

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

CHRISTINA HYTEN,

Claimant,

vs.

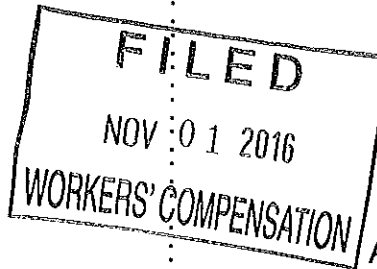
THE HON COMPANY, LLC,

Employer,

and

ACE INSURANCE COMPANY,

Insurance Carrier,
Defendants.



File No. 5051067

ARBITRATION
DECISION

Head Note Nos.: 1803; 4000.2

STATEMENT OF THE CASE

Christina Hyten filed a petition for arbitration seeking workers' compensation benefits from the Hon Company, LLC, and ACE Insurance Company.

The matter came on for hearing on December 7, 2015, before Deputy Workers' Compensation Commissioner Joseph L. Walsh. The record in the case consists of claimant's exhibits 1 through 22; defense exhibits A through F; as well the sworn testimony of claimant, Christina Hyten. The parties briefed this case and the matter was fully submitted on January 8, 2016. Amy Rose Coenen was appointed to serve as the court reporter in this case.

ISSUES

The parties submitted a hearing report and order, which has been approved by the undersigned. The stipulations contained in the hearing order were accepted and by this decision, are deemed binding. The parties agree that the claimant, Christina Hyten, suffered a cumulative injury to her right arm or right upper extremity which manifested on or about July 13, 2013. This cumulative injury resulted in both temporary and permanent partial disability to claimant's right arm. The claimant contends she is entitled to additional temporary partial disability benefits as set forth in Claimant's Exhibit 14. This is disputed by defendants. Claimant contends she is entitled to additional permanency benefits for the loss of function in her right arm. Defendants contend all benefits have been paid. It appears the appropriate commencement date for benefits is in dispute as well. The parties have a minor dispute over the rate of compensation. All affirmative defenses have been waived and medical expenses are

not in dispute, other than medical mileage, set forth in Claimant's Exhibit 20. Claimant asserts she is entitled to penalty benefits for late payments.

FINDINGS OF FACT

Christina Hyten began working at Hon Company in March 2013. She worked in the flat pack department as a work cell operator. Her position involved the repetitive use of her arms. In the weeks and months leading up to July 13, 2013, Ms. Hyten testified she worked 10 hour shifts during the week and additional hours on the weekends. As a result of her work activities, Ms. Hyten suffered a cumulative injury to her right arm which manifested on about July 13, 2013.

In January 2014, she was evaluated by an authorized physician Daniel Hogan, M.D. (Defendants' Exhibit A) He quickly referred her on to Phyllis Chang, M.D., a hand specialist at Hand & Plastic Surgery of Iowa. At her first visit she recounted Ms. Hyten's history of the injury. She noted that the EMG/NCV performed on February 6, 2014, documented "right carpal tunnel syndrome, severe." (Cl. Ex. 9, p. 39) She recommended surgery and placed her on significant medical restrictions. (Cl. Ex. 9, p. 41)

Ms. Hyten testified the employer terminated her on March 7, 2014 for absenteeism. The basis for the termination is not well-documented in the record although she applied for, and received, unemployment insurance benefits. (Def. Ex. E)

On March 13, 2014, Dr. Chang performed three surgical procedures on Ms. Hyten's right upper extremity: right carpal tunnel release, right index trigger finger release, and a kenalog injection on the right first dorsal component. (Cl. Ex. 8, p. 37)

Ms. Hyten was paid weekly compensation benefits commencing March 13, 2014. (Def. Ex. F, p. 2) Defendants continued paying through June 8, 2014, the date Dr. Chen released claimant without restrictions. (Def. Ex. B, p. 1) Defendants paid benefits at the rate of \$310.15 per week. (Def. Ex. F) There is no evidence in the record as to how this rate was calculated. There is no evidence in the file that defendants provided claimant notice of termination of her benefits. On May 14, 2014, the claims representative from Gallagher Bassett Services wrote to Dr. Chang requesting a rating. (Def. Ex. C, p. 1) There is no evidence in the record that Dr. Chang responded to this until she wrote a letter on July 6, 2015. (Def. Ex. B, p. 2)

In April 2015, claimant was evaluated by Mark Taylor, M.D., who issued an independent medical examination (IME) report on May 1, 2015. (Cl. Ex. 3) Dr. Taylor reviewed the appropriate records and took a detailed and thorough history. He also performed a thorough examination of Ms. Hyten. He provided an expert opinion that Ms. Hyten's right upper extremity disability was caused by a repetitive trauma injury for the employer. (Cl. Ex. 3, pp. 20-21) He further opined that she suffered a permanent functional loss of 14 percent of the right upper extremity. (Cl. Ex. 3, p. 22)

After the May IME report, claimant's counsel contacted defense counsel seeking payment of permanent partial disability. (Cl. Ex. 10) Counsel for the parties then corresponded back and forth. (Cl. Exs. 11 through 14)

On July 6, 2015, Dr. Chang wrote to Gallagher Bassett Services and issued an impairment rating of 39 percent of the right arm. (Def. Ex. B, p. 2)

On October 22, 2015, defendants sent a payment for permanent partial disability in the amount of \$11,510.61. (Cl. Ex. 18)

CONCLUSIONS OF LAW

The first issue which needs to be resolved is the claimant's average weekly wage.

Section 85.36 states the basis of compensation is the weekly earnings of the employee at the time of the injury. The section defines weekly earnings as the gross salary, wages, or earnings to which an employee would have been entitled had the employee worked the customary hours for the full pay period in which injured as the employer regularly required for the work or employment. The various subsections of section 85.36 set forth methods of computing weekly earnings depending upon the type of earnings and employment.

Under section 85.36(7), the gross weekly earnings of an employee who has worked for the employer for less than the full 13 calendar weeks immediately preceding the injury are determined by looking at the earnings of other similarly situated employees employed over that full period, but if earnings of similar employees cannot be determined, by averaging the employee's weekly earnings computed for the number of weeks that the employee has been in the employ of the employer.

Ms. Hyten had not worked directly for this employer for a full quarter prior to suffering her work injury. Neither party submitted evidence of the claimant's actual wages during this period of time, nor did either party submit evidence of a comparable employee's wages. Claimant contends her average wage prior to the injury date was \$491.00 per week, however, she argues that the defendants used the rate of \$310.15 when they paid benefits and they should continue to use that figure. For their part, defendants argue that the claimant's average weekly wage was \$447.00 per week. Like claimant, defendants did not submit any actual evidence to support this. Based upon this record, I find that the claimant has failed to meet her burden of proof on the issue of the average weekly wage. I adopt the defendants' admission that the average weekly wage was \$447.00 per week. Being single and entitled to three exemptions as stipulated, the claimant's appropriate rate of compensation is \$305.54.

The next issue whether the claimant is entitled to temporary partial disability benefits. Claimant alleges entitlement to temporary partial disability benefits from February 6, 2014, through March 6, 2014. Defendants dispute this.

An employee is entitled to appropriate temporary partial disability benefits during those periods in which the employee is temporarily, partially disabled. An employee is temporarily, partially disabled when the employee is not capable medically of returning to employment substantially similar to the employment in which the employee was engaged at the time of the injury, but is able to perform other work consistent with the employee's disability. Temporary partial benefits are not payable upon termination of temporary disability, healing period, or permanent partial disability simply because the employee is not able to secure work paying weekly earnings equal to the employee's weekly earnings at the time of the injury. Section 85.33(2).

I have determined the average weekly wage to be \$447.00 per week based upon the evidence in the record. The claimant did earn less than \$447.00 per week during the period of time for which she is claiming entitlement to temporary partial disability. (See Cl. Ex. 12, pp. 63-67) The claimant, however, did not prove that the reason her wages were reduced was because of her disability. While there is evidence in the record that she was on light-duty during this period of time, it is unclear whether the fact she was on light-duty caused the decreased pay, or whether the decreased pay resulted from fewer hours worked based upon the production needs of the employer. Based upon the record before the agency, it appears more likely that production hours were reduced for reasons unrelated to claimant's disability. It is the claimant's burden to prove her entitlement to temporary partial disability benefits and she has failed to meet this burden.

The next issue is the nature and extent of the claimant's loss of function in her right upper extremity.

Under the Iowa Workers' Compensation Act permanent partial disability is categorized as either to a scheduled member or to the body as a whole. See section 85.34(2). Section 85.34(2)(a)-(t) sets forth specific scheduled injuries and compensation payable for those injuries. 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). Compensation for scheduled injuries is not related to earning capacity. 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).

In this case, the parties have stipulated that the injury and disability are to claimant's right arm. As such, her disability is evaluated under Iowa Code section 85.34(2)(m). The disability is evaluated based upon the loss of function and is capped at 250 weeks.

The AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, has been adopted as a guide for determining an injured worker's extent of functional disability. 876 IAC section 2.4. In making an assessment of the loss of use of a scheduled member, however, the evaluation is not limited to the use of the AMA Guides. Lay testimony and demonstrated difficulties from claimant must be considered in determining the actual loss of use so long as loss of earning capacity is not considered. Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417, 420, 421 (Iowa 1994); Soukup v. Shores Co., 222 Iowa 272, 268 N.W. 598 (1936).

Notwithstanding suggestions to the contrary in the AMA Guides, this agency has a long history of recognizing that the actual loss of use which is to be compensated is the loss of use of the body member in the activities of daily living, including activities of employment. Pain which limits use, loss of grip strength, fatigability, activity restrictions, and other pertinent factors may all be considered when determining scheduled disability. Bergmann v. Mercy Medical Center, File Nos. 5018613 & 5018614, (App. March 14, 2008); Moss v. United Parcel Service, File No. 881576 (App. September 26, 1994); Greenlee v. Cedar Falls Community Schools, File No. 934910 (App. December 27, 1993); Westcott-Riepma v. K-Products, Inc., File No. 1011173 (Arb. July 19, 1994); Bieghler v. Seneca Corporation, File No. 979887 (Arb. February 8, 1994); Ryland v. Rose's Wood Products, File No. 937842 (Arb. January 13, 1994); Smith v. Winnebago Industries, File No. 824666 (Arb. April 2, 1991).

Having considered all of the evidence in the record, I find that the claimant has suffered a 25 percent loss of function of her right arm as a result of the stipulated work injury. Ms. Hyten testified credibly, under oath. Her right arm did not heal well. She was only 35 years old as of the date of hearing, yet she has difficulty throwing a baseball or playing hockey with her son. She has pain and numbness in her hands which interferes with a number of her activities of daily living, in particular, any activities which involve grasping or pinching with her right hand. She testified she no longer hunts or fishes and she regularly drops items. While these factors indicate a high functional disability in her right arm, claimant is able to work without restrictions and use her arm to some degree in her employment.

Dr. Taylor, claimant's chosen IME physician, opined her loss of function was 14 percent. Dr. Chang, the treating surgeon opined the loss was 39 percent. Both opinions are well-reasoned and based upon competent information. When these opinions are considered in conjunction with the competent lay evidence, I find that the claimant's actual functional loss in her right arm is 25 percent. This entitles her to 62.5 weeks of compensation commencing the date her temporary disability benefits ended, June 10, 2014.

The next issue is penalty. Claimant has numerous penalty theories. Defendants contend claimant has failed to meet her burden with regard to any of the theories.

Claimant's penalty benefit claim is based upon the statutory language contained at Iowa Code section 86.13(4), which 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.

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.

If weekly compensation benefits are not fully paid when due, section 86.13 requires that additional benefits be awarded unless the employer shows reasonable cause or excuse for the delay or denial. Robbennolt v. Snap-on Tools Corp., 555 N.W.2d 229 (Iowa 1996).

Delay attributable to the time required to perform a reasonable investigation is not unreasonable. Kiesecker v. Webster City Meats, Inc., 528 N.W.2d 109 (Iowa 1995).

It also is not unreasonable to deny a claim when a good faith issue of law or fact makes the employer's liability fairly debatable. An issue of law is fairly debatable if viable arguments exist in favor of each party. Covia v. Robinson, 507 N.W.2d 411 (Iowa 1993). An issue of fact is fairly debatable if substantial evidence exists which would support a finding favorable to the employer. Gilbert v. USF Holland, Inc., 637 N.W.2d 194 (Iowa 2001).

An employer's bare assertion that a claim is fairly debatable is insufficient to avoid imposition of a penalty. The employer must assert facts upon which the commissioner could reasonably find that the claim was "fairly debatable." Meyers v. Holiday Express Corp., 557 N.W.2d 502 (Iowa 1996).

If the employer fails to show reasonable cause or excuse for the delay or denial, the commissioner shall impose a penalty in an amount up to 50 percent of the amount unreasonably delayed or denied. Christensen v. Snap-on Tools Corp., 554 N.W.2d 254 (Iowa 1996). The factors to be considered in determining the amount of the penalty include the length of the delay, the number of delays, the information available to the employer and the employer's past record of penalties. Robbennolt, 555 N.W.2d at 238.

Under the current statutory framework, the burden is on the claimant to demonstrate when a payment is due and that the payment was not made on time. Once the claimant has proven the delay, the burden shifts to the defendants to provide a reasonable excuse.

I find a penalty is mandatory in this case. The defendants paid no permanent partial disability until October 22, 2015. (Def. Ex. F, p. 1) The defendants ceased healing period apparently without notice on June 9, 2014. The claimant reached maximum medical improvement in approximately September 2014. When the defendants finally paid benefits, they based their rating on the rating from claimant's IME physician, Dr. Taylor. He issued his rating in May 2015. Defendants' physician, Dr. Chang, issued a rating in July 2015. The defendants provided no explanation for why they waited to pay benefits on October 22, 2015. In reality, benefits should have been calculated and paid sometime in the summer of 2014, at the conclusion of claimant's healing period. It was evident she had not fully healed. Benefits were undeniably owed once claimant obtained a rating of impairment from her own physician. Considering the length of the delay, the defendants' history of delays, as well as the complete lack of explanation for the delay in the record, I find a 50 percent penalty is appropriate on all late benefits.

I find that the defendants' ultimate decision to pay 14 percent on the basis of Dr. Taylor's opinion, is not unreasonable. Fourteen percent of 250 weeks is 35 weeks of benefits, multiplied by claimant's rate of \$305.54 totals \$10,693.90. This is the principle amount which was owed and payable commencing June 10, 2015, for the following 35 weeks. I assess a penalty of \$5,346.95; or 50 percent of the principle amount owed during that time period.

The claimant's remaining penalty theories are hereby rejected.

ORDER

THEREFORE IT IS ORDERED:

Defendants shall pay the claimant one hundred and twenty-five (125) weeks of permanent partial disability benefits at the rate of three hundred five and 54/100 (\$305.54) per week from June 10, 2014.

Defendants shall pay accrued weekly benefits in a lump sum.

Defendants shall pay interest on unpaid weekly benefits awarded herein as set forth in Iowa Code section 85.30.

Defendants shall be given credit for the weeks previously paid.


Defendants shall pay a penalty in the amount of five thousand three hundred forty-six and 95/100 dollars (\$5,346.95).

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

Defendants shall pay medical mileage for all authorized medical appointments if not already paid.

Costs are taxed to defendants.

Signed and filed this 15th day of November, 2016.


JOSEPH L. WALSH
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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Right to Appeal: This decision shall become final unless you or another interested party appeals within 20 days from the date above, pursuant to rule 876-4.27 (17A, 86) of the Iowa Administrative Code. The notice of appeal must be in writing and received by the commissioner's office within 20 days from the date of the decision. The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday. The notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 1000 E. Grand Avenue, Des Moines, Iowa 50319-0209.