was claimant's supervisor at Osceola in February of 2014 until June of 2014. Mr. Cooley testified claimant did not tell him he had a work-related hernia or abdominal condition. (Tr. pp. 148-152)

Roberto Luna testified he was HR manager at the Osceola plant where claimant worked, beginning in February of 2014. He testified the first time he was aware of claimant's condition was sometime in June of 2015. (Tr. pp. 127-128)

Mr. Luna testified that in June of 2015, he was told to go to the nurse's office. He said when he arrived, he saw claimant sitting in a chair. Claimant showed him an "extremely large extension" in claimant's groin area. Claimant told Mr. Luna the condition had gone on for a while. He said he did not know the condition was a hernia until claimant went to a doctor. He testified he specifically asked claimant more than once if his condition was work related, and claimant said it was not. (Tr. pp. 128-129)

Mr. Luna testified employees at Osceola are routinely told to report all work-related accidents or injuries. (Tr. p. 130)

Mr. Luna testified he first learned claimant's condition was potentially work related when Osceola received a short-term disability (STD) form from a doctor indicating claimant's condition was work related. Mr. Luna said claimant said this was a mistake and a call was made to claimant's doctor to correct the mistake. He said the STD form had claimant indicating the injury was not work related while the doctor noted the injury was work related. Mr. Luna testified prior to the STD form, Osceola Foods had no knowledge claimant's injury was potentially work related. (Tr. pp. 136-137, 139)

Mr. Luna said the STD form was never corrected by the doctor. He said the STD form was the first notice Osceola got that claimant's condition was potentially work related. (Tr. pp. 140-141) Mr. Luna said at least by July 9, 2015, when Osceola received a letter from claimant's attorney, Osceola knew claimant was claiming his condition was work related. (Tr. p. 142)

On July 2, 2015 claimant was evaluated by Dr. Mayfield. Claimant had seen Dr. Mayfield one to two years prior with a left inguinal hernia but did not want it repaired. Claimant indicated he was recently moved to more manual labor. Several months prior to July 2, 2015 claimant said he heard a pop and noted a massive increase in his left inguinal hernia. Claimant was assessed as having a huge scrotal left inguinal hernia. Surgery was recommended. (Ex. 2, pp. 8-10) On or about the same day Dr. Mayfield completed an STD form for claimant indicating claimant was unable to do his job from approximately July 2, 2015 through July 27, 2015. Dr. Mayfield indicated the condition

was work related. Claimant completed the STD form indicating his condition was not work related. (Ex. E, p. 5)

Claimant testified Nurse Higdon told him to sign the STD form. Claimant said he thought the form would allow him to go to the hospital. He said the nurse completed the form, and he only signed it. (Tr. pp. 44-46) Claimant said he told the nurse his condition was work related. (Tr. pp. 44-46)

In a memo, Nurse Higdon indicated communicating with claimant on or about July 6, 2015 regarding his hernia condition. Claimant indicated he was not filing a workers' compensation claim. Claimant indicated Dr. Mayfield would be changing the STD application to indicate claimant's hernia was not work related. (Ex. 9, p. 61)

In a July 16, 2015 form claimant was granted FMLA leave from June 26, 2015 through August 17, 2015. (Ex. D, p. 9)

On September 14, 2015 claimant underwent a laparoscopic inguinal hernia repair. Surgery was performed by Dr. Mayfield. (Ex. 2, pp. 17-18)

In a September 23, 2015 note, written by defense counsel, Dr. Mayfield indicated if claimant had had a hernia repair in February of 2014, as offered, claimant's hernia would not have progressed to the point that he needed to see Dr. Mayfield in September of 2015. (Ex. 2, pp. 22-23)

On September 24, 2015 claimant returned in followup with Dr. Mayfield. Claimant had a large seroma. Claimant complained of pain and requested pain medication. Claimant was told to elevate his legs to decrease the size of the seroma. (Ex. 2, pp. 19-20)

Claimant returned in followup with Dr. Mayfield on October 1, 2015. Claimant's pain had improved. Claimant was returned to work to full duty on October 5, 2015. (Ex. 2, pp. 20, 33; Ex. B; Ex. D, p. 18)

On October 23, 2015 claimant was terminated for walking off the job. (Ex. D, p. 19) Claimant testified he voluntarily terminated his employment with Osceola. He said he could have kept working at Osceola if he had not quit. (Tr. p. 75)

In a November 27, 2015 note, written by claimant's counsel, Dr. Mayfield indicated claimant's work activities, prior to February 20, 2014, materially aggravated an underlying condition. He indicated claimant's work activities prior to July 2, 2015 materially aggravated claimant's underlying condition. He agreed claimant's decision to not have surgery in February of 2014 was reasonable. He did not give claimant any restrictions regarding his hernia. (Ex. 3)

In an August 22, 2013 report Sunil Bansal, M.D., gave his opinions of claimant's condition following an IME. Claimant told Dr. Bansal after discussing surgery with the doctor, he returned to work and reported his condition to a company nurse. Claimant

said he was returned to work. Because of a new supervisor, claimant said he was required to lift more and his condition worsened. (Ex. 7, pp. 50-54)

Dr. Bansal assessed claimant as having a left inguinal hernia repair and complications with a large seroma. He opined the heavy lifting claimant did at Osceola significantly contributed to his left hernia condition that developed in December of 2013 and redeveloped in 2015. He found claimant had a 5 percent permanent impairment to the body as a whole based upon Table 6-9, page 136 of the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition. He restricted claimant from heavy lifting. He opined claimant would need evaluation for his seroma. Dr. Bansal could not say it was reasonable for claimant to forego surgery in February of 2014. (Ex. 7, pp. 54-57)

In a September 7, 2016 letter, written by defense counsel, Dr. Mayfield indicated he encouraged claimant, on February 20, 2014, to have a hernia repair surgery. He also indicated he told claimant claimant could get ill in the future or require emergency surgery if he did not have the surgery. (Ex. A)

Claimant testified when he left Osceola he began employment with Aerotek. At Aerotek claimant assembled truck bodies in a production line. Claimant testified the job required heavy lifting at times. This involved lifting 200-pound boxes with a coworker. Claimant said he routinely worked over 40 hours at Aerotek. Claimant was employed at Aerotek from November 24, 2015 through January 29, 2016. He said he left Aerotek, as he did not get along with coworkers. (Ex. I, pp. 1, 4-5; Ex. G, p. 6; Depo. pp. 22-23; Tr. pp. 56, 66-67)

After Aerotek claimant applied to a temporary agency, People 360. Claimant indicated on the People 360 application he had not been injured at work prior and had no condition that would affect his ability to work. (Ex. H, p. 4)

Claimant testified at the time of hearing he was homeless.

Claimant testified he has difficulty urinating because of his condition. He said he has difficulty with sitting for extended periods of time due to his condition.

CONCLUSIONS OF LAW

The first issue to be determined is did claimant sustain an injury that arose out of and in the course of employment?

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).

The claimant has the burden of proving by a preponderance of the evidence that the alleged injury actually occurred and that it both arose out of and in the course of the employment. Quaker Oats Co. v. Ciha, 552 N.W.2d 143 (Iowa 1996); Miedema v. Dial Corp., 551 N.W.2d 309 (Iowa 1996). The words "arising out of" referred to the cause or

source of the injury. The words "in the course of" refer to the time, place, and circumstances of the injury. 2800 Corp. v. Fernandez, 528 N.W.2d 124 (Iowa 1995). An injury arises out of the employment when a causal relationship exists between the injury and the employment. Miedema, 551 N.W.2d 309. The injury must be a rational consequence of a hazard connected with the employment and not merely incidental to the employment. Koehler Electric v. Wills, 608 N.W.2d 1 (Iowa 2000); Miedema, 551 N.W.2d 309. An injury occurs "in the course of" employment when it happens within a period of employment at a place where the employee reasonably may be when performing employment duties and while the employee is fulfilling those duties or doing an activity incidental to them. Ciha, 552 N.W.2d 143.

The claimant has the burden of proving by a preponderance of the evidence that the injury is a proximate cause of the disability on which the claim is based. A cause is proximate if it is a substantial factor in bringing about the result; it need not be the only cause. A preponderance of the evidence exists when the causal connection is probable rather than merely possible. George A. Hormel & Co. v. Jordan, 569 N.W.2d 148 (Iowa 1997); Frye v. Smith-Doyle Contractors, 569 N.W.2d 154 (Iowa App. 1997); Sanchez v. Blue Bird Midwest, 554 N.W.2d 283 (Iowa App. 1996).

The question of causal connection is essentially within the domain of expert testimony. The expert medical evidence must be considered with all other evidence introduced bearing on the causal connection between the injury and the disability. Supportive lay testimony may be used to buttress the expert testimony and, therefore, is also relevant and material to the causation question. The weight to be given to an expert opinion is determined by the finder of fact and may be affected by the accuracy of the facts the expert relied upon as well as other surrounding circumstances. The expert opinion may be accepted or rejected, in whole or in part. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); IBP, Inc. v. Harpole, 621 N.W.2d 410 (Iowa 2001); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995). Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417 (Iowa 1994). Unrebutted expert medical testimony cannot be summarily rejected. Poula v. Siouxland Wall & Ceiling, Inc., 516 N.W.2d 910 (Iowa App. 1994).

While a claimant is not entitled to compensation for the results of a preexisting injury or disease, its mere existence at the time of a subsequent injury is not a defense. Rose v. John Deere Ottumwa Works, 247 Iowa 900, 76 N.W.2d 756 (1956). If the claimant had a preexisting condition or disability that is materially aggravated, accelerated, worsened or lighted up so that it results in disability, claimant is entitled to recover. Nicks v. Davenport Produce Co., 254 Iowa 130, 115 N.W.2d 812 (1962); Yeager v. Firestone Tire & Rubber Co., 253 Iowa 369, 112 N.W.2d 299 (1961).

Claimant alleges dates of injury of January 28, 2014 and June 26, 2015. Dr. Mayfield opined claimant's work activities at Osceola prior to February 20, 2014 materially aggravated an underlying condition. He also opined claimant's work activities prior to his visit on July 2, 2015 materially aggravated claimant's underlying condition. (Ex. 3, p. 35)

Dr. Bansal also opined claimant's hernia was aggravated by his work activities at Osceola. (Ex. 7, pp. 55-56)

There is no contrary opinion indicating claimant's hernia condition was not materially aggravated by his work at Osceola.

Claimant contends his work at Osceola materially aggravated a hernia condition occurring on or about January 28, 2014 and on or about June 26, 2015. Two experts have opined claimant's work activities at Osceola materially aggravated his underlying condition on or about the dates alleged. There are no contrary expert opinions. Given this record, claimant has carried his burden of proof he sustained an injury that arose out of and in the course of employment on or about January 28, 2014 and June 26, 2015.

Defendant contends claimant actually only sustained one hernia, and that occurred sometime in 2013 or 2014. (Defendant's post-hearing brief, p. 11) I appreciate this position. However, there is no expert opinion in the record supporting this position. As noted, two experts have opined claimant sustained a material aggravation to his underlying hernia condition on or about January 2014 and June of 2015. Given this record, defendant's argument must fail.

Defendant also contends information on the STD application that the June of 2015 condition was not work related and indicates claimant did not have a work-related injury. (Ex. D, p. 17)

Claimant's unrebutted testimony was that the form was completed by Nurse Higdon. His unrebutted testimony was he signed the form and he believed signing the form would allow him to get medical care. (Tr. pp. 44-46) Based on this, defendant's argument also fails.

Claimant has alleged dates of injury of January 28, 2014 and June 26, 2015. June 26, 2015 appears to be the date claimant saw his employer regarding his hernia condition. (Ex. 9, p. 62) The parties have relied upon and used the dates pled as dates of injury since the petitions were filed. There is no indication the dates of injuries alleged are prejudicial to either party. The record is not entirely clear when either hernia occurred. Based on this, it is found claimant sustained a work-related hernia injury on or about January 28, 2014 and June 26, 2015 that arose out of and in the course of employment.

The next issue to be determined is if claimant failed to give notice under Iowa Code section 85.23 regarding his January 28, 2014 date of injury.

Iowa Code section 85.23 requires an employee to give notice of the occurrence of an injury to the employer within 90 days from the date of the occurrence, unless the employer has actual knowledge of the occurrence of the injury.

The purpose of the 90-day notice or actual knowledge requirement is to give the employer an opportunity to timely investigate the facts surrounding the injury. The actual knowledge alternative to notice is met when the employer, as a reasonably conscientious manager, is alerted to the possibility of a potential compensation claim through information which makes the employer aware that the injury occurred and that it may be work related. Dillinger v. City of Sioux City, 368 N.W.2d 176 (Iowa 1985); Robinson v. Department of Transp., 296 N.W.2d 809 (Iowa 1980).

Failure to give notice is an affirmative defense which the employer must prove by a preponderance of the evidence. DeLong v. Highway Commission, 229 Iowa 700, 295 N.W. 91 (1940).

The 90-day limit for notice does not begin running until the employee, acting reasonably, should know his injuries are both serious and work connected. Robinson v. Department of Transp., 296 N.W.2d 809, 812 (1980). The statute of limitations also does not begin to run until the employee knows that the physical condition is serious enough to have a permanent adverse impact on his employment or employability. Herrera v. IBP, Inc., 633 N.W.2d 284 (Iowa 2001).

Disability is found to have manifested when an employee has knowledge of a permanent impairment of the injury, and the causal impact the injury would have upon a job. George A. Hormel & Co. v. Jordan, 569 N.W.2d 148, 152 (Iowa 1997). The date of surgery has been used as a correct date of injury in other cumulative injury cases. Wetzell v. Packaging Corporation, File Nos. 5000444, 5000445 (App. 2003).

The burden rests on the employer to prove claimant did not provide the 90-day notice. Once the employer can show an affirmative defense under Iowa Code section 85.23, the burden shifts to the employee to show the discovery rule exception applies. IBP, Inc. v. Burress, 779 N.W.2d 210, 219 (Iowa 2010).

Claimant was assessed as having a hernia by Dr. Fotiadis on February 11, 2014. (Ex. 1) Dr. Mayfield also told claimant he had a hernia at that time. (Ex. 2, p. 4) Dr. Mayfield told claimant he needed to have surgery for his hernia. Claimant knew his condition was serious enough to warrant surgery. Claimant also told Dr. Mayfield he believed his hernia occurred at work. (Ex. 2, p. 4) Claimant testified he did not want surgery because he feared he would not come out of anesthesia, and because he did not want to take time off of work for fear of losing his job. (Tr. pp. 34-35, 92-93)

Nurse Higdon, Mr. Cooley, and Mr. Luna all testified they had no knowledge in 2014 that claimant had a work-related hernia condition. Nurse Higdon testified she had no knowledge claimant might have a work-related injury until sometime in late June of early July of 2015. (Tr. pp. 115-118, 122, 127-131, 148-152)

In February of 2014 claimant knew he had a work-related condition that was serious and may have an adverse impact on his employment. He failed to give notice of that injury until late June or early July of 2015. Given this record, defendant has carried

its burden of proof that claimant failed to give timely notice of the January 28, 2014 hernia injury. As a result, claimant's claim for benefits is barred as to the January 28, 2014 date of injury.

As claimant failed to give notice of his January 28, 2014 injury, all other issues regarding File No. 5054476 (date of injury January 28, 2014) are moot.

The next issue to be determined is the extent of claimant's entitlement to temporary benefits regarding the June 26, 2015 date of injury.

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.

When an injured worker has been unable to work during a period of recuperation from an injury that did not produce permanent disability, the worker is entitled to temporary total disability benefits during the time the worker is disabled by the injury. Those benefits are payable until the employee has returned to work, or is medically capable of returning to work substantially similar to the work performed at the time of injury. Section 85.33(1).

The parties stipulated on the hearing report claimant was off work from June 26, 2015 until he was returned to work by Dr. Mayfield on October 5, 2015. As detailed above, claimant has carried his burden of proof his injury of June 26, 2015 was found to have arisen out of and in the course of employment. Given this record, claimant is due temporary benefits from June 26, 2015 through October 5, 2015.

The next issue to be determined is whether claimant sustained a permanent disability as a result of his hernia injury and subsequent surgery.

Dr. Bansal found claimant had a permanent impairment as a result of his hernia and subsequent repair. (Ex. 7, p. 57) There is no opinion that is contrary to Dr. Bansal's finding of permanent impairment. Given this record, claimant has carried his burden of proof his July 26, 2015 injury resulted in a permanent disability.

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.

Industrial disability can be equal to, less than, or greater than functional impairment. Taylor v. Hummel Insurance Agency, Inc., 2-2, Iowa Industrial Comm'r Dec. 736 (1985); Kroll v. Iowa Utilities, 1-4, Iowa Industrial Comm'r Dec. 937 (App. 1985);Birmingham v. Firestone Tire & Rubber Company, II, Iowa Industrial Comm'r Rep., 39, (App. 1981).

Claimant was 54 years old at the time of hearing. He graduated from high school. Claimant has worked in a lumber yard and done basic maintenance on trucks. He has worked construction as a janitor. He also worked as a supervisor translator for Monsanto Seeds.

Dr. Bansal found claimant had a 5 percent permanent impairment to the body as a whole based upon the Guides. There is no other rating. It is found claimant has a 5 percent permanent impairment to the body as a whole.

Dr. Mayfield returned claimant to work with no restrictions. (Ex. 2, pp. 20, 33; Ex. B; Ex. D, p. 18) Claimant continued to work full duty for Osceola with no restrictions from October 5, 2015 until he left employment on October 23, 2015. Following this, claimant worked at Aerotek from November 24, 2015 through January 29, 2016. At Aerotek claimant worked on the line selling truck bodies. Claimant testified the job at Aerotek can at times be heavy work. (Tr. p. 66) Claimant worked over 40 hours per week at Aerotek with no restrictions. (Ex. G, p. 6; Depo. p. 22; Ex. I, p. 4)

Dr. Bansal gave claimant some permanent restrictions regarding lifting. (Ex. 7, p. 57) In light of the fact that claimant worked relatively heavy work at Osceola and Aerotek with no restrictions for approximately three months, it is found Dr. Bansal's

permanent restrictions are not convincing. Based on the record detailed above, it is found claimant has no permanent restrictions.

Claimant has a 5 percent permanent impairment. He has no permanent restrictions. He worked at Osceola and Aerotek with no restrictions but left both jobs due to personal reasons. At the time of the hearing, claimant was homeless. There is little evidence in the record indicating claimant's homeless status is due to his hernia condition. When all relevant factors are considered, claimant has a 5 percent industrial disability or loss of earning capacity.

The next issue to be determined is did claimant have a duty to mitigate his damages?

Defendant contends that because claimant failed to have surgery in February of 2014 when his hernia was initially diagnosed, this somehow should minimize claimant's benefits under the theory of the duty to mitigate damages. Defendant sites to Stufflebean v. City of Fort Dodge, 233 Iowa 438, 9 N.W.2d 281 (Iowa 1943) to support this position.

In Stufflebean, claimant had a hernia but did not desire to undergo a second surgery. Defendants denied liability. A deputy industrial commissioner ordered defendants to furnish claimant medical and surgical benefits for claimant's care. On appeal, the industrial commissioner found claimant's refusal to submit to treatment was not so unreasonable as to forfeit his right to compensation. Stufflebean, 233 Iowa at 439-440.

The court noted the issue on review was if the refusal to submit to curative treatment was so unreasonable as to forfeit the right to compensation during the period of refusal. Id. at 439. The court affirmed the industrial commissioner's decision and found claimant should receive workers' compensation benefits even though he did not want to have a second hernia surgery. Id. at 433.

Contrary to what defendant argues, Stufflebean does not hold that claimant's benefits, in this case, should be reduced based upon claimant's decision to not have surgery in February of 2014. Stufflebean only suggests there may be situations in workers' compensation law in Iowa in which benefits may be forfeited during a period of time when defendants' authorized care is refused. That situation is not present in this case at all. First, defendant never provided or authorized any care to claimant. Second, claimant has already had the surgery in September of 2015. Claimant has already had the recommended care, and for that reason there is no forfeiture of a benefit during a period of refusal.

The law in Stufflebean does not stand for the proposition that claimant's benefits should be diminished because he did not have surgery in February of 2014 or allegedly did not admit it as damages. There is absolutely no statutory authority, under the Workers' Compensation Act, indicating mitigation can apply workers' compensation

matters. For these reasons, mitigation is not appropriate, and claimant's benefits are not diminished based upon alleged failure to mitigate.

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

Claimant seeks payment of medical expenses listed in Exhibit 17. The expenses detailed in Exhibit 17 appear to be related to claimant's work-related hernia injury. There is no evidence in the record the costs related to the treatment of claimant's hernia repair are not fair and reasonable. There is also no evidence the medical expenses claimed are not causally connected to the treatment for claimant's hernia surgery. Based on this, defendant is liable for the claimed medical expenses found at Exhibit 17.

The next issue to be determined is if defendant is liable for reimbursement of costs associated with Dr. Bansal's IME exam.

Section 85.39 permits an employee to be reimbursed for subsequent examination by a physician of the employee's choice where an employer-retained physician has previously evaluated "permanent disability" and the employee believes that the initial evaluation is too low. The section also permits reimbursement for reasonably necessary transportation expenses incurred and for any wage loss occasioned by the employee attending the subsequent examination.

Defendants are responsible only for reasonable fees associated with claimant's independent medical examination. Claimant has the burden of proving the reasonableness of the expenses incurred for the examination. See Schintgen v. Economy Fire & Casualty Co., File No. 855298 (App. April 26, 1991).

Iowa Code section 85.39 is the sole method for reimbursement of an exam by a physician of the employee's choice. If an injured worker seeks reimbursement for an IME, the provisions established by the legislature, under Iowa Code section 85.39, must be followed. Only the costs associated with preparation of the written report of a claimant's IME can be reimbursed as a cost at hearing under rule 876 IAC 4.33. Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839, 846-847 (Iowa 2015).

Claimant seeks reimbursement for the IME performed by Dr. Bansal. Dr. Bansal's report was dated August 22, 2016. There was no prior report of impairment from a physician retained by defendant. Based on this, claimant is not due reimbursement of Dr. Bansal's IME report under Iowa Code section 85.39. Dr. Bansal's statement for the IME does show he charged $2,142.00 for preparation and writing of the report for the August of 2016 IME. As a result, claimant can recover $2,142.00 of the report as a cost under rule 876 IAC 4.33. (Ex. 16, p. 114)

The final issue to be determined is if defendant is 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).

Iowa Code section 86.13(4)(c) requires that if a delay in commencement or termination of benefits occurs without reasonable or probable cause or excuse, the workers' compensation commissioner shall award additional weekly benefits in an amount not to exceed 50 percent of the amount of benefits that were unreasonably delayed or denied. A reasonable or probable cause or excuse must satisfy the following requirements:

(1) The excuse was preceded by a reasonable investigation and evaluation by the employer or insurance carrier into whether benefits were owed to the employee;

(2) The results of the reasonable investigation and evaluation were the actual basis upon which the employer or insurance carrier contemporaneously relied to deny, delay payment of, or terminate benefit;

(3) The employer or insurance carrier contemporaneously conveyed the basis of the denial, delay in payment, or termination of benefits to the employee at the time of the denial, delay or termination of benefits. Iowa Code section 86.13(4)(c)

Iowa Code 86.13(4)(c) requires some kind of investigation be performed and the reasons of a denial be conveyed at the time of the denial of a claim. That did not occur in this case. The record does not show defendants provided a reasonable excuse for the denial of benefits or made a response to claimant's request for benefits. (See Ex. 18-19)

I find it difficult to award a penalty in this case. Three witnesses for the employer testified claimant never said his hernia was work-related. (Tr. pp. 115-118, 122, 127-128, 148-152; Ex. 9, p. 62) Claimant never provided information to his employer when he saw Dr. Fotiadis and Dr. Mayfield in February of 2014 and was assessed as having a hernia. (Tr. 114) However, the statute requires an employer or insurance carrier to convey the basis of denial of a benefit at the time of the denial. The record indicates that was not done, even though claimant's counsel requested benefits. Given the facts of this case, a penalty of ten percent is appropriate. Claimant was due healing period benefits from June 26, 2015 through October 5, 2015. This is approximately 14 weeks. Claimant's stipulated rate is $568.70. A penalty of $800.00 is appropriate (14 weeks x $568.70 x 10%).

ORDER

THEREFORE IT IS ORDERED:

Regarding File No. 5054476 (date of injury January 28, 2014), claimant shall take nothing.

Regarding File No. 5054475 (date of injury June 26, 2015):

That defendant shall pay claimant healing period benefits from June 26, 2015 through October 5, 2015 at the rate of six hundred sixty-eight and 70/100 dollars ($668.70) per week.

That defendant shall pay claimant twenty-five (25) weeks of permanent partial disability benefits at the rate of six hundred sixty-eight and 70/100 dollars ($668.70) per week commencing on October 6, 2015.

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

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

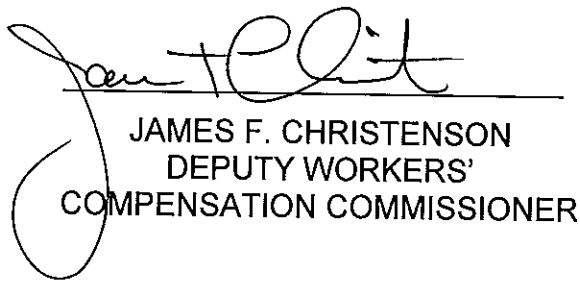
That defendant shall pay a penalty of eight hundred and 00/100 dollars ($800.00) for the delayed payment of healing period benefits.

That defendant shall pay medical costs as detailed in this decision.

That defendant shall pay costs, including two thousand one-hundred forty-two and 00/100 dollars ($2142.00) for the report by Dr. Bansal under 876 IAC 4.33.

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

Signed and filed this 26th day of January, 2017.



JAMES F. CHRISTENSON
DEPUTY WORKERS'
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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.