BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

CRAIG D. SUMMERS, Claimant, vs. JEFFREY TEMEYER, Employer, and GRINNELL MUTUAL REINSURANCE COMPANY, Insurance Carrier, Defendants.	File No. 5049632, 5049633 ARBITRATION DECISION Head Note Nos.: 1100, 1802,1803, 3701

FILED
JAN 09 2017
WORKERS' COMPENSATION

STATEMENT OF THE CASE

Craig Summers, claimant, filed petitions in arbitration seeking workers' compensation benefits from Jeffrey Temeyer (Temeyer) and its insurer, Grinnell Mutual Reinsurance Company, as a result injuries he allegedly sustained on September 5, 2014 and September 26, 2014 that allegedly arose out of and in the course of his employment. This case was heard in Waterloo, Iowa and fully submitted on May 1, 2016. The evidence in this case consists of the testimony of claimant, Justin Jeffrey Temeyer, claimant's exhibits 1 – 23 and defendants' exhibits A - J. Claimant was provided the opportunity to submit a deposition in response to a late disclosed exhibit by defendant. Claimant chose not to do so. Prior to the hearing of these cases the claimant and the Second injury Fund of Iowa reached a settlement. The Second Injury Fund is not a party to these cases.

On the hearing reports, the parties entered into certain stipulations. Those stipulations are accepted and relied upon in this decision. No findings of fact or conclusions of law will be made with respect to the parties' stipulations.

ISSUES

File No. 5049632 (Date of Injury September 5, 2014):

1. Whether an employer-employee relationship existed at the time of the alleged injury;

2. Whether claimant sustained an injury on September 5, 2014 which arose out of and in the course of employment;

3. Whether the alleged injury is a cause of temporary disability and, if so, the extent;

4. Whether the alleged injury is a cause of permanent disability and, if so;

5. Whether the alleged disability is a scheduled member disability or an unscheduled disability and, if so;

6. The extent of claimant's disability.

7. The claimant's gross earning and his weekly rate.

8. Payment of medical expenses.

9. Payment of an independent medical examination.

10. Whether a penalty should be assessed for non-payment of temporary and permanent benefits.

11. Assessment of costs.

File No. 5049633 (Date of Injury September 26, 2014):

1. Whether an employer-employee relationship existed at the time of the alleged injury;

2. Whether claimant sustained an injury on September 26, 2014 which arose out of and in the course of employment;

3. Whether the alleged injury is a cause of temporary disability and, if so, the extent;

4. Whether the alleged injury is a cause of permanent disability and, if so;

5. Whether the alleged disability is a scheduled member disability or an unscheduled disability and, if so;

6. The extent of claimant's disability.

7. The claimant's gross earning and his weekly rate.

8. Payment of medical expenses.

9. Payment of an independent medical examination.

10. Whether a penalty should be assessed for non-payment of temporary and permanent benefits.

11. Assessment of costs.

FINDINGS OF FACT

The deputy workers' compensation commissioner having heard the testimony and considered the evidence in the record finds that:

Craig Summers, claimant, was 59 years old at the time of the hearing. He was single at the time of his alleged injuries and had no dependents. Claimant is entitled to claim single with one exemption for his weekly rate.

Claimant graduated from high school. He went to community college, but did not complete any course of study. Temeyer is a farm operation. Claimant was hired in August 2014 to work for Temeyer. Claimant was self-employed as a truck driver from 2007 – 2013. He worked as a printer for two newspapers. In 2015 claimant worked at a golf course, mowing. (Tr. p. 66) Claimant, post injury, has worked part time cleaning used restaurant equipment for resale. (Tr. p. 62)

Claimant was hired by Jeffrey Temeyer, primarily to drive a truck. (Transcript, page 27) Justin Temeyer testified that claimant was hired by his father to work at Temeyer for truck driving and not to take care of livestock. (Tr. p. 107) Claimant testified that he injured his left arm when he was trying to put a sheep back in the pen when his left arm was pulled and injured. (Tr. p. 31; Ex. G, p. 31) Claimant is right hand dominant. (Ex. 9, p. 2) Claimant testified that he was directed by a co-employee Dave Mohlis to assist with the livestock. Claimant testified this happened on September 5, 2015. Claimant also testified that Dr. Feldkamp's records were probably accurate about his injury date. (Tr. p. 73) Claimant's attorney, in his brief, points out that the correct date was more likely September 10, 1014. The medical report of September 11, 2014 states the claimant felt a pop in his elbow on September 10, 2014 and that his elbow had been sore for about a week due to moving sheep. (Ex. B, p. 7) Defendants' employment records do not show claimant working on September 5, 2014. (Ex. I, p. 67). I find that the claimant's date of injury for File 5049632 was September 10, 2014.

Claimant went to Mark Feldkamp, D.O., on September 11, 2014. Claimant was complaining of left arm pain for about a week and more pain and a pop on September 10, 2014. (Ex. B, p. 7) Dr. Feldman wrote, "Lateral epicondyle tenderness noted. Left upper arm: He exhibits tenderness and swelling. Some tenderness in the left bicep but no obvious bunching. Wrist ROM and grip cause a lot of pain at elbow. No palpable step off or deformity at elbow but is very tender to touch at lateral aspect." (Ex. B, p. 8) His assessment was left elbow pain, biceps tendonitis on left and left lateral epicondylitis. Dr. FeldKamp gave claimant a wrist brace splint and considered a referral to orthopedics if no improvement. (Ex. B. pp. 8, 9) Clamant did not follow up with any additional appointments due to this injury.

While claimant was incorrect about the date of the injury; it was September 10, 2014 not September 5, 2014. I find that he proved a temporary aggravation to his left upper extremity. I find it credible that claimant was assisting with the sheep as directed by his co-worker Mr. Mohlis and suffered an injury. He went to Dr. Feldkamp the day after the aggravation and received conservative care. Claimant was advised to re-contact Dr. Feldkamp if there was no improvement. Claimant did not do so. The evidence supports only a temporary injury for File No. 5049632.

On September 26, 2014, claimant was filling a trailer with corn while working for Temeyer. (Tr. p.36) Claimant was climbing on a ladder when the wrist splint on his left hand got caught and claimant was suspended in the air and something popped. (Tr. p. 38). Claimant then lay on the ground due to his pain. Another person Rhonda (no last name given) saw claimant on the ground. At that time, Rhonda was on the phone with Justin Temeyer. Claimant testified that Justin Temeyer could hear him on the ground screaming in pain. (Tr. pp. 39, 40) Rhonda offered to take claimant to the hospital. Claimant declined as he thought his pain would pass. (Tr. p.40) Claimant said that he could hardly move his arm at that time. He also said that he noticed his left bicep was off to an angle. (Tr. p. 41)

Claimant had x-rays of his left arm on September 29, 2014 which was unremarkable. (Ex. 5, p. 3) Jason Stanford, D.O., saw claimant on September 30, 2014. His assessment was "Left anterior elbow pain with radicular symptoms." He recommended an EMG and a MRI. (Ex. 5, p. 3; Ex. C, p. 13)

On October 7, 2014, Dr. Stanford reported that the MRI showed a "High grade partial thickness distal biceps tendon tear with partial common extensor tendon tear." (Ex. 5, p. 4) He recommended surgical intervention for the distal biceps tendon repair and conservative treatment for the extensor tendon. (Ex. 5, p. 4) On October 10, 2014, Clinton Cummings, D.O., diagnosed a traumatic tear of biceps tendon. (Ex. 7, p. 6) Claimant wanted a second opinion about surgery and was seen by Robert Bartelt, M.D., on October 20, 2014. Dr. Bartelt also recommended surgery. (Ex. 8, p. 2)

Claimant worked hauling grain for Temeyer after the September 26, 2014 injury. (Tr. p. 86) Claimant's last day of work for Temeyer was October 27, 2014. (Tr. p. 57) Claimant sent a text to Justin Temeyer, Jeffrey Temeyer's son, and requested money to resolve issues between the parties. This evidence shows that claimant was unsophisticated as to how workers' compensation works, but does not shed any light as to causation and extent of any disability. Claimant's deposition testimony about the impropriety he alleged by Jeffrey Temeyer and the affidavit of Del Thomson is not material to any disputed issues. (See. Ex. G, p. 38; Ex E, pp. 1, 2: Ex. G p. 39b – 39d) They are not significant on any credibility issues related to the workers compensation claims.

On October 28, 2014, Dr. Bartelt performed a left distal biceps tendon repair. (Ex. 9, p. 1) Claimant was off work after his surgery and did not receive any workers' compensation. His medical bills were paid with private insurance and Iowa Medicaid[1]. (Tr. p. 46; Ex. H, p. 61) On April 3, 2015, Dr. Bartelt released claimant from his care with no restriction. (Ex. D, p. 14) On November 5, 2015, Dr. Bartelt stated claimant was at maximum medical improvement as of April 3, 2015 and on November 5, 2015 gave claimant a 3 percent impairment rating to the upper extremity due to the mild weakness in supination. (Ex. D, p. 15) Claimant was not paid this rating. (Tr. p. 47)

Sunil Bansal, M.D., performed an independent medical examination on claimant on May 22, 2015. Claimant informed Dr. Bansal he had no prior injuries or problems with his left arm. (Ex.1, p. 5) Dr. Bansal found a 5 percent impairment upper extremity rating for the claimant's left elbow. (Ex. 1, p. 8) He provided a 4 percent body as a whole for claimant's left shoulder complaints. (Ex. 1. p. 8) As for the left shoulder Dr. Bansal wrote:

> LEFT SHOULDER:
>
> Mr. Summers reports left shoulder pain since the September 26, 2014 injury. That injury certainly could cause injury to the shoulder from the traction. However, no diagnostics have been performed to date. Therefore, I recommend an MRI of the left shoulder to properly diagnose.

(Ex. 1. p. 9) He recommended restrictions of no lifting greater than 35 pounds occasionally with left arm or 15 pounds frequently and no overhead lifting with the left arm. (Ex. 1, p. 10) On February 9, 2016, Dr. Bansal reviewed additional reports, including the July 1, 2015 report of Dan Meyer, PA-C that stated claimant had a 49 percent loss of the function of the left arm. Dr. Bansal stated that he stands by his opinions in his IME of May 2015. (Ex. 2, p. 2)

I find that claimant has a 5 percent impairment to his left arm based upon Dr. Bansal's evaluation. The record shows the testing Dr. Bansal performed to reach his rating. Dr. Bartelt did not perform an evaluation at the time of his 3 percent rating in November 2015 and had not seen claimant since April 2015.

Claimant was seen by PA-C Meyer for monitoring his diabetes. (Ex. 3, p. 1) PA-C Meyer noted that claimant had a permanent 49 percent loss of function in the left arm. (Ex. 3, p. 2) PA-C Meyer noted in the medical history claimant had a "Non-traumatic rupture of biceps tendon." (Ex. 2, p. 4) Claimant testified he was not told of the 49 percent rating during his visit. (Tr. p. 49) It is not explained in PA-C Meyer's records how he arrived at his rating. As there is no explanation in the record about this

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[1] The health plan Meridan as reflected in Exhibit 22 was a third party administrator for the Iowa Medicaid program in 2014. Exhibit 21 http://www.mhplan.com/ia/ .

rating and the purpose of the medical visit with PC-A Meyer was a check on claimant's diabetes, I do not find his conclusion convincing and do not give it any significant weight. PC- Meyer also incorrectly identified the bicep tear to be non-traumatic. Dr. Cummins diagnosis on October 10, 2014 was, "Traumatic tear of biceps tendon." (Ex. 7, p. 6) Dr. Bartelt found an acute left elbow biceps tendon tear. (Ex. 8, p. 2)

Claimant testified that a number of years ago he had tennis elbow in his left arm. (Tr. p. 50) He also saw PA-C Meyer in 2013 for his left hand going to sleep. PA-C Meyer recommended a wrist splint if his hand condition got worse. (Ex. A, p. 5)

Justin Temeyer (Justin) testified. He is the son of Jeffrey Temeyer and works with his father and has his own farm operation. (Tr. p. 105) Justin considered himself a boss of claimant. (Tr. p. 122) Justin said that claimant was hired to drive a semi and haul grain and not to work with livestock. (Tr. p. 107) Justin testified that he learned of claimant's arm injury [September 26, 2014 injury] when he was on the phone with Rhonda. Justin said he learned of claimant's injury while working with the sheep– September 5, 2015 injury.

> A. I learned of the injury of his arm the night of – the same night that I learned – or the same day – it was the evening – the afternoon of the incident with the semi-trailer is when I learned of the injury to the arm from the sheep. And I had got – I received a call from Rhonda that day on the phone, I was in the combine, I could – she said, you know, Craig's on the ground, whatever else, as soon as – she was on the phone.
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> I said, "Well, is he all right?" You know. "Is he okay?" And I could hear him hollering in the background, everything else. And as soon as he learned that she was on the phone with me, I said, "You need to take him to the ER right now. If he's hurt that bad, the way he's screaming and moaning and everything else, he needs to go to the ER and get it checked out immediately." I told her, I said, "There's a farm truck there. You get him in the farm truck and you get him to the ER."

(Tr. p. 110) Justin saw claimant later that day and claimant told Justin about his other injury when he was moving sheep, the September 5, 2014 injury, the evening of September 26, 2014 when Justin saw claimant near his residence. (Tr. p. 112) Justin testified based upon the "hollering" he heard on the phone, he thought claimant had a serious injury. Justin said:

> A. I indicated that your client had not been to the ER that day, and I was – I was under the impression, from the hollering and everything I heard through the phone, that there was no way this guys' arm was even attached yet.

(Tr. p. 129)

The parties do not disagree as to how much claimant earned while working for Temeyer. The record shows the claimant earned the following:

8/1/2014 - 08/06/14	$555.00	(1 week)
08/07/14 - 08/14/14	$1,072.00	(1 week)
09/10/14 - 09/27/14	$802.50	(2 weeks)
09/28/14 - 10/05/14	$712.50	(1 week)
10/06/14 - 10/11/14	$1,005.00	(1 week)
10/12/14 - 10/21/14	$510.00	(1 weeks)
TOTAL	$4,657.00	7 weeks

(Ex. I, p. 67) Claimant asserts that for the September 5, 2014 injury his average weekly wage is $813.50. Claimant uses the first two weeks before the injury to reach this amount. (Ex. 20. p. 1; Claimant's brief p. 14) For the September 26, 2014 injury claimant uses the three weeks before the injury to arrive at a gross weekly wage of $676.08. (Claimant's brief p. 14)

Defendants incorrectly assume eight weeks of claimant's work at Temeyer to arrive at an average weekly wage of $607.37. (Defendants' brief, p. 9) The chart in defendant's brief incorrectly lists a two week pay period of 10/12/14 through 10/28/14 of $510.00. A close examination of Exhibit I page 67 reveals that the pay period is 10/12/14 through 10/21/14. It also notes on Exhibit I, page 67 that the $510.00 is for a one-week period.

Claimant was hired to primarily drive a truck during harvest season, generally a period where long hours are required. There is no certitude as to the exact figures to use in this case. I find that the weeks that claimant earned income between August 1, 2014 and October 11, 2014 a most representative of claimant's earning. I used all of the weeks even though the two week period of 9/10/14 through 9/27/14 was lower than other weeks. The parties anticipated varying hours of work at harvest time. I find claimant's gross average wage to be $690.25 ($555.00 + $1,072.00 + $802.50 + $712.50 + $1,005.00 + $510.00 = $4,657.00)($4,657.00 ÷ 7 = $665.28) Using the rate book in effect at the time of the injury I find that the claimant's weekly workers' compensation rate with single and one exemption to be $410.62.

The defendants conducted surveillance of the claimant from December 14, 2014 through December 19, 2014. (Ex. J) The DVD for the most part shows very little activity. Portions of the DVD show claimant doing some work in a garage. The claimant was generally using his right arm as his dominant arm and would also use his left arm. There was no showing of claimant repeatedly using his left arm or any significant lifting. This exhibit did not provide assistance in reaching any findings or conclusions in this case. There is no evidence that defendants relied upon this surveillance in denying claimant's request for benefits.

The defendants provided an affidavit of Chris Taylor which was dated February 15, 2016. There was no evidence that defendants relied upon this statement before denying benefits. Ms. Taylor's statement was that in late 2014 or early 2015 claimant had a gash on his arm and told Ms. Taylor that he hurt his wrist working on his truck. I do not find this evidence significant in this case as the evidence shows claimant had surgery on October 28, 2014.

I find that claimant has proven by preponderance of the evidence that he tore the biceps tendon on his left arm as a result of a work injury on September 26, 2014. The reports of Dr. Bansal, Dr. Cumming and Dr. Bartelt all support this finding. The claimant and Justin Temeyer's testimony support this conclusion.

Claimant has incurred medical bills and expenses as a result of the two injuries. The record shows that as of April 23, 2015 there was a Medicaid claim/lien in the amount of $5,884.41. (Ex. 21, p. 1) As of February 24, 2016 claimant had incurred $19,129.29 in medical expenses related to his work injuries. I find that these expenses are related to his work injuries and are reasonable and necessary expenses.

Claimant has established that there was a denial of benefits and a delay in payment. I find that the defendants have not provided in evidence any explanation they contemporaneously conveyed to the claimant as to why they were denying the claim.

CONCLUSIONS OF LAW

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).

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).

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I find that claimant has not shown any permanent injury for the September 5, 2014 (September 10, 2014 actual date). Claimant's injury arose out of and in the course of his employment with Temeyer. Claimant has shown that his work at Temeyer temporarily aggravated his left elbow. Claimant's medical care from September 11, 2014 through September 26, 2014 was related to this temporary injury. Claimant has not shown entitlement to any indemnity benefits for this injury. He is entitled to payment of his medical expenses related to this injury.

File No. 5049633

Claimant has proven that on September 26, 2014 he tore his left biceps tendon when his arm got caught in a ladder at work. Claimant's testimony was not always consistent, but was generally consistent with a traumatic work injury. More importantly the medical evidence overwhelming supports the fact that claimant suffered a torn left biceps tendon that needed to be surgically repaired.

Scheduled member or industrial disability.

Claimant argues that the claimant's biceps injury extends to the shoulder. The claimant had distal biceps tendon repair. The distal portion of the tendon is attached around the elbow. While some biceps injuries are injuries to the shoulder, there is no convincing medical evidence that claimant's injury extended to the shoulder. While claimant cited Jackson v. Tyson Fresh Meats, Inc., File No. 5050985 (Arb., July 15, 2005) in support of the argument that the injury to the biceps is an injury to the shoulder. I do not find that case persuasive. It is not binding authority and was based on the unique facts of that case. A bicep injury can be an injury to the shoulder when the proximal aspect of the biceps tendon suffers damage; however, that is not the evidence in this case. There is speculation that claimant may have a shoulder injury, but there is not sufficient evidence for claimant to meet his burden of proof as to a shoulder and body as a whole injury.

Dr. Bansal was equivocal at best concerning a shoulder injury. He recommended additional testing to determine a proper diagnosis for the shoulder. None was performed. Claimant has not presented sufficient convincing medical evidence to prove an injury to the shoulder.

Under the Iowa Workers' Compensation Act, permanent partial disability is compensated either for a loss or loss of use of a scheduled member under Iowa Code section 85.34(2)(a)-(t) or for loss of earning capacity under section 85.34(2)(u). The extent of scheduled member disability benefits to which an injured worker is entitled is determined by using the functional method. Functional disability is "limited to the loss of the physiological capacity of the body or body part." Mortimer v. Fruehauf Corp., 502 N.W.2d 12, 15 (Iowa 1993); Sherman v. Pella Corp., 576 N.W.2d 312 (Iowa 1998). The fact finder must consider both medical and lay evidence relating to the extent of the functional loss in determining permanent disability resulting from an injury to a scheduled member. Terwilliger v. Snap-On Tools Corp., 529 N.W.2d 267, 272-273 (Iowa 1995); Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417, 420 (Iowa 1994).

Due to the additional testing that Dr. Bansal performed, I find that claimant has proven he is entitled to a 5 percent award of permanent partial benefits for his injury to his left arm. This is 12.5 weeks of benefits.

Healing period

Section 85.34(1) provides that healing period benefits are payable to an injured worker who has suffered permanent partial disability until (1) the worker has returned to work; (2) the worker is medically capable of returning to substantially similar employment; or (3) the worker has achieved maximum medical recovery. The healing period can be considered the period during which there is a reasonable expectation of improvement of the disabling condition. See Armstrong Tire & Rubber Co. v. Kubli, 312 N.W.2d 60 (Iowa App. 1981). Healing period benefits can be interrupted or intermittent. Teel v. McCord, 394 N.W.2d 405 (Iowa 1986).

Claimant has shown that he was entitled to healing period benefits from October 28, 2014 through April 3, 2015. He had surgery on his left arm on October 28, 2014 and released without restriction on April 4, 2015

PENALTY

In addition to his claim for permanent disability, claimant asserts a claim for penalty benefits pursuant to Iowa Code section 86.13. Iowa Code section 86.13(4) provides:

> 4. *a.* If a denial, a delay in payment, or a termination of benefits occurs without reasonable or probable cause or excuse known to the employer or insurance carrier at the time of the denial, delay in payment, or termination of benefits, the workers' compensation commissioner shall award benefits in addition to those benefits payable under this chapter, or chapter 85, 85A, or 85B, up to fifty percent of the amount of benefits that were denied, delayed, or terminated without reasonable or probable cause or excuse.
> *b.* The workers' compensation commissioner shall award benefits under this subsection if the commissioner finds both of the following facts:
> (1) The employee has demonstrated a denial, delay in payment, or termination of benefits.
> (2) The employer has failed to prove a reasonable or probable cause or excuse for the denial, delay in payment, or termination of benefits.
> *c.* In order to be considered a reasonable or probable cause or excuse under paragraph *"b"*, an excuse shall satisfy all of the following criteria:
> (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 benefits.
> (3) The employer or insurance carrier contemporaneously conveyed the basis for the denial, delay in payment, or termination of benefits to the employee at the time of the denial, delay, or termination of benefits

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 claimthe "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.
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> (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.
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> (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.
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> 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).

As I have not awarded any indemnity benefits in File No. 5049632 no penalty benefits are awarded. For File No. 5049633, I have awarded both healing period and permanency benefits and hold that defendants shall pay penalty benefits in this case.

Claimant had surgery on October 27, 2014 and was not released to return to work until April 1, 2015. Dr. Bartelt issued a rating of 3 percent to the upper extremity on November 5, 2015. No healing period or permanent partial benefits were paid. This is a scheduled member case and therefore industrial disability factors are not relevant factors in making a payment to the claimant for the defendant to consider. Claimant testified he has not been paid any workers' compensation. Claimant has established a delay in payment.

Defendants have failed to introduce evidence that they contemporaneously conveyed the reason(s) they denied payment. For this reason alone claimant is entitled to penalty benefits.

Defendants failed to show a reasonable cause or excuse for not paying benefits for the September 26, 2014 injury. Justin Temeyer heard claimant "hollering" and screaming on the other end of the phone right after the accident. He authorized for the claimant to go to the hospital. There is no credible medical evidence that claimant did not tear his biceps tendon on September 26, 2014. Defendants mention in their brief that PA-C Meyer lists a non-traumatic bicep rupture in a July 1, 2015 report. As pointed out above that is clearly inaccurate and cannot reasonably be relied upon. Certainly, defendants have not relied upon the 49 percent impairment rating PA-C Meyer gave at that visit. Additionally, there is no evidence that defendants ever relied upon this report.

Claimant was found to have a torn left biceps tendon and had surgery on October 28, 2014. The claimant's weekly workers' compensation rate was more difficult to calculate than many cases due to the short time claimant worked for Temeyer. Defendants calculated a rate of $377.40 and that is the rate I will use in my penalty assessment, even though I found claimants rate to be $410.62 and could have used that rate. Defendants owed temporary benefits from October 28, 2014 through April 3, 2015 and failed to pay without reasonable cause or excuse. This is 22 weeks and 4 days. I assess a penalty of approximately 50 percent for failure to pay healing period benefits for 22 weeks. The penalty assessment is for failure to pay healing period benefits is $4,151.40 [$377.40 x 22 weeks = $8,302.80 x 50% =$4,151.40]

Defendants failed to pay the 3 percent rating for the upper extremity (arm) that Dr. Bartelt issued on November 5, 2015. The defendants did not have reasonable cause or excuse for failing to pay this rating. I award penalty benefits in the amount of $1,415.25 for failure to pay this rating. (250 x 3% = 7.5 weeks. 7.5 x $377.40 = $2,830.50 x 50% = $1,415.25) The total amount of penalty awarded is $5,566.65. I considered the length of delay and the information available to the defendant in determining that a 50 percent penalty is appropriate in this case.

Mileage and motel expenses

Claimant requests reimbursement for medical mileage in the amount of $286.00 for 500 miles to "various" providers. (Ex. 17, p. 1) While claimant is entitled to medical mileage, he has not provided sufficient detail to receive an award. Claimant also requests $3,010.08 for motel charges for 48 nights during his period of recovery from October 21, 2014 through December 8, 2014. (Ex. 17, p. 1) Claimant presented no evidence that staying at the motel was medically necessary. He provided no authority as to why he could be eligible for this cost. The request for reimbursement of his motel costs is denied.

Medical Expenses

Claimant has shown that he incurred $19,129.29 in medical expenses as of February 24, 2016 for his work injuries. Defendant shall pay these expenses. Any out of pocket expenses shall be paid directly to claimant.

Under Iowa Code section 249A.6 recipients of Medicaid assign the right to payment of medical care from any third party. Federal Medicaid law requires states operating Medicaid programs to ascertain whether there is third party liability for costs paid for by Medicaid and to seek reimbursement for such costs – as Medicaid is a "secondary payer", so that it pays only where a primary payer does not exist. 42 U.S.C. § 1396a(a)(25)(A) and (B). These "secondary payer" requirements are set forth in greater detail in Medicaid's underlying regulations. 42 CFR § 433.137, § 433.139, § 433.140, and § 433.145. In 1987, the Iowa legislature adopted Iowa Code section 249A.6, which implemented federal law regarding a state's obligation to seek recovery of Medicaid benefits from liable third parties. Under Iowa law, claimant is not allowed to waive the rights to Medicaid reimbursement for medical care received under Medicaid. Defendants shall reimburse Medicaid for the work-related expenses that were incurred by claimant.

Defendants shall pay any future medical expense related to these work injuries.

Claimant has requested costs and IME expenses. (Ex. 23) I find the cost allowable under 876 IAC 4.33 and order defendants to pay claimant costs of $204.99.

Claimant has requested reimbursement of Dr. Bansal's IME fee of $2,495.00. There is no evidence that the defendants obtained the opinion of a physician they retained before Dr. Bansal performed his IME in May 2015. There is no breakdown as to the cost of the report. Claimant is not entitled to this cost under Iowa Code 85.39 or 876 IAC 4.33

ORDER

THEREFORE, IT IS ORDERED:

For File 5049632:

Defendants shall pay medical benefits as set forth in this decision.

Claimant shall take nothing else for this file.

For File No. 5049633:

Defendants shall pay claimant twelve point five (12.5) weeks of permanent partial disability benefits at the weekly rate of four hundred ten and 62/100 dollars ($410.62) commencing April 4, 2015.

Defendants shall pay healing period benefits from October 28, 2014 through April 3, 2015 at the weekly rate of four hundred ten and 62/100 dollars ($410.62).

Defendants shall pay claimant a penalty of five thousand five hundred sixty-six and 65/100 dollars ($5,566.65).

Any past due amounts shall be paid in a lump sum with interest as provided by law.

For both File Nos. 5049632 and 5049633:

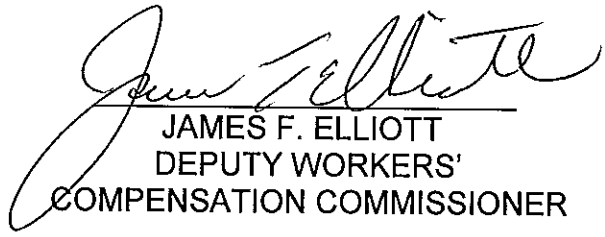
Defendants shall file subsequent reports of injury as required by this agency pursuant to rule 876 IAC 3.1(2).

Defendants shall pay medical expenses as set forth in the decision.

Defendants to pay claimant's costs of two hundred four and 99/100 dollars ($204.99).

The parties are ordered to comply with all stipulations that have been accepted by this agency.

Signed and filed this 9th day of January, 2017.



JAMES F. ELLIOTT
DEPUTY WORKERS'
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JFE/kjw

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.