BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

DAVID SCOTT MILES, Claimant, vs. CITY OF DES MOINES, Employer, Self-Insured, Defendant.	:	File Nos. 5048896, 5048897 5048898, 5048899 A R B I T R A T I O N D E C I S I O N Head Note No.: 1803

STATEMENT OF THE CASE

Claimant, David Scott Miles, has filed petitions in arbitration and seeks workers' compensation benefits from, City of Des Moines, employer, defendant.

Deputy Workers' Compensation Commissioner, Stan McElderry, heard this matter in Des Moines, Iowa.

ISSUES

For File No. 5048896:

Whether the injury on November 29, 2012 arose out of and in the course of employment, temporary benefits, permanent benefits, scheduled or industrial, medical expenses, 85.39 evaluation, and penalty.

For File No. 5048897:

Whether the injury on April 5, 2013 arose out of and in the course of employment, temporary benefits, permanent benefits, scheduled or industrial, medical expenses, 85.39 evaluation, and penalty.

For File No. 5048898:

Whether the injury on April 17, 2013 arose out of and in the course of employment, temporary benefits, permanent benefits, scheduled or industrial, medical expenses, 85.39 evaluation, and penalty.

For File No. 5048899:

Whether the injury on December 20, 2013 arose out of and in the course of employment, temporary benefits, permanent benefits, scheduled or industrial, medical expenses, 85.39 evaluation, and penalty. However, since the defendant has already accepted the claim as to the back and hip it appears the actual issues do not include scheduled versus industrial.

FINDINGS OF FACT

The undersigned having considered all of the evidence and testimony in the record finds:

The claimant was 55 years old at the time of hearing. He left high school in the tenth grade, and has no formal education beyond that. The claimant has been a full-time employee of the City of Des Moines for 25 years, and was a "casual" employee for nine years before becoming full time. The claimant was a Plant Field Worker for more than 20 years for the wastewater treatment plant operated by the City. He is currently acting in the role of Wastewater Maintenance System Specialist and being paid that higher rate, although still classified as a Plant Field Worker. Since the claimant no longer receives the overtime he did as a Plant Field Worker his actual earnings have decreased about 20 percent.

The first claim herein is a cumulative injury to both knees, hips, and back injury of November 29, 2012. Next, a cumulative low back injury of April 5, 2013, and then an April 17, 2013 cumulative injury to both ankles. Lastly, on December 20, 2013 an accepted body as a whole (BAW) injury from a fall injuring the back and right hip.

As a Plant Field Worker the claimant operated equipment off road and over rough farm fields. The machinery itself such as the TerraGator rarely, if ever, had shock absorbers, and the claimant was required to use his feet and legs as shock absorbers while at the same time the claimant had to use his feet to maneuver pedals.

The claimant had tarsal tunnel surgery to both ankles in 2000. A workers' compensation claim was not made regarding medical treatment or the surgery to the ankles. The claimant had a right knee surgery in July of 2011, which was authorized and paid for by the defendant as a work injury. (Exhibit 5, pages 80-81) Subsequent to that surgery the claimant began having left knee problems. The defendant initially also treated this as a work comp matter based at least in part on the opinions of authorized physicians Jon Yankey, M.D., and Richard Bratkiewicz, M.D. (See Ex. 7, pp. 114, 133, 142 et al.) R.D. Lee Evans, D.P.M., on October 28, 2013 opined that the knee pain was not caused by work. (Ex. 5, p. 95) On April 14, 2014 Dr. Bratkiewicz noted that he did not understand why the claim for the knees, hip, and back were now denied. (Ex. 7, p. 142) The claimant continued treatment for his knees through his own health insurance, which eventually led to knee surgery by Scott A. Meyer, M.D. March 15, 2015. Those

medical expenses and temporary total disability time have not been paid by the defendant. (See Exs. 11, 14, and 15) Jacqueline Stoken, D.O., who provided an independent medical examination rated the knee as a 10 percent permanent impairment to the left lower extremity. (Ex. 1, p. 20)

Defendant has denied the bilateral tarsal tunnel although the defendant-authorized physician found the condition as work related and probably a result of repetitive trauma from work. (Ex. 7, p. 133) Dr. Evans performed right foot tarsal tunnel release on January 6, 2014. (Ex. 5, p. 98) He performed a left foot tarsal tunnel release on April 14, 2014. On November 1, 2013 Dr. Evans agreed that work could be materially aggravating, lighting up or accelerating the underlying bilateral tarsal tunnel condition. (Ex. 5, p. 96) On January 6, 2014 Dr. Evans noted that since he had not observed the claimant working he was unable to opine as to causation. (Ex. 5, p. 97) Dr. Stoken opined that the claimant had suffered an impairment of 2 percent lower extremity impairment for the right lower extremity and 2 percent for the left from the bilateral tarsal tunnel injuries. (Ex. 1, p. 20)

On December 20, 2013 the claimant fell on ice just outside his workplace door and hurt his right hip and buttocks. (Ex. 7, p. 135) The injury was accepted by the defendant. Treatment was by Dr. Kumar who placed the claimant at MMI on September 3, 2014. (Ex. 10, pp. 208-9) On January 2, 2015 Dr. Meyer opined a 5 percent of the body as a whole impairment from the hip and back injury of December 20, 2013. (Ex. 20, p. 212) Dr. Stoken agreed. (Ex. 1, p. 20) The defendant has paid the 5 percent rating for this injury.

As for November 29, 2012, the claimant established a left knee injury from cumulative trauma which was rated as causing 10 percent impairment of the left lower extremity. (Ex. 1, p. 20) The claimant did not establish a cumulative back injury to the back manifesting April 5, 2013. (Ex. 1) The claimant established an April 17, 2013 cumulative injury to his bilateral ankle with 2 percent impairment to each. (Ex. 1. p. 20)

The claimant has physical restrictions and impairment from the December 20, 2013 back and hip injury. The functional capacity evaluation (FCE) taken on June 2, 2015 was considered valid. (Ex. 2) That FCE placed the claimant at a low level of medium work category. The FCE and Dr. Stoken's report do not break out the restrictions by injury. Restrictions include floor to waist of 20 pounds constant, 35 pounds frequently, 55 pounds occasionally, and 75 pounds rarely. Lifting waist to overhead 10 pounds constantly, 20 pounds frequently, 35 pounds occasionally, and 50 pounds rarely. Horizontal lift of 25, 40, 60, and 80. Static push of 25, 40, 55, and 70. Static pull of 30, 45, 60, and 75 pounds. Right or left carry of 15, 35, 45, and 60 pounds. Front carry of 25, 40, 55, and 70 pounds. Must be allowed to transition between sitting, standing, and walking as tolerated and not exceed more than occasional for any one of them. (Ex. 1, p. 21) All his work has been generally medium to heavy, and his restrictions generally preclude a return to his past relevant work history. His employer has recognized this and put him into a lighter mixed labor and office position that claimant is not fully qualified for. He has suffered almost a

20 percent real loss of earnings from being placed in the accommodated position. His formal education ended at the tenth grade (ninth grade was last one completed). Considering the claimant's medical impairments, training, permanent restrictions, as well as all other factors of industrial disability, the claimant has suffered a 45 percent loss of earnings capacity.

On November 29, 2012 the claimant was single, entitled to one exemption, and had average weekly wages of $1,244.90. As such, his weekly benefit rate is $725.89 for that injury date. The parties stipulated to a July 1, 2015 commencement date.

On April 5, 2013 the claimant was single, entitled to one exemption, and had average weekly wages of $1,248.56. As such, his weekly benefit rate is $727.91 for that injury date. The parties stipulated to a January 2, 2015 commencement date.

On April 5, 2013 and April 17, 2013 the claimant was single, entitled to one exemption, and had average weekly wages of $1,248.56. As such, his weekly benefit rate is $727.91 for that injury date.

The parties stipulated to a January 2, 2015 commencement date for the April 5, 2013 claim, and November 1, 2013 for the April 17, 2013 claim. On December 20, 2013 the claimant was single, entitled to one exemption, and had average weekly wages of $1,147.30. As such, his weekly benefit rate is $659.71 for that injury date. The parties stipulated to a July 2, 2015 commencement date.

The claimant seeks the $4,500.00 IME fee of Dr. Stoken and medical expenses detailed in Exhibits 11, 14, and 15. Those expenses were reasonable and necessary for the treatment of the work injuries herein.

REASONING AND CONCLUSIONS OF LAW

Permanent disability for the December 20, 2013 injury.

The party who would suffer loss if an issue were not established has the burden of proving that issue by a preponderance of the evidence. Iowa Rule of Appellate Procedure 6.14(6).

The claimant has the burden of proving by a preponderance of the evidence that the alleged injury actually occurred and that it both arose out of and in the course of the employment. Quaker Oats Co. v. Ciha, 552 N.W.2d 143 (Iowa 1996); Miedema v. Dial Corp., 551 N.W.2d 309 (Iowa 1996). The words "arising out of" referred to the cause or source of the injury. The words "in the course of" refer to the time, place, and circumstances of the injury. 2800 Corp. v. Fernandez, 528 N.W.2d 124 (Iowa 1995). An injury arises out of the employment when a causal relationship exists between the injury and the employment. Miedema, 551 N.W.2d 309. The injury must be a rational consequence of a hazard connected with the employment and not merely incidental to the employment. Koehler Elec. 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.

Since claimant has an impairment to the body as a whole, an industrial disability has been sustained. Industrial disability was defined in Diederich v. Tri-City R. Co., 219 Iowa 587, 258 N.W.2d 899 (1935) as follows: "It is therefore plain that the legislature intended the term 'disability' to mean 'industrial disability' or loss of earning capacity and not a mere 'functional disability' to be computed in the terms of percentages of the total physical and mental ability of a normal man."

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

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

While a claimant is not entitled to compensation for the results of a preexisting injury or disease, its mere existence at the time of a subsequent injury is not a defense. Rose v. John Deere Ottumwa Works, 247 Iowa 900, 76 N.W.2d 756 (1956). If the claimant had a preexisting condition or disability that is materially aggravated, accelerated, worsened or lighted up so that it results in disability, claimant is entitled to recover. Nicks v. Davenport Produce Co., 254 Iowa 130, 115 N.W.2d 812 (1962); Yeager v. Firestone Tire & Rubber Co., 253 Iowa 369, 112 N.W.2d 299 (1961). Total disability does not mean a state of absolute helplessness. Permanent total disability occurs where the injury wholly disables the employee from performing work that the employee's experience, training, education, intelligence, and physical capacities would otherwise permit the employee to perform. See McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Diederich v. Tri-City R. Co., 219 Iowa 587, 258 N.W. 899 (1935).

Based on the finding that the claimant has suffered a 45 percent loss of earning capacity, he has sustained a 45 percent permanent partial industrial disability entitling him to 225 weeks of permanent partial disability pursuant to Iowa Code section 85.34(2)(u).

Permanent disability for the November 29, 2012 injury (File No. 5048896).

The courts have repeatedly stated that for those injuries limited to the schedules in Iowa Code section 85.34(2)(a-t), this agency must only consider the functional loss of the particular scheduled member involved and not the other factors which constitute an "industrial disability." Iowa Supreme Court decisions over the years have repeatedly cited favorably the following language in the 66-year-old case of Soukup v. Shores Co., 222 Iowa 272, 277; 268 N.W. 598, 601 (1936):

> The legislature has definitely fixed the amount of compensation that shall be paid for specific injuries . . . and that, regardless of the education or qualifications or nature of the particular individual, or of his inability . . . to engage in employment . . . the compensation payable . . . is limited to the amount therein fixed.

Our court has even specifically upheld the constitutionality of the scheduled member compensation scheme. Gilleland v. Armstrong Rubber Co., 524 N.W.2d 404 (Iowa 1994). Permanent partial disabilities are classified as either scheduled or unscheduled. A specific scheduled disability is evaluated by the functional method; the industrial method is used to evaluate an unscheduled disability. Graves v. Eagle Iron Works, 331 N.W.2d 116; Simbro v. DeLong's Sportswear 332 N.W.2d 886, 887 (Iowa 1983); Martin v. Skelly Oil Co., 252 Iowa 128, 133, 106 N.W.2d 95, 98 (1960).

When the result of an injury is loss to a scheduled member, the compensation payable is limited to that set forth in the appropriate subdivision of Code section 85.34(2). Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961). "Loss of use" of a member is equivalent to "loss" of the member. Moses v. National Union C. M. Co., 194 Iowa 819, 184 N.W. 746 (1921). Pursuant to Iowa Code section 85.34(2)(u) the workers' compensation commissioner may equitably prorate compensation payable in those cases wherein the loss is something less than that provided for in the schedule. Blizek v. Eagle Signal Co., 164 N.W.2d 84 (Iowa 1969).

Evidence considered in assessing the loss of use of a particular scheduled member may entail more than a medical rating pursuant to standardized guides for evaluating permanent impairment. A claimant's testimony and demonstration of difficulties incurred in using the injured member and medical evidence regarding general loss of use may be considered in determining the actual loss of use compensable. Soukup, 222 Iowa 272, 268 N.W. 598. Consideration is not given to what effect the scheduled loss has on claimant's earning capacity. The scheduled loss system created by the legislature is presumed to include compensation for reduced capacity to labor and to earn. Schell v. Central Engineering Co., 232 Iowa 421, 4 N.W.2d 339 (1942).

The right of a worker to receive compensation for injuries sustained which arose out of and in the course of employment is statutory. The statute conferring this right can also fix the amount of compensation to be paid for different specific injuries, and the

employee is not entitled to compensation except as provided by statute. Soukup, 222 Iowa 272, 268 N.W. 598.

I found that the claimant suffered a 10 percent permanent loss of use of his left lower extremity due to the November 29, 2012 injury. Based on such a finding, the claimant is entitled to 22 weeks of permanent partial disability benefits under Iowa Code section 85.34(2)(o), which is 10 percent of 220 weeks, the maximum allowable weeks of disability for an injury to the leg in that subsection.

Permanent disability for the April 17, 2013 bilateral lower extremity injuries (File No. 5048898).

Where an injury is limited to a scheduled member the loss is measured functionally, not industrially. Graves v. Eagle Iron Works, 331 N.W.2d 116 (Iowa 1983).

The courts have repeatedly stated that for those injuries limited to the schedules in Iowa Code section 85.34(2)(a-t), this agency must only consider the functional loss of the particular scheduled member involved and not the other factors which constitute an "industrial disability." Iowa Supreme Court decisions over the years have repeatedly cited favorably the following language in the 66-year-old case of Soukup v. Shores Co., 222 Iowa 272, 277; 268 N.W. 598, 601 (1936):

> The legislature has definitely fixed the amount of compensation that shall be paid for specific injuries . . . and that, regardless of the education or qualifications or nature of the particular individual, or of his inability . . . to engage in employment . . . the compensation payable . . . is limited to the amount therein fixed.

Our court has even specifically upheld the constitutionality of the scheduled member compensation scheme. Gilleland v. Armstrong Rubber Co., 524 N.W.2d 404 (Iowa 1994). Permanent partial disabilities are classified as either scheduled or unscheduled. A specific scheduled disability is evaluated by the functional method; the industrial method is used to evaluate an unscheduled disability. Graves, 331 N.W.2d 116; Simbro v. DeLong's Sportswear 332 N.W.2d 886, 887 (Iowa 1983); Martin v. Skelly Oil Co., 252 Iowa 128, 133, 106 N.W.2d 95, 98 (1960).

When the result of an injury is loss to a scheduled member, the compensation payable is limited to that set forth in the appropriate subdivision of Code section 85.34(2). Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961). "Loss of use" of a member is equivalent to "loss" of the member. Moses v. National Union C. M. Co., 194 Iowa 819, 184 N.W. 746 (1921). Pursuant to Iowa Code section 85.34(2)(u) the workers' compensation commissioner may equitably prorate compensation payable in those cases wherein the loss is something less than that provided for in the schedule. Blizek v. Eagle Signal Co., 164 N.W.2d 84 (Iowa 1969).

Evidence considered in assessing the loss of use of a particular scheduled member may entail more than a medical rating pursuant to standardized guides for evaluating permanent impairment. A claimant's testimony and demonstration of difficulties incurred in using the injured member and medical evidence regarding general loss of use may be considered in determining the actual loss of use compensable. Soukup, 222 Iowa 272, 268 N.W. 598. Consideration is not given to what effect the scheduled loss has on claimant's earning capacity. The scheduled loss system created by the legislature is presumed to include compensation for reduced capacity to labor and to earn. Schell v. Central Engineering Co., 232 Iowa 421, 4 N.W.2d 339 (1942).

The right of a worker to receive compensation for injuries sustained which arose out of and in the course of employment is statutory. The statute conferring this right can also fix the amount of compensation to be paid for different specific injuries, and the employee is not entitled to compensation except as provided by statute. Soukup, 222 Iowa 272, 268 N.W. 598.

I found that the claimant suffered a 2 percent permanent loss of use of his left lower extremity due to the April 17, 2013 injury. Based on such a finding, the claimant is entitled to 4.4 weeks of permanent partial disability benefits under Iowa Code section 85.34(2)(o), which is 2 percent of 220 weeks, the maximum allowable weeks of disability for an injury to the leg in that subsection. I found that the claimant suffered a 2 percent permanent loss of use of his right lower extremity due to the April 17, 2013 injury. Based on such a finding, the claimant is entitled to 4.4 weeks of permanent partial disability benefits under Iowa Code section 85.34(2)(o), which is 2 percent of 220 weeks, the maximum allowable weeks of disability for an injury to the leg in that subsection. A Simbro analysis was not made.

The claimant seeks payment of medical expenses.

The employer shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance and hospital services and supplies for all conditions compensable under the workers' compensation law. The employer shall also allow reasonable and necessary transportation expenses incurred for those services. The employer has the right to choose the provider of care, except where the employer has denied liability for the injury. Section 85.27. Holbert v. Townsend Engineering Co., Thirty-second Biennial Report of the Industrial Commissioner 78 (Review-reopen October 16, 1975).

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). Defendants' liability for claimant's injury need not ultimately be established before defendants are obligated to reimburse claimant for an independent medical examination.

The claimant seeks payment of medical expenses. Those expenses are contained in Exhibits 11 and 14. Since this decision causally connects the injuries to work, and the expenses were reasonable and necessary for the treatment of those injuries, the defendant is responsible for paying/reimbursing as appropriate those medical expenses.

IME

Independent Medical Examination.

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). Defendants' liability for claimant's injury need not ultimately be established before defendants are obligated to reimburse claimant for an independent medical examination.

The claimant chose to get an evaluation/examination to establish whether the injuries arose out of and in the course of employment, and whether they caused permanent impairment or disability. Defendant had opinions of no causal connection and a 5 percent rating for the BAW injury. The claimant got the IME exam from Dr. Stoken who charged a reasonable fee of $4,500.00 for the ratings. Defendant shall pay/reimburse the IME fee as appropriate.

The next issue is penalty.

Iowa Code section 86.13(4) provides:

> 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 in 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.

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).

On this record there was a reasonable basis to deny the claims denied, and to pay no more than was paid on the body as a whole injury. No penalty is payable on this record.

Temporary benefits.

The claimant was off work from January 6 through February 7, 2014 (5 weeks) for the right tarsal tunnel release and April 14 through May 2, 2014 (3 weeks) for the left tarsal release. For the left knee the claimant was off March 19 through March 30, 2013. The claimant is entitled to temporary benefits for those periods.

ORDER

Therefore it is ordered:

That the defendant shall pay the claimant two hundred twenty-five (225) weeks of permanent partial disability commencing January 2, 2015 at the weekly rate of six hundred fifty-nine and 71/100 dollars ($659.71) (File No. 5048899).

That the defendant shall pay the claimant twenty-two (22) weeks of permanent partial disability commencing July 1, 2015 at the weekly rate of seven hundred twenty-five and 89/100 dollars ($725.89) (File No. 5048896).

That the defendant shall pay the claimant eight point eight (8.8) weeks of permanent partial disability commencing January 2, 2015 at the weekly rate of seven hundred twenty-seven and 91/100 dollars ($727.91) (File No. 5048898).

That the defendant shall pay the claimant five (5) weeks of temporary benefits commencing January 6, 2014 and three (3) weeks commencing April 14, 2014 at the weekly rate of seven hundred twenty-five and 89/100 dollars ($725.89) (File No. 5048896).

That the defendant shall pay the claimant one point two eight six (1.286) weeks of temporary benefits commencing March 19, 2015 at the weekly rate of seven hundred twenty-seven and 91/100 dollars ($727.91) (File No. 5048898).

Defendant shall reimburse/pay IME of four thousand five hundred 00/100 dollars ($4,500.00).

Defendant shall receive credit for all benefits previously paid.

Costs are taxed to the defendant pursuant to 876 IAC 4.33.

Accrued benefits shall be paid in lump sum together with interest pursuant to Iowa Code section 85.30 with subsequent reports of injury pursuant to rule 876 IAC 3.1.

Signed and filed this 5th day of February, 2016.

STAN MCELDERRY
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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SRM/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.