

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

FILED

DIANA WINN,

MAR 26 2015

Claimant,

File No. 5027519

WORKERS COMPENSATION

vs.

REVIEW-REOPENING

PELLA CORPORATION,

DECISION

Employer,
Self-Insured,
Defendant.

Head Note Nos.: 1804; 1806; 2403
2502; 2905; 4000.2

STATEMENT OF THE CASE

Claimant, Diana Winn, filed a petition in review-reopening, seeking workers' compensation benefits from Pella Corporation (Pella), self-insured defendant. This case was heard on January 21, 2015 and fully submitted on February 27, 2015.

At hearing, defendant objected to exhibit 17. Exhibit 17 are file notes from claimant's counsel regarding communications made between claimant and defendant's counsel. Exhibit 17 was excluded from the record. The record in this case consists of claimant's exhibits 1-16 and 18-22, defendant's exhibits A-X, and the testimony of claimant.

On December 8, 2008, claimant filed a petition in arbitration concerning an August 11, 2008 date of injury to the left shoulder. Hearing was held in this matter on January 12, 2010. An arbitration decision, dated May 21, 2010, found claimant had an injury to the left shoulder on August 11, 2008 that arose out of and in the course of employment. Defendant was also ordered to pay claimant's medical expenses. Claimant also sought an order for defendant to pay claimant's future medical care.

That decision was affirmed in an agency appeal decision dated July 21, 2011. The case was ultimately affirmed by the Iowa Court of Appeals on February 13, 2013. (Exhibit 18)

Claimant also filed a petition for a right shoulder injury, which is not at issue in this proceeding. That petition (File Nos. 5035646 and 5035647) alleged an injury to claimant's right shoulder. An arbitration decision dated September 19, 2012, found claimant failed to carry her burden of proof that she sustained an injury to her right shoulder on June 1, 2010 (File No. 5035647). Claimant was found to have an 80 percent industrial disability regarding a right shoulder injury occurring on

November 16, 2010 (File No. 5035646). That decision was affirmed on agency appeal dated July 1, 2013. The decision was affirmed in the district court on February 17, 2014. (Ex. 19) At the time of hearing, the matter, regarding File No. 5035646 (Date of injury: November 16, 2010) was still under appeal at the Iowa Court of Appeals.

ISSUES

Whether claimant sustained a change in condition since the original arbitration decision that would entitle her to benefits under review-reopening.

Whether claimant's claim for benefits is barred under Iowa Code section 85.26(2).

Whether claimant's claim for benefits is estopped.

Whether claimant is entitled to reimbursement for an independent medical evaluation (IME) under Iowa Code section 85.39.

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

Claimant also asked for an order to provide medical benefits for her left shoulder injury.

FINDINGS OF FACT

Claimant was 64 years old at the time of hearing. Claimant completed the 11th grade, but did not get her GED. Claimant worked as a dishwasher and a server at a Veteran's Administration (VA) Hospital. Claimant also worked in a factory putting collars on shirts.

Claimant began at Pella in August 1976. Prior to August 11, 2008, claimant had no prior history of shoulder problems.

On August 11, 2008, claimant fell from a flatbed truck to the ground. Claimant injured her left shoulder.

In August 2008 claimant was evaluated by Lloyd Thurston, M.D. Claimant was evaluated as having a large rotator cuff tear and a fracture to the left radius. Dr. Thurston found that claimant's injury was caused by work. (Arbitration Decision, page 3)

Claimant was evaluated by Ian Lin, M.D., in May of 2009. Dr. Lin found that claimant's injury was work related. Claimant was assessed as having a severe left rotator cuff tear. Dr. Lin recommended surgery. (Arb. Dec. p. 4)

Claimant was evaluated by Jacqueline Stoken, D.O. Dr. Stoken assessed claimant as having a work related full rotator cuff tear. Dr. Stoken recommended surgery. (Arb. Dec. p. 4)

Scott Neff, D.O., initially opined claimant had a work related injury to her left shoulder. Dr. Neff changed that opinion based upon a photograph of the accident and discussion with defendant's counsel. (Arb. Dec. p. 4)

As noted above, the arbitration decision, dated May 21, 2010, in this matter found that claimant had an injury to her left shoulder that arose out of and in the course of her employment. Defendant was also required to pay claimant's medical expenses.

On June 1, 2010, claimant was evaluated by Katheryne Todd, ARNP. Claimant had left and right shoulder pain. Claimant's left arm was in a sling. Claimant was overusing her right arm. Claimant was still working at Pella. Claimant sought medications for pain. Claimant was assessed as having right arm pain, neck pain, and left rotator cuff tear. Claimant was treated with pain medication. (Ex. 6, p. 25)

On August 28, 2010, claimant was evaluated by Cassim Igram, M.D., for right shoulder pain. Claimant's left arm was in a sling. An MRI of the right shoulder was recommended. (Ex. 4, pp. 13-14) An MRI of the right shoulder suggested a small full-thickness tear in the rotator cuff. (Ex. 4, p. 15)

Claimant was evaluated by Scott Meyer, M.D. He recommended right shoulder surgery. Claimant was assessed as having a right and left rotator cuff tear. (Ex. 4, pp. 16-17)

On August 22, 2010, claimant was seen by Nurse Practitioner Todd. Claimant had ongoing left shoulder pain. Claimant's employer was continuing to deny care for the left shoulder and claimant's left shoulder was getting worse. Claimant was treated with pain medication. (Ex. 6, p. 27)

On October 23, 2010, claimant was put under surveillance by defendant. Surveillance footage shows claimant holding her left arm close to her body during most of the recording. Claimant watered and fed horses with her right arm. The footage does not show claimant lifting heavy materials or objects with her right arm. The footage shows claimant guarding her left arm. (Ex. R)

On December 1, 2010, claimant was terminated from Pella for allegedly providing false information to obtain time off work. (Ex. 6, p. 31; Ex. 11) Claimant testified her last day of actual work at Pella was November 16, 2010.

In a January 20, 2011 note, written by claimant's counsel, Dr. Meyer indicated claimant's right shoulder problem was due to overuse caused by the left rotator cuff tear. Surgery was recommended. (Ex. 4, pp. 18-19)

In a December 30, 2011 report, Dr. Stoken, gave her opinions of claimant's condition following an IME. Claimant had pain in her right shoulder. She was assessed as having a work related right rotator cuff tear. Claimant was found to have a ten percent permanent impairment to the right shoulder as a result of the work related injury. (Ex. A)

In an April 18, 2013 letter, claimant's counsel requested defendant pay claimant's past medical bills. This was based on affirmation of the agency decision at the Iowa Court of Appeals. As claimant's injury was found to have arisen out of and in the course of her employment, claimant was requesting surgery for a left shoulder condition. Claimant's counsel noted that if the shoulder could not be repaired, defendant needed to begin to pay permanent partial disability benefits. (Ex. 15, pp. 91-93)

In a May 2013 letter, defendant's counsel responded, indicating that defendant was responsible for care for claimant's left shoulder. Claimant's counsel also expressed the belief that because claimant had not requested any temporary or permanent benefits at the arbitration level, claimant had no legal grounds to pursue payment of permanent partial disability benefits under a review-reopening theory. (Ex. X)

In a September 9, 2014 report, Sunil Bansal, M.D., gave his opinion of claimant's condition following an IME. Claimant had constant pain in the left shoulder. Claimant could lift a gallon of milk on the left as long as she did not have to hold it or carry it for very long. (Ex. 12, pp. 1-13)

Claimant was assessed as having a full-thickness rotator cuff tear on the left. Dr. Bansal found that claimant had a 21 percent permanent impairment to the left upper extremity, converting to a 13 percent permanent impairment to the body as a whole. Dr. Bansal recommended claimant undergo a surgical evaluation by a shoulder specialist at the University of Iowa Hospitals and Clinics, before proceeding with surgery. This was because claimant's medical treatment on the left shoulder had been delayed by defendant for an extended period of time. Claimant was limited to lifting no greater than five pounds occasionally and no frequent lifting, pushing or pulling on the left. (Ex. 12, pp. 13-15)

Claimant testified, at the time of hearing, she has yet to receive surgery as recommended by Drs. Lin, Thurston, and Stoken. She says she has pain in the shoulder radiating into her back, shoulder blades, trapezius, and into the upper arm. Claimant testified she takes prescription medication for pain. She says her pain medications are paid for by her husband's insurance plan.

Claimant testified she has looked for work since being terminated in 2010. She said she looked for work in all local factories and at convenience stores. Claimant said that in 2013 she took a job for a while with Wal-Mart. Claimant began as a cashier at Wal-Mart part time in 2013 at approximately \$7.75 an hour. She said that she worked at the job with a torn rotator cuff on both her left and right shoulders. She said that as a cashier/checker at Wal-Mart, she had difficulty lifting heavy items off of conveyor belts,

like bags of dog food. Claimant worked 20 to 30 hours per week. She said she also worked for approximately 1 month in 2013 at a Casey's convenience store.

Claimant said she had to quit her job as a Wal-Mart cashier, as Wal-Mart could not guarantee her that she would not have to perform heavy lifting.

Claimant testified that approximately in March of 2014 she began working part time at Head Start as a substitute. In that job, claimant sets tables for children's meals, serves food, and plays with children. Claimant said she works a total of one week every month as a substitute.

Claimant testified that, at the time of hearing, she continues to look daily for full time positions.

Claimant said she has difficulty doing chores around her house due to pain in her left and right shoulders. She said she has been trying, since 2008, to get Pella to provide medical care for her left shoulder. Claimant said she wants to see a doctor for treatment of her left shoulder and desires an order from Pella to provide needed medical care.

Claimant testified she still wears a sling when working. She said she takes the sling off when she goes home.

CONCLUSIONS OF LAW

The first issue to be determined is if claimant has had a change in condition, since the arbitration decision, that would entitle claimant to benefits under a review-reopening proceeding.

Defendant Pella contends that claimant is precluded from proceeding under review-reopening proceeding based upon Iowa Code section 86.14(2).

Iowa Code section 86.14(2) states:

In a proceeding to reopen an award for payments or agreement for settlement as provided by section 86.13, inquiry shall be into whether or not the condition of the employee warrants an end to, diminishment of, or increase of compensation so awarded or agreed upon.

Defendant Pella contends that in the underlying arbitration decision, no compensation was awarded and for this reason claimant is precluded from proceeding under review-reopening proceeding.

A review of the transcript and the arbitration decision in this matter indicates that at the time of the January 12, 2010 hearing, claimant pled an injury to her left shoulder arising out of and in the course of employment on August 11, 2008. At the time of the hearing, claimant was still working at Pella. Claimant had not lost any time at Pella due

to her left shoulder injury. At the time of the January 12, 2010 hearing, claimant was only seeking to have Pella pay for her medical care. Claimant had not lost any time off of work due to her left shoulder injury and had no claim for temporary benefits. Claimant had not yet reached maximum medical improvement, as she was still seeking to have Pella pay for her right shoulder treatment. For that reason, she had no claim for permanent partial disability benefits at that time. The only justiciable issue at the time of the January 12, 2010 hearing was whether claimant's injury of August 11, 2008 arose out of and in the course of employment, and if claimant's injury was causally connected to the claimed medical expenses.

Given the facts of this case, claimant should not be precluded from now seeking permanent partial disability benefits merely because she did not have a justiciable claim for temporary benefits or permanent partial disability benefits at the time of the January 12, 2010 hearing.

In addition, the Iowa Supreme Court in Beier Glass Company v. Brundige, 329 N.W.2d 280, 287 (Iowa 1983) noted that: "We hold an arbitration award of medical benefits is sufficient to support review-reopening under section 85.26(2)."

At the time of the arbitration decision, claimant was still employed at Pella. In late 2010, claimant was terminated from her employment. Claimant's un rebutted testimony is she sought jobs in her area at factories and convenience stores. Claimant was able to get a part time job at Casey's in 2013 and part time work at Wal-Mart. Claimant worked both jobs with torn rotator cuffs in both shoulders. Her un rebutted testimony is that she could not continue to work either job due to lifting requirements. At the time of hearing, claimant was working as a substitute with Head Start. Claimant worked approximately one week per month as a substitute. At the time of hearing, claimant was attempting to still find full time work.

Given the record above, claimant has carried her burden of proof she has an economic change in condition.

At the time of hearing of the arbitration decision in January 2010, claimant contended she had an injury to her left upper extremity. Since the decision was issued in May of 2010, claimant has also gone to hearing regarding a right shoulder injury that occurred on November 16, 2010 (File No. 5035646). The arbitration decision, in that case, found that claimant had an 80 percent industrial disability due to her right shoulder injury. Records from this case, and the arbitration decision regarding her right shoulder injury, found that claimant's right shoulder injury was proximally caused by overuse in guarding the torn rotator cuff on the left. (Ex. 6, pp. 25-27; Ex. 4, pp. 16-19; Ex. 8; Ex. 12)

Claimant has been found to have a permanent impairment to her right shoulder as a direct result of the guarding of the left shoulder. Given this record, claimant has carried her burden of proof she also has a physical change of condition since the time of the underlying arbitration decision.

Claimant was 64 years old at the time of hearing. She went up to the 11th grade but did not graduate from high school. Claimant does not have a GED. Claimant has worked as a dishwasher and server at a VA facility. Claimant has also put collars on shirts in a factory. Claimant worked for 34 years at Pella before being terminated by her employer. Records indicate claimant is required to keep her left arm in a sling when working. Claimant has been assessed as having a torn rotator cuff in both shoulders. Claimant is limited to lifting no more than 5 pounds occasionally on the left with no frequent lifting, pushing or pulling on the left. (Ex. 12, pp. 13-15) Claimant has similar restrictions regarding her right shoulder. (Ex. 8, p. 14)

Following her termination at Pella, claimant worked part time at Wal-Mart and a convenience store. Claimant's un rebutted testimony is that she was unable to continue those jobs due to the lifting required. Claimant's un rebutted testimony is that she has looked for work with other employers. The only job claimant has been able to find is a position as a substitute with Head Start. Claimant works approximately one week every month as a substitute.

Defendant has offered no evidence indicating claimant is employable in the competitive labor market in her geographic area.

The record suggests that, based on the ongoing delays caused by defendant, a rotator cuff repair may not be a treatment option for claimant. As Dr. Bansal notes in his report:

Due to the very lengthy legal battle that followed, she has not had any treatment. Her private insurance has informed her they would not cover treatment because the injury occurred at work, and the workers' compensation carrier would not pay for it because they did not think it occurred at work.

....

Secondary to the marked delay in treatment, surgery though recommended, would be extremely challenging.

(Ex. 12, pp. 11, 14)

Given this record, claimant has carried her burden of proof that she is permanently and totally disabled.

Defendant contends that apportionment, regarding the right shoulder injury, somehow negates claimant from being found to be permanently and totally disabled in this matter. Permanent total disability is not subject to apportionment under Iowa Code section 85.34(7). Drake University v. Davis, 769 N.W.2d 176, 184-185 (Iowa 2009).

The date of the commencement of additional weekly permanent benefits in a review-reopening case is the date the review-reopening petition was filed. See Verizon

Bus. Network Servs., Inc. v. McKenzie, No. 2-394/11-1845 (Iowa Ct. App. Oct. 17, 2012) and Searle Petroleum, Inc. v. Mlady, No. 3-480/12-2008 (Iowa Ct. App. Dec. 5, 2013). But see, Caven v. John Deere Dubuque Works, File No. 5023051 (App. May 23, 2013). The date the review-reopening petition was filed was September 9, 2013.

The next issue to be determined is if claimant's claim for benefits is barred under Iowa Code section 85.26(2).

Iowa Code section 85.26(2) permits either the employee or the employer to timely bring a review-reopening proceeding after either an award of weekly benefits or an agreement for settlement under section 85.13, provided that the proceeding is commenced within three years from the date of the last payment of weekly benefits under the award or agreement.

That the employee failed to bring a proceeding within the required time period is an affirmative defense which the employer must plead and prove by a preponderance of the evidence. See Dart v. Sheller-Globe Corp., II Iowa Industrial Comm'r Rep. 99 (App. 1982).

As noted above, an award at the arbitration level for medical benefits is sufficient to support a review-reopening under Iowa Code section 85.26(2). Beier Glass, 329 N.W.2d 280, 287 (Iowa 1983).

The final agency decision in this matter was filed on February 21, 2011. Claimant filed her review-reopening petition on September 9, 2013. Claimant's petition was timely filed under Iowa Code section 85.26(2).

Defendant contends that the ruling in Beier Glass is incorrect, and that the proper interpretation of Iowa Code section 85.26(2) would bar claimant's claim for permanent partial disability benefits. (Defendant's post-hearing brief, pp. 2-21) The undersigned does not have the authority to overrule long-standing case law from the Iowa Supreme Court. For this reason, defendant's contentions, that claimant's claim for benefits is barred by application of Iowa Code section 85.26(2), is not convincing.

The next issue to be determined is if claimant is estopped from pursuing a claim of permanent partial disability benefits.

The burden to prove and establish estoppel is on the party asserting it, with strict proof of all the elements being demanded. Dart v. Thompson, 154 N.W.2d 82, 86 (Iowa 1967). To prove a claim of equitable estoppel, defendant must show: 1) that the claimant made a false representation or concealment of facts, 2) that defendant lacked knowledge of the true facts, 3) that the claimant intended for defendant to rely on the false representation or concealment of facts, and 4) that defendant relied on such fraudulent statement or concealment, resulting in prejudice. Axtell v. Harbert, 256 Iowa 867; 129 N.W.2d 637, 639 (Iowa 1964).

The doctrine of judicial estoppel prohibits a party who has successfully and unequivocally asserted a position in one proceeding from asserting an inconsistent position in a subsequent proceeding." Wilson v. Liberty Mutual Group, 666 N.W.2d 163, 166 (Iowa 2003) (internal quotations omitted). The main objective of applying judicial estoppel is to protect the integrity of the judicial process by preventing deliberately inconsistent and potentially misleading assertions from being urged in succeeding tribunals or proceedings. Id.

Equitable estoppel focuses on ensuring fairness between parties in litigation and preventing prejudice that may result from a change in position. Judicial estoppel seeks to protect the integrity of the judicial system by preventing the inconsistent and misleading claims from being presented in succeeding proceedings.

Regarding equitable estoppel, there is no evidence claimant made a false representation regarding the facts regarding a left shoulder injury, or sought to conceal that she would eventually seek permanent partial disability benefits. The record, instead suggests, that the only reason claimant did not seek permanent partial disability benefits in the original arbitration decision, was because defendant was denying and delaying claimant's treatment for her shoulder. Given this record, defendant has failed to carry its burden of proof that equitable estoppel applies in this case.

Regarding judicial estoppel, there is scant evidence that claimant has assumed a position in her review-reopening proceeding, that is inconsistent with the position she took in the underlying arbitration case. As noted above, the record suggest the only reason claimant did not seek a claim for permanent partial disability benefits in the underlying arbitration proceeding, was because claimant was not at MMI for her left shoulder condition. The reason claimant was not at MMI for the left shoulder is because defendant was denying and delaying treatment for her left shoulder. Given this record, defendant has failed to carry its burden of proof that judicial estoppel applies in this case.

The next issue to be determined is if defendant is liable for reimbursement for an IME by Dr. Bansal.

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). Claimant need not ultimately prove the injury arose out of and in the course of employment to qualify

for reimbursement under section 85.39. See Dodd v. Fleetguard, Inc., 759 N.W.2d 133, 140 (Iowa App. 2008).

Iowa Code section 85.39 limits the injured worker to one IME, regardless if the examination is paid by the employer or its insurance carrier. Larson Mfg. Co., Inc. v. Thorson, 763 N.W.2d 842 (Iowa 2009). Reimbursement of an IME is not a recoverable cost under rule 876 IAC 4.33. Des Moines Area Regional Transit Authority v. Young, No. 14-0231, filed October 1, 2014 (Iowa Court of Appeals), unpublished 856 N.W.2d 383 (Table).

The record indicates Dr. Bansal gave his opinions in a September 9, 2014 IME report. There is no record that a defendant-retained physician issued an opinion regarding impairment since the underlying arbitration decision was filed in this matter. Claimant is not due reimbursement for the IME report by Dr. Bansal.

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

Long-standing case law indicates an arbitration award for medical benefits is sufficient to support a review-reopening proceeding. Beier Glass at 287. The same case law indicates that the three-year statute of limitations would apply in such a case. I appreciate defendant's position that the holding in Bier Glass is incorrect. However, it is not reasonable for defendant to delay payment of claimant's permanent partial disability benefits based upon an interpretation of Iowa Code section 85.26(2), when long-standing case law explicitly holds that position is incorrect.

In a report, dated September 9, 2014, Dr. Bansal found claimant had a 13 percent permanent impairment to the body as a whole. (Ex. 12) There is no other record in evidence, issued since the May 21, 2010 arbitration decision, that is contrary to the findings that claimant had a 13 percent permanent impairment to the body as a whole due to her left upper extremity injury. Given this, it was unreasonable for defendant not to pay claimant permanent partial disability benefits based on Dr. Bansal's rating.

The period of time from September 9, 2014 to the date of hearing is approximately 19 weeks. A penalty of 20 percent is appropriate in this case. Defendant is liable for a penalty of \$1,707.61 ($\$449.37 \times 19 \text{ weeks} \times 20 \text{ percent}$).

ORDER

THEREFORE, IT IS ORDERED:

That defendant shall pay claimant permanent total disability benefits at the rate of four hundred forty-nine and 37/100 dollars (\$449.37) commencing on September 9, 2013.

That defendant shall pay accrued benefits in lump sum.

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

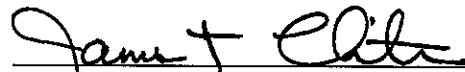
That defendant shall pay claimant a penalty of one thousand seven hundred seven and 61/100 dollars (\$1,707.61).

The defendant shall pay medical care for claimant's left shoulder injury.

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

That defendant shall pay the costs of this matter.

Signed and filed this 26th day of March, 2015.


JAMES F. CHRISTENSON
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.