BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

ROBERTA MARRS, Claimant, vs. REGIONAL CARE HOSPITAL PARTNERS, INC., Employer, and AMERICAN ZURICH INSURANCE COMPANY, Insurance Carrier, Defendants.	:	File No. 5052161 ARBITRATION DECISION Head Note No.: 1800

FILED
JUN 14 2017
WORKERS' COMPENSATION

STATEMENT OF THE CASE

Claimant, Roberta Marrs, has filed a petition in arbitration and seeks worker's compensation benefits from Regional Care Hospital Partners, Inc., employer, and American Zurich Insurance Company, insurance carrier, defendants.

Deputy workers' compensation commissioner, Stan McElderry, heard this matter in Des Moines, Iowa.

ISSUES

The parties have submitted the following issues for determination:

1. If the injury arising out of and in the course of employment on or about July 28, 2014 caused permanent disability;
2. Running Award;
3. Gross Earnings;
4. Medical benefits; and
5. Penalty.

The parties filed a hearing report at the commencement of the arbitration hearing. On the hearing report, the parties entered into various stipulations. All of those stipulations were accepted and are hereby incorporated into this arbitration decision and no factual or legal issues relative to the parties' stipulations will be raised or discussed in this decision. The parties are now bound by their stipulations.

FINDINGS OF FACT

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

The claimant was 44 years old at the time of hearing. At all times relevant to this preceding she was a nurse. Prior to July 28, 2014 she had no problems with her neck or thoracic areas.

On or about July 18, 2014 the claimant suffered a stipulated injury arising out of and in the course of her employment when she attempted to catch a very heavy patient who was falling. She reported neck and back pain to the ER. (Exhibit 1, page 1) She was also concerned for her lower back since she had had surgery to the lower back in 2002. Over time the low back problems from the July 18, 2014 injury returned to baseline. The neck and thoracic problems did not.

The claimant was never able to return to her regular nursing duties with the hospital, but did perform some light duty office work. She was taken off work on October 30, 2014 following trigger point injections to the neck and thoracic area. She was released to light duty November 17, 2014 but was never offered a return to work by the employer. The defendants also stopped paying medical bills and ceased temporary benefits without any notice other than the fact that benefit checks stopped and bills were not paid. Benefits were not paid after October 21, 2014.

On April 13, 2015, Chad Abernathey, M.D., provided an opinion of C6-7 degenerative changes with a maximum medical improvement (MMI) date of January 28, 2014. (Ex. 6, p. 115) The MMI date is pre-injury and thus probably a typo. It is also an expression of how little weight this sloppy paid for opinion is entitled to. Particularly since Dr. Abernathey noted that surgery was a possibility for the condition, which even if pre-existing was lit-up by the July 28, 2014 injury.

The unrebutted evidence is that the claimant was told by multiple physicians that thoracic pain as she has is an indicator of neck injury. Todd Harbach, M.D., retained by the defense, agrees. (Ex. 9, p. 143) The claimant suffered an injury to the thoracic and cervical areas on July 28, 2014 for which she is not at MMI as the surgery and treatment to get her to MMI have not been provided. The claimant also has unpaid medical expenses detailed in exhibits 12-15. Those expenses were reasonable and necessary for treatment of the work injury.

There is also a dispute as to gross earnings. The defendants want to include the two week period ending June 28, 2014 where the claimant worked 54.75 hours in the rate calculation. Claimant wants it excluded as unrepresentative. During those two weeks, the claimant took some time off for a daughter's wedding, and therefore worked and was able to work for fewer hours than she regularly did. On the date of injury, the claimant had gross weekly earnings was married, and entitled to three exemptions. Excluding that two weeks would give claimant average weekly wages of $854.27 for a benefit rate of $559.49. Including those two weeks would give claimant average weekly wages of $806.84 for a benefit rate of $532.58. The two weeks should be excluded as vacation is not part of a normal week of earnings.

REASONING AND CONCLUSIONS OF LAW

Healing period/running award.

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).

Healing period compensation describes temporary workers' compensation weekly benefits that precede an allowance of permanent partial disability benefits. Ellingson v. Fleetguard, Inc., 599 N.W.2d 440 (Iowa 1999). Section 85.34(1) provides that healing period benefits are payable to an injured worker who has suffered permanent partial disability until the first to occur of three events. These are: (1) the worker has returned to work; (2) the worker medically is capable of returning to substantially similar employment; or (3) the worker has achieved maximum medical recovery. Maximum medical recovery is achieved when healing is complete and the extent of permanent disability can be determined. Armstrong Tire & Rubber Co. v. Kubli, Iowa App., 312 N.W.2d 60 (1981). Neither maintenance medical care nor an employee's continuing to have pain or other symptoms necessarily prolongs the healing period.

Claimant is currently unable to return to substantially similar work, she has not been returned to work by the employer, and she is not at MMI. Claimant is entitled to be awarded a running award of healing period benefits at this time commencing October 22, 2014.

Medical

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).

The claimant has unpaid medical bills detailed in exhibits 12-15. Those medical bills are for medical treatment and expenses necessary for the treatment of the work injury. Those bills are the responsibility of the defendants.

Penalty

The issues to be resolved are whether claimant is entitled to penalty benefits under Iowa Code section 86.13 and, if so, how much.

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."
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> 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).

In Schadendorf v. Snap-on Tools Corp., 757 N.W.2d 330, 335 (Iowa 2008) the court held that the delay in paying the award did allow the imposition of a penalty after the defendant no longer had a reasonable excuse for non-payment. The court in Schadendorf affirmed an award of penalty when the defendants did not reasonable pay benefits after an award of benefits.

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.

Even if the defendants relied on the opinion of Dr. Abernathey, approximately three months of benefits are unpaid without reasonable cause or excuse. Also no notice of termination of benefits was sent, so no Auxier notice. And no reasonable person would use the after the fact opinion of Dr. Abernathey to deny this claim. It is poorly written, contradictory, and even the MMI date is listed as PRIOR to the injury. Benefits unpaid without reasonable cause or excuse exceed $100,000.00. Defendant insurer has a lengthy history of penalties. A penalty of $50,000.00, or in range of the maximum of 50 percent, is most appropriate here.

ORDER

THEREFORE IT IS ORDERED:

That the defendants pay claimant healing period benefits at the weekly rate of five hundred fifty-nine and 49/100 dollars ($559.49) commencing October 22, 2014 and continuing until the claimant has reached the end of her healing period as defined by Iowa Code section 85.34(1).

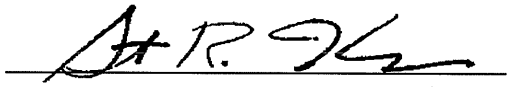
Defendants shall pay a penalty of fifty thousand and no/100 dollars ($50,000.00), all of which is accrued.

Defendant shall pay/reimburse as appropriate those medical expenses as set forth above.

Costs are taxed to the defendants 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 14th day of June, 2017.



STAN MCELDERRY
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

Copies To:

John P. Dougherty
Attorney at Law
4090 Westown Parkway, Ste. E
West Des Moines, IA 50266
Johndougherty3@me.com

Valerie A. Foote
Attorney at Law
1225 Jordan Creek Pkwy, Ste. 108
West Des Moines, IA 50266
vfoote@schedlruplaw.com

SRM/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.