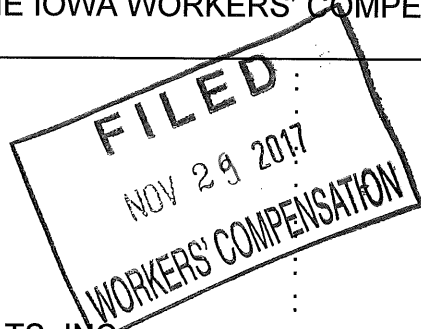


BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

AZRA SEHIC,  
Claimant,

vs.

TYSON FRESH MEATS, INC.,  
Employer,  
Self-Insured,  
Defendant.



File No. 5050655

ARBITRATION

DECISION

Claimant Azra Sehic filed a petition in arbitration on July 25, 2014, alleging she sustained injuries to his bilateral upper extremities, shoulders, and neck while working for the defendant, Tyson Fresh Meats, Inc. (Tyson). Tyson filed an answer on October 14, 2014. An arbitration hearing was held on September 24, 2015. The parties entered into an agreement for settlement, agreeing Sehic was entitled to thirty weeks of compensation for a six percent loss of her bilateral upper extremities before the arbitration decision was issued. The presiding deputy workers' compensation commissioner issued a decision on January 19, 2016, awarding Sehic fifty weeks of permanent partial disability benefits. Tyson remitted payment to Sehic of twenty additional weeks of permanent partial disability benefits.

On August 29, 2016, Sehic filed a petition in arbitration seeking an award of penalty benefits. Tyson filed an answer on October 5, 2016. An arbitration hearing was scheduled for September 12, 2017. The parties elected to submit the case on the record without a hearing. Exhibits 1 through 3 and A through L were admitted into the record. The record was held open through September 26, 2017, for the receipt of briefs from the parties. The briefs were received and the record was closed.

The parties submitted a hearing report listing stipulations and issues to be decided. Tyson waived all affirmative defenses.

**STIPULATIONS**

1. An employer-employee relationship existed between Tyson and Sehic at the time of the alleged injury.
2. Sehic sustained an injury on April 22, 2013, which arose out of and in the course of her employment with Tyson.

3. Temporary and permanent benefits are no longer in dispute.
4. At the time of the alleged injury Sehic's gross earnings were \$592.28 per week, she was married and entitled to three exemptions, and the parties believe the weekly rate is \$412.23.
5. Medical benefits are no longer in dispute.

### **ISSUE**

Is Sehic entitled to an award of penalty benefits?

### **FINDINGS OF FACT**

Following Sehic's work injury, Thomas Gorsche, M.D., an orthopedic surgeon, provided treatment to Sehic. (Exhibit B, page 4) Tyson sent Dr. Gorsche a letter on May 29, 2014, asking for his opinion concerning permanency. (Ex. B, p. 4) Dr. Gorsche responded on June 4, 2014, by circling he agreed Sehic had reached maximum medical improvement, and by writing she reached maximum medical improvement on May 19, 2014. (Ex. B, p. 4) Dr. Gorsche opined Sehic had sustained a permanent impairment as a result of her work injury. (Ex. B, p. 4) Using Table 16-15 of the AMA Guides, Dr. Gorsche opined Sehic had sustained a two percent impairment of the left upper extremity, and a two percent impairment of the right upper extremity. (Ex. B, p. 4)

Sunil Bansal, M.D. conducted an independent medical examination for Sehic. Tyson sent Dr. Gorsche a copy of Dr. Bansal's independent medical examination on September 16, 2015. (Ex. B, p. 5) Dr. Gorsche sent a response letter on September 17, 2015, noting he treated Sehic for bilateral carpal tunnel syndrome. (Ex. B, p. 5) Dr. Gorsche acknowledged cervical magnetic resonance imaging revealed a two-level disk herniation, but Sehic did not require surgery for her cervical condition, and she underwent right and left carpal tunnel releases, and she underwent a shoulder cortisone injection, which relieved her shoulder symptoms. (Ex. B, p. 5) Dr. Gorsche reported he last evaluated Sehic on July 23, 2015, and noted "[i]n my opinion, she has a cervical disk on the right side. In my medical opinion, her symptoms of upper extremity complaints are coming from the cervical spine and are not related to the shoulder/glenohumeral joint." (Ex. B, p. 5) Dr. Gorsche acknowledged Dr. Bansal performed his impairment rating correctly, and while Dr. Gorsche acknowledged he did not treat her cervical condition, it appeared "her job activity was less likely than not to cause her cervical condition." (Ex. B, p. 6)

An arbitration hearing was held on September 24, 2015 before Deputy Workers' Compensation Commissioner James Christenson. The parties signed a hearing report and order, listing stipulations and issues to be decided. (Ex. 1, pp. 1-2) The parties stipulated credits were "no longer in dispute." (Ex. 1, p. 2)

Sehic and Tyson entered in an agreement for settlement on November 23, 2015, agreeing Sehic sustained an injury arising out of and in the course of her employment, and that Sehic was entitled to seven weeks and six days of "temporary total disability/temporary partial disability/healing period compensation" and thirty weeks of compensation for a six percent loss of the bilateral upper extremities under Iowa Code section 85.34(2), commencing on May 20, 2014. (Ex. B, p. 1) The parties further agreed the benefits that remained to be paid included twenty weeks of permanent partial disability benefits, at the rate of \$412.23 per week, or \$8,244.60, and Tyson agreed to pay half of the cost of Dr. Bansal's independent medical examination. (Ex. B, p. 1)

Deputy Christenson issued a decision on January 19, 2016, noting, "[a] settlement for a bilateral upper extremity injury was approved by this agency on December 9, 2015." (Exs. 1; C) Deputy Christenson found, "[b]ased on this record, claimant has carried her burden of proof she sustained a neck injury on April 22, 2013 that arose out of and in the course of her employment." (Exs. 1, p. 9; C, p. 7) Deputy Christenson further found Sehic sustained a "10 percent loss of earning capacity or industrial disability" and awarded Sehic fifty weeks of permanent partial disability benefits, at the rate of \$412.23 per week, commencing on August 6, 2015. (Exs. 1, pp. 10-11; C, pp. 8-9) Deputy Christenson ordered Tyson to pay all accrued weekly benefits in a lump sum with interest as set forth in Iowa Code section 85.30, and to pay Sehic's medical expenses and costs. (Exs. 1, p. 11; C, p. 9) The deputy commissioner noted Tyson had paid half of the cost of Dr. Bansal's independent medical examination when Tyson "accepted liability for claimant's carpal tunnel syndrome" and ordered Tyson to pay for the full cost of Dr. Bansal's independent medical examination. (Exs. 1, p. 11; C, p. 9)

On February 12, 2016, Tyson's attorney sent a letter to Sehic's attorney enclosing a check in the amount of \$8,988.66, "representing the additional twenty (20) weeks of benefits owed plus interest per Deputy Christenson's award." (Ex. D, p. 1) Sehic's attorney responded on February 17, 2016, as follows:

Deputy Christenson awarded my client 50 weeks of benefits (10% ID award) starting August 6, 2015. By the time of your decision to pay the award at least 27 weeks have elapsed. Therefore, you are 7 weeks short plus amended interest. Further, 23 weeks are owed. I expect prompt payment. This letter does not waive a potential penalty claim for late payment of the 7 weeks in question and any further weeks should this delay persist.

(Exs. 2, p. 1; E, p. 1)

The attorney for Tyson sent a response letter on February 25, 2016, which provides:

I am writing in response to your February 17, 2016 letter in which you reference Deputy Christenson's award of 50 weeks of benefits. As you recall, an Agreement for Settlement for the bilateral upper extremity claim was filed on November 23, 2015, and your client received a check from Tyson in the amount of \$8,244.60. The settlement agreement was for 30 weeks paid representing 6% to the body as a whole based on a scheduled injury to the bilateral upper extremities under Iowa Code 85.34(2)(s). It is our position that Tyson is entitled to a credit for such. Therefore the check in the amount of \$8,988.66 you most recently received was for the remaining 20 weeks of benefits owed per the Arbitration decision.

(Exs. 2, p. 2; F, p. 1) Sehic's attorney sent an e-mail to Tyson's attorney, stating

The prehearing report does not stipulate or ask for any credits against potential ID award. The Deputy did not provide for a credit against the 50 weeks in his decision. Appeal cannot be taken. There is no credit you can take. Again, we also now seek 50% penalty on the unpaid weeks. Also why you would claim credit for PPD paid on a scheduled injury against an ID award . . . .

(Ex. G, p. 1)

Tyson's attorney sent Sehic's attorney a letter on March 2, 2016, which provides:

I am writing in response to your e-mail correspondence to me on March 2, 2016 regarding the arbitration decision in this matter and your client's entitlement to additional weekly benefits. As you recall this claim was filed as a single petition on July 23, 2014 alleging a cumulative injury to the bilateral upper extremities, shoulders and neck occurring on April 22, 2013.

Prior to hearing the parties reached an agreement for settlement with regard to the bilateral upper extremity portion of this claim and paid 30 weeks of benefits pursuant to Iowa Code 85.34(2)(s). This settlement was read into the record at hearing and Deputy Christenson even references Ms. Sehic's restrictions and symptoms in her bilateral upper extremities in his analysis within the arbitration decision. After weighing these factors and the alleged cervical complaints, Deputy Christenson awarded your client 10% industrial disability.

Having already paid 30 weeks for the alleged April 22, 2013 injury date as part of the agreement for settlement, it is Defendant's position that a credit was established with 20 weeks left to be paid on the award of 50 weeks.

That check was issued to your office on February 12, 2016. We do not feel that the lack of such a credit on the hearing report is dispositive on this issue.

(Ex. H, p. 1) Sehic's attorney responded on March 31, 2016, indicating he would be filing a petition for penalty benefits. (Exs. 2, p. 3; K, p. 1)

Tyson's attorney sent Sehic's attorney a letter on May 2, 2016, which provides:

I would like to again reach out to you on the above claim in an attempt to resolve this matter regarding the issue of benefits owed. As you recall this claim was filed as a single petition on July 23, 2014 alleging a cumulative injury to the bilateral upper extremities, shoulders and neck occurring on April 22, 2013. Having already paid 30 weeks for the alleged April 22, 2013 injury date as part of the agreement for settlement, it is Defendant's position that a credit was established with 20 weeks left to be paid on the award of 50 weeks. That check was issued to your office on February 12, 2016. We do not feel that the lack of such a credit on the hearing report is dispositive on this issue.

However, in light of the fact that we continue to disagree on this issue, I would propose that we jointly reach out to Deputy Christenson to request that he provide us with clarification on this issue and whether Defendant is entitled to a credit or not. Tyson will agree to be bound by Deputy Christenson's decision on this matter if you and your client will agree to be bound as well. Should additional benefits be owed, Tyson would agree to pay those with any interest that has accrued.

(Exs. 2, p. 4; L, p. 1) On May 4, 2016, Sehic's attorney requested Tyson provide a printout of all benefits paid to Sehic for any claims she has had with Tyson during her employment. (Ex. 2, p. 5)

Tyson retained former Deputy Workers' Compensation Commissioner Ron Pohlman to provide an expert legal opinion. (Ex. A)

## **CONCLUSIONS OF LAW**

### **I. Credits**

After receiving Deputy Christenson's arbitration decision, Tyson paid Sehic twenty additional weeks of permanent partial disability benefits, and asserted it was entitled to a credit for the thirty weeks paid pursuant to the parties' agreement for settlement of the bilateral upper extremity injury. Sehic contends Tyson waived the issue of credit by failing to raise the issue of credit on the hearing report. Tyson rejects Sehic's assertion.

Rule 876 Iowa Administrative Code 4.19(3)(f) provides,

Counsel and pro se litigants shall prepare a hearing report that defines the claims, defenses, and issues that are to be submitted to the deputy commissioner who presides at the hearing. The hearing report shall be signed by all counsel of record and pro se litigants and submitted to the deputy when the hearing commences.

The hearing report must be prepared prior to the commencement of the hearing and must be signed by the parties and the presiding deputy. James R. Lawyer, Iowa Practice Series – Workers' Compensation § 21.24, at 275-76. The parties can stipulate to or dispute issues, including, but not limited to the claimant's entitlement to permanency benefits and credits. Id. at 276.

When completing the hearing report, the parties stipulated to a number of issues, and identified the issues to be determined by Deputy Christenson. The hearing report addresses "credits against any award." (Ex. 1, p. 2) The parties checked a box noting credits were "no longer in dispute." (Ex. 1, p. 2) No information was completed concerning any compensation paid or to be paid to Sehic in the credit portion of the hearing report. (Ex. 1, p. 2)

When the parties submitted the hearing report to Deputy Christenson, the parties reported there was no dispute concerning the issue of credits. If Tyson believed there was a dispute concerning credits, or that it was entitled to a credit, Tyson should have raised the issue before Deputy Christenson. Tyson did not raise the issue of credit before Deputy Christenson issued his opinion on January 19, 2016. Deputy Christenson did not address any credit allegedly due to Tyson in the arbitration decision. Neither party filed an application for rehearing or an appeal within twenty days of the date of the decision. The decision became a final decision. 876 IAC 4.24, 4.27.

Tyson's attorney signed the hearing report on September 24, 2015, agreeing there was no dispute regarding credits. This agency relies on hearing reports to determine the issues to be decided by the presiding deputy commissioners. Tyson waived the issue of credits by signing the hearing report and by failing to raise the issue of credits with Deputy Christenson at the start of the hearing. See Bos v. Climate Engineers, Inc., File No. 5044761 (App. Dec. Mar. 22, 2016) (concluding the claimant's attorney waived his argument the defendants had admitted the claimant was permanently and totally disabled by signing the hearing report and by failing to raise the purported admission by the defendants with the deputy commissioner at the start of the hearing); Hawkeye Wood Shavings v. Parrish, No. 08-1708, 2009 WL 3337613, at \*4 (Iowa Ct. App. 2009) (concluding the defendants waived the issue of whether they were entitled to a credit for benefits already paid for the September 2000 injury because on the hearing report signed by the defendants, the defendants stipulated "0 weeks" of credit); Burnett v. Webster City Custom Meats, Inc., No. 05-1265, 2007 WL 254722, at \*3-4 (Iowa Ct. App. Jan. 31, 2007) (concluding the deputy commissioner did not commit an abuse of discretion by refusing the claimant's request to change dates in the joint

hearing report, and noting the agency's approach requiring claimants to list dates prior to hearing in a hearing report "is more than reasonable"). Cf. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181, 186-87 (Iowa 1980) (concluding claimant's attorney failed to preserve error on foundation objection by failing to object when the deposition was offered into evidence before the deputy, and by failing to afford "his adversary [with the opportunity] to remedy the alleged defect"). Deputy Christenson's decision did not address the issue of credits and is final agency action. The agency lacks jurisdiction to consider the issue of credits. Cf. Norgard v. Dep't of Transp., 555 N.W.2d 226 (Iowa 1996) (affirming district court's dismissal of matter for lack of jurisdiction because the appeal was untimely).

## II. Penalty

Sehic alleges she is entitled to an award of penalty benefits due to Tyson's unreasonable refusal to pay thirty of the fifty weeks of permanent partial disability benefits awarded to her by Deputy Christenson, at the rate of \$412.23 per week, or \$12,366.90. Tyson avers it had a reasonable basis for refusing the pay of benefits because it was entitled to a credit of thirty weeks.

Iowa Code section 86.13 governs penalty benefits. Under the statute's plain language, if there is a delay in payment absent "a reasonable or probable cause or excuse," the employee is entitled to penalty benefits, of up to fifty percent of the amount of benefits that were denied, delayed, or terminated without reasonable or probable cause or excuse. Iowa Code § 86.13(4); see also Christensen v. Snap-On Tools Corp., 554 N.W.2d 254, 260 (Iowa 1996) (citing earlier version of the statute). "The application of the penalty provision does not turn on the length of the delay in making the correct compensation payment." Robbennolt v. Snap-On Tools Corp., 555 N.W.2d 229, 236 (Iowa 1996). If a delay occurs without a reasonable excuse, the commissioner is required to award penalty benefits in some amount to the employee. Id.

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

the court must 'determine if the defendant knew, or should have known, that the basis for denying the employee's claim was unreasonable.'" Id.

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

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

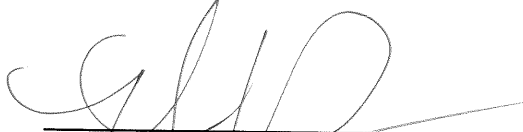
Deputy Christenson did not address the issue of credits in his decision. After receiving Deputy Christenson's decision awarding Sehic fifty weeks of permanent partial disability benefits, Tyson sent Sehic's attorney a check for twenty weeks of permanent partial disability benefits, alleging it was entitled to a credit of thirty weeks. Tyson did not file an application for rehearing or an appeal within twenty days of the decision. The decision became a final decision. 876 IAC 4.24, 4.27. The record evidence in this case does not support Tyson had a reasonable basis for withholding payment of thirty weeks of permanent partial disability benefits. Imposition of penalty benefits is warranted. Sehic is awarded \$6,183.45 in penalty benefits.

### ORDER

Tyson shall pay Sehic six thousand one hundred eighty-three and 45/100 dollars (\$6,183.45) in penalty benefits.

Tyson shall file subsequent reports of injury as required by this agency pursuant to rules 876 IAC 3.1(2) and 876 IAC 11.7.

Signed and filed this 29<sup>th</sup> day of November, 2017.

  
HEATHER L. PALMER  
DEPUTY WORKERS'  
COMPENSATION COMMISSIONER



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HLP/sam

**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.