BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

FILED
JUN 30 2016
WORKERS' COMPENSATION

ERIC ZALAZNIK,	File Nos. 5049263, 5049378
Claimant,	ARBITRATION
vs.	DECISION
JOHN DEERE DUBUQUE WORKS,	
Employer, Self-Insured, Defendant.	Head Note Nos.: 1402.20, 1802, 1803, 2402, 2501, 2502, 3003, 4000.2

STATEMENT OF THE CASE

Claimant, Eric Zalaznik, filed petitions in arbitration seeking workers' compensation benefits from John Deere Dubuque Works (Deere), self-insured employer. This case was heard in Des Moines, Iowa on February 10, 2016 with a final submission date of April 4, 2016.

At hearing, defendant was allowed to supplement exhibits to offset any prejudice resulting from claimant's untimely served exhibits (Transcript page 12-13). By e-mail, dated February 16, 2016, defendant submitted additional exhibits M through P, and those exhibits were made apart of the record.

The record in this case consists of claimant's exhibits 1 through 33, defendant's exhibits A, and C through P, and the testimony of claimant, Josh Hogan, Aric Psaros, and Tara Adams.

ISSUES

For File No. 5049263 (date of injury May 21, 2012):

1. Whether claimant sustained a right shoulder injury that arose out of and in the course of employment.

2. Whether claimant's claim is barred by application of Iowa Code section 85.26.

3. Whether the injury resulted in temporary disability.

4. Whether the injury resulted in a permanent disability; and if so

5. The extent of claimant's entitlement to permanent partial disability benefits.

6. The commencement of permanent partial disability benefits.

7. Rate.

8. Whether there is a causal connection between the injury and the claimed medical expenses.

9. Whether claimant is due reimbursement for an independent medical evaluation (IME) under Iowa Code section 85.39.

10. Whether defendant is liable for a penalty under Iowa Code section 86.13.

For File No. 5049378 (date of injury January 17, 2013):

1. Whether claimant sustained a right shoulder injury that arose out of and in the course of employment.

2. Whether claimant's claim is barred by application of Iowa Code section 85.26.

3. Whether the injury resulted in temporary disability.

4. Whether the injury resulted in a permanent disability; and if so

5. The extent of claimant's entitlement to permanent partial disability benefits.

6. The commencement of permanent partial disability benefits.

7. Rate.

8. Whether there is a causal connection between the injury and the claimed medical expenses.

9. Whether claimant is due reimbursement for an independent medical evaluation (IME) under Iowa Code section 85.39.

10. Whether defendant is liable for a penalty under Iowa Code section 86.13.

FINDINGS OF FACT

Claimant was 41 years old at the time of hearing. Claimant graduated from high school. He went to a community college for one semester but did not graduate.

Claimant has worked as a laborer for construction and plumbing companies. Claimant worked at biodiesel plants. Claimant worked as a painter in his own business. Claimant began in April of 2011 with Deere. (Exhibit 11, pages 8-9)

Claimant has worked at a number of different positions with Deere. Claimant began in a resource pool and worked at various jobs filling in for employees who were absent. Claimant also worked in assembly, fabricating and painting. At the time of hearing claimant worked as an inspector at Deere.

While working for Deere, claimant has also had his own painting business. In a taped statement, dated April 9, 2013, claimant indicated he had been painting off and on for ten years. Claimant indicated that, in April of 2013, he had been painting approximately 15 hours a week in 2011 and 2012. (Ex. A, p. 19) Claimant indicated his painting was part time and sporadic based upon the season. (Ex. A, pp. 19-20)

Claimant testified in hearing, he made a mistake in that statement. He said, on reviewing tax records, he probably worked three hours per week in 2011 and about an hour and a half per week in 2012 on painting.

On May 21, 2012 claimant was seen at the Deere Infirmary with complaints of bilateral arm pain. Claimant indicated he had started a new job on May 16, 2012 and noticed symptoms six hours after starting the job. Claimant returned to the infirmary on May 29, 2012 and again indicated pain in both elbows bilaterally. He returned to the infirmary again on June 25, 2012. Claimant had bilateral paresthesia in both hands. (Ex. 1, p. 1)

Claimant testified that in approximately May of 2012 he was putting bolts and lock washers in cabs. He said the job put a strain on both his elbow and shoulders.

Claimant testified in hearing that in mid-July of 2012 he knew his job at Deere was hurting his right shoulder. (Transcript pp. 134-135)

Claimant said that on or about November 22, 2012 he reported a right shoulder injury to his supervisor.

On January 4, 2013 claimant was seen in the infirmary for bilateral shoulder and elbow pain. (Ex. 1, p. 7) On January 17, 2013 claimant was seen by David Field, M.D. for pain, and was given an injection in both elbows and the right shoulder. (Ex. 1, p. 7)

On January 31, 2013 claimant received cortisone shots from Dr. Field. (Ex. 1, p. 2)

On March 1, 2013 claimant was evaluated at the Deere Infirmary for right shoulder pain. Claimant indicated right shoulder pain since October of 2012. (Ex. 1, p. 9)

On March 7, 2013 claimant underwent an MRI of the right shoulder. It showed degenerative wear of the anterior labrum and AC joint arthritis. An impingement was also noted. (Ex. 2, p. 1)

In a March 7, 2013 injury investigation report, claimant indicated right shoulder pain that began in October of 2012 or November of 2012. (Ex. C, p. 41)

On March 27, 2013 claimant was seen at the Deere Infirmary with complaints of right shoulder pain after spraying. Claimant was restricted by Dr. Field with no work above shoulder level. (Ex. 1, p. 9)

In an April 23, 2013 letter Dr. Field indicated he believed claimant's private painting business had some bearing on his shoulder condition. He opined claimant's work at Deere and his personal painting business had bearing on the potential course of claimant's shoulder. Dr. Field could not say if claimant's work at Deere was the primary source of claimant's shoulder problem. (Ex. A, pp. 34-35)

On May 20, 2013 claimant returned to Dr. Field with continued complaints of bilateral elbow pain. Claimant was given injections. He was returned to work with no overhead work. Dr. Field noted claimant's shoulder condition was found not to be work related. (Ex. 2, pp. 4-5)

On October 24, 2013 claimant underwent a modified Nirschl procedure on the left elbow. Surgery was performed by Dr. Field. A Nirschl procedure is used to treat chronic inflammation of an elbow. It involves excision of a segment of the tendon of the extensor carpi radialis. (Ex. 2, pp. 7-8)

On January 10, 2014 claimant underwent a modified Nirschl procedure on the right elbow. Surgery was performed by Dr. Field. (Ex. 2, p. 14)

On April 9, 2014 Lawrence Hutchison, M.D. opined claimant's work at Deere contributed to or caused claimant's shoulder condition on the right. Dr. Hutchison is claimant's family doctor. (Ex. 4, p. 3)

On April 29, 2014 claimant was evaluated by David Tearse, M.D. Claimant indicated he was on a painting job at work, in August of 2012, and in October of 2012 noticed his shoulder was aching and tired. Claimant was assessed as having right shoulder arthrosis with impingement. Physical therapy was prescribed. (Ex. F, p. 64) In May of 2014 Dr. Tearse gave claimant a cortisone injection in the right shoulder. (Ex. F, p. 66)

On June 11, 2014 claimant was evaluated at the University of Iowa Hospitals and Clinics (UIHC) by Apurva Shah, M.D. Claimant had problems with his left elbow and numbness in the fingers of the left hand. MRI of the left elbow was recommended along with nerve conduction studies. Nerve conduction studies and EMGs were consistent with a left ulnar neuropathy. (Ex. 6, pp. 1-10)

On July 31, 2014 claimant underwent an ulnar nerve decompression on the left. Surgery was performed by Dr. Shah. (Ex. 6, p. 16)

Claimant was evaluated by Dr. Tearse on August 11, 2014. Surgery for the right shoulder was discussed and chosen as a treatment option. (Ex. 5, p. 8) On the same day claimant was returned to work on light duty with no repetitive pushing and pulling more than five pounds. (Ex. 6, p. 18)

On October 17, 2014 claimant filed a petition with this agency for a May 21, 2012 date of injury to the right shoulder.

In a November 3, 2014 letter Dr. Field found claimant had a 13 percent permanent impairment to the left upper extremity. (Ex. A, pp. 36-37)

On November 6, 2014 claimant filed a second petition regarding a January 17, 2013 date of injury.

In a November 25, 2014 letter Dr. Hutchison opined the most likely source of claimant's shoulder condition was his work at Deere and not his personal painting business. (Ex. 4, p. 10)

In a January 30, 2015 letter Dr. Field found claimant had a 3 percent permanent impairment to the right upper extremity for his work injury at Deere. (Ex. A, p. 38)

On May 27, 2015 claimant underwent a right shoulder surgery consisting of a coracoacromial ligament release and an excision of the distal clavicle. Surgery was performed by Dr. Tearse. (Ex. A, pp. 68-70)

In a September 29, 2015 letter Dr. Tearse found claimant had a 14 percent permanent impairment in the right upper extremity converting to an 8 percent permanent impairment to the body as a whole. He limited claimant to avoid overhead reaching and lifting and no lifting away from the body over 20 pounds. He found claimant was at maximum medical improvement (MMI) for the shoulder on August 13, 2015. (Ex. F, p. 71)

In an October 28, 2015 letter Richard Kreiter, M.D., gave his opinions of claimant's condition following an IME. He found claimant's right shoulder was caused or aggravated by his work at Deere. He opined claimant had a 21 percent permanent impairment to the right shoulder converting to a 13 percent permanent impairment to the body as a whole. He also found claimant had 20 percent permanent impairment to the left upper extremity. (Ex. 7, pp. 6-9)

In a December 29, 2015 report Thomas Magner, CRC, gave his opinions of claimant's vocational opportunities. Mr. Magner opined if claimant left his job at Deere, he would have a difficult time finding a job within his restrictions. He opined claimant would earn half as much as he was earning at Deere if he ever left the plant. (Ex. H)

Josh Hogan testified he is employed at John Deere and has worked with claimant. Mr. Hogan testified that CIPP stands for continuous improvement payment plan. It is an incentive plan for employees at Deere who are on a CIPP team. A CIPP team needs to meet 115 percent of a production goal in order to qualify for CIPP pay. He testified if a work group does not meet periodic goals, they will not receive CIPP pay.

Mr. Hogan testified there is no guarantee an employee will get CIPP pay. He said at the time of hearing, claimant was an inspector and was not receiving CIPP pay. He said most employees at Deere who are on a CIPP team receive CIPP pay.

Aric Psaros testified he has worked at Deere for 11 years. Mr. Psaros is an inspector. He said when he was on a CIPP work group he never had a negative CIPP bonus.

Tara Adams is claimant's fiancée. She said she knew claimant had a right shoulder injury at approximately August 2012. She said claimant was throwing a football and stopped due to right shoulder pain. She said claimant did not tell her, at that time, how he injured his right shoulder.

Ms. Adams says claimant's right shoulder and elbow injuries limit his ability to fold laundry, mow, and remove snow. She said she and claimant recently moved into a new home. She said because of claimant's limitations, they had to hire somebody to install ceiling fans and shelves in their new home.

Claimant testified he has difficulty reaching out and working over shoulder level based on his shoulder condition. He said he did not believe he could do any of his prior jobs at Deere given his limitations in his right shoulder. He said he has difficulty lifting anything above shoulder level. He said he has a little right shoulder pain, but still has limitations in range of motion.

Claimant testified he believed his elbow condition lead to his shoulder problem. He said compensating for his right elbow affected his right shoulder.

Claimant testified his earnings have increased since 2012.

The parties agree the following weeks and hours should be used to calculate claimant's average weekly wage (AWW):

	WEEK ENDING	HOURS
1	5/13/2012	50
2	4/29/2012	50
3	4/22/2012	41
4	4/15/2012	65

5	4/8/2012	43
6	4/1/2012	48
7	3/25/2012	40
8	3/11/2012	40
9	3/4/2012	40
10	2/25/2012	40
11	2/19/2012	40
12	2/5/2012	57
13	1/29/2012	46

(Exs. 26 and I)

The parties appear to agree that weekly CIPP payments should be used to determine claimant's AWW. (Defendant's post-hearing brief pp. 18-19; claimant's post-hearing brief pp. 33-35) A semester bonus for CIPP payments is also paid out every six months to employees in CIPP plans. (Tr. 25-28) Defendant contends the CIPP semester bonuses, those paid every six months, should not be used to calculate claimant's AWW, as they are irregular bonuses. (Ex. P; defendant's post-hearing brief pp. 18-19) Claimant contends the semester bonuses should be used to calculate claimant's AWW. (Claimant's post-hearing brief pp. 33-35)

CONCLUSIONS OF LAW

The first issue to be determined is if claimant had a right shoulder injury that arose out of and in the course of employment. Defendant has stipulated claimant's bilateral elbow injury arose out of and in the course of employment. Defendant disputes that claimant's right shoulder injury arose out of and in the course of employment.

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 R. App. P. 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 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).

Claimant's unrebutted testimony was he believed he began to feel right shoulder pain initially when installing lock washers on cabs. Claimant credibly testified his elbow and shoulder were at awkward angles when installing lock washers. Claimant had worked for Deere since 2011. The record indicates it was not until March of 2012, when claimant began working as an assembler, and later as a painter, that he began to experience bilateral elbow pain and later right shoulder pain. (Ex. 1, pp. 1-9; Ex. 22)

Defendant suggests claimant's right shoulder pain may be the result of claimant's painting job outside of work. There is little in the record to support this position. The record indicates claimant painted off and on for approximately ten years. There is no evidence claimant had any shoulder injury caused by his painting business.

Four experts have opined regarding the cause of claimant's shoulder condition. Dr. Hutchison is claimant's family physician. Dr. Hutchinson opined claimant's job at Deere was the cause of his symptoms and not his personal painting business. (Ex. 4, pp. 3, 10)

Dr. Tearse treated claimant for his right shoulder condition for an extended period of time and performed surgery on claimant's shoulder. As a practical matter, Dr. Tearse has a far better familiarity with claimant's medical presentation, concerning the right shoulder, than does any other expert. Dr. Tearse opined claimant's right shoulder injury was substantially caused by his work at Deere. (Ex. F, p. 67)

Dr. Kreiter saw claimant one time for an IME. He also found claimant's work at Deere caused or materially aggravated his right shoulder problems. (Ex. 7, p. 7)

Dr. Field treated claimant for an extended period of time for claimant's bilateral elbow injuries. Dr. Field indicated he could not say claimant's work at Deere was the primary cause of his right shoulder condition, given claimant's personal painting business. As noted above, claimant has worked in his painting business for approximately ten years. There is little evidence in the record claimant's painting business caused or materially aggravated his right shoulder condition. For this reason, the opinions of Dr. Field regarding causation of the right shoulder injury, are found not convincing.

Claimant credibly testified that after being moved to an assembly, and later painting job, he began having right shoulder pain. This testimony is collaborated by records from the Deere Medical Infirmary. Three experts have opined claimant's right shoulder condition was caused by his work at Deere. Only Dr. Field has opined he could not say claimant's work at Deere was a primary cause of his right shoulder condition. As noted, Dr. Field's testimony on causation of the right shoulder is found not convincing. Given this record, claimant has carried his burden of proof his right shoulder injury arose out of and in the course of his employment at Deere.

The next issue is if claimant's claim for benefits is barred by application of Iowa Code section 85.26.

Iowa Code section 85.26(1) requires an employee to bring an original proceeding for benefits within two years from the date of the occurrence of the injury if the employer has paid the employee no weekly indemnity benefits for the claimed injury. If the employer has paid the employee weekly benefits on account of the claimed injury, however, the employee must bring an original proceeding within three years from the date of last payment of weekly compensation benefits.

Failure to timely commence an action under the limitation statute is an affirmative defense which defendant must prove by a preponderance of the evidence. Delong v. Highway Commission, 229 Iowa 700, 295 N.W.91 (1940); Venenga v. John Deere Component Works, 498 N.W.2d 422 (Iowa App. 1993).

When the injury develops gradually over time, the cumulative injury rule applies. The date of injury for cumulative injury purposes is the date on which the disability manifests. Manifestation is best characterized as that date on which both the fact of injury and the causal relationship of the injury to the claimant's employment would be

plainly apparent to a reasonable person. The date of manifestation inherently is a fact based determination. The fact-finder is entitled to substantial latitude in making this determination and may consider a variety of factors, none of which is necessarily dispositive in establishing a manifestation date. Among others, the factors may include missing work when the condition prevents performing the job, or receiving significant medical care for the condition. For time limitation purposes, the discovery rule then becomes pertinent so the statute of limitations does not begin to run until the employee, as a reasonable person, knows or should know, that the cumulative injury condition is serious enough to have a permanent, adverse impact on his or her employment. Herrera v. IBP, Inc., 633 N.W.2d 284 (Iowa 2001); Oscar Mayer Foods Corp. v. Tasler, 483 N.W.2d 824 (Iowa 1992); McKeever Custom Cabinets v. Smith, 379 N.W. 2d 368 (Iowa 1985).

An original proceeding for benefits must be commenced within two years from the date of the occurrence of the injury for which benefits are claimed or within three years from the date of the last payment of weekly compensation benefits if benefits have been paid under Iowa Code section 86.13. Iowa Code section 85.26(1) Under the rule, the time during which a proceeding may be commenced does not begin to run until the claimant, as a reasonable person, should recognize the nature, seriousness and probable compensable character of the condition. Failure to timely commence an action under the limitations statute is an affirmative defense, which defendants must prove by a preponderance of the evidence. Venenga v. John Deere Component Works, 498 N.W.2d 422 (Iowa App. 1993).

In Herrera v. IBP, Inc., 633 N.W.2d 284 (Iowa 2001), the Iowa Supreme Court held that by virtue of the discovery rule, the statute of limitations will not run until an employee also knows the physical condition is serious enough to have a permanent adverse impact on his employment or employability. The Court rejected a finding that the claimant, as a reasonable person, should have been aware of the seriousness of her condition when she had pain, sought medical treatment and was placed on light duty and into work hardening. See also Larson Mfg. Co. v. Thorson, 763 N.W.2d 842, 854–55 (Iowa 2009); Midwest Ambulance Serv. v. Ruud, 754 N.W.2d 860, 865 (Iowa 2008).

As noted, defendant has accepted liability for a May 21, 2012 injury to claimant's bilateral elbows.

Claimant alleges, regarding File No. 5049263, a May 21, 2012 injury to the right shoulder. Defendant has not paid any benefits to claimant for the alleged right shoulder injury. Claimant contends his right shoulder injury is a sequela to the right elbow injury. No expert has opined claimant's right shoulder injury is a sequela to the right elbow injury. Claimant filed his claim for a right shoulder injury, occurring on May 21, 2012 on October 17, 2014. No benefits were paid for a right shoulder injury. Given this record, claimant's right shoulder injury for the alleged date of May 21, 2012 is barred by application of Iowa Code section 85.26.

As claimant's alleged right shoulder injury is barred by application of Iowa Code section 85.26 regarding a date of injury of May 21, 2012, all other issues related to the right shoulder injury, for File No. 5049263, are moot.

Regarding File No. 5049378 (date of injury January 17, 2013), the record indicates claimant knew he had a right shoulder injury sometime in the summer of 2012. Claimant also knew it was caused by his work at Deere. However, there is no evidence claimant knew, in the summer of 2012, the shoulder injury was severe enough to have a permanent adverse impact on his employment. The record suggests claimant first received an injection for the right shoulder injury on or about January 17, 2013. (Ex. 1, p. 7) Given this record, it is found claimant's cumulative right shoulder injury manifested on or about January 17, 2013. Claimant filed his petition alleging the January 17, 2013 right shoulder injury on or about November 6, 2014. Claimant's petition for a January 17, 2013 right shoulder injury, File No. 5049378, is not barred by application of Iowa Code section 85.26.

The next issue to be determined is the extent of claimant's entitlement to temporary disability benefits.

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 (Iowa 1981). Neither maintenance medical care nor an employee's continuing to have pain or other symptoms necessarily prolongs the healing period.

The record indicates claimant was off for his right shoulder from May 17, 2015 through September 13, 2015. (Ex. L, p. 126; Hearing report) Given this record, claimant is due temporary benefits from May 17, 2015 through September 13, 2015 at the stipulated rate of $509.20 per week.

The next issue to be determined is if claimant's right shoulder injury resulted in a permanent disability.

Claimant received surgery for his right shoulder. Both Dr. Tearse and Dr. Kreiter opined claimant has a permanent disability to his right shoulder. There is no contrary opinion. Claimant was given restrictions regarding his right shoulder. Given this record, claimant has carried his burden of proof he has a permanent disability to his right shoulder.

The next issue to be determined is the extent of claimant's entitlement to permanent partial disability benefits.

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. 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.

Claimant was 41 years old at the time of hearing. He graduated from high school. Claimant has worked as a laborer and in biodiesel plants. Claimant has also worked in his own painting business.

Claimant had injuries and surgeries to both his left and right elbows. Dr. Field, who performed both surgeries, found claimant had a 13 percent permanent impairment to the right upper extremity and a 3 percent permanent impairment to the left upper extremity. (Ex. A, pp. 36, 38)

Claimant also underwent a right shoulder surgery by Dr. Tearse. Dr. Tearse, who treated claimant for an extended period of time and performed the surgery, believed claimant had an 8 percent permanent impairment to the body as a whole as a result of the shoulder injury. (Ex. F, p. 31) Dr. Kreiter saw claimant on one occasion for an IME. He found claimant had a 13 percent permanent impairment to the body as a whole in regards to his shoulder injury. (Ex. 7, pp. 6-8)

The opinions of treating doctors are not to be given greater weight as a matter of law. Gilleland v. Armstrong Rubber Co., 524 N.W.2d 404, 408 (Iowa 1994). However, as a factual matter, Dr. Tearse has a far greater familiarity with claimant's history, medical presentation, and condition than does Dr. Kreiter. Based on this, it is found the opinions of Dr. Tearse regarding the extent of claimant's permanent impairment are more convincing than that of Dr. Kreiter.

Claimant has restrictions that limit him in lifting overhead and away from his body. (Ex. F, p. 71)

At the time of hearing claimant was still working for Deere as an inspector. Claimant's income for Deere has increased from approximately $48,000.00 in 2012 to approximately $52,000.00 in 2015. Claimant did not work a number of weeks in 2015 due to time off for his shoulder surgery. (Ex. 10, p. 1)

Mr. Magner opined claimant would have a difficult time finding employment within his restrictions if he left the Deere plant. (Ex. 8)

Claimant has a 13 percent permanent impairment to the right upper extremity and a 3 percent permanent impairment to the left upper extremity. He also has an 8 percent permanent impairment to the body as a whole for his shoulder injury. Claimant is still employed at Deere, and his yearly earnings have increased. Claimant has restrictions that limit his ability to lift overhead and away from his body. When all relevant factors are considered, it is found claimant has a 20 percent industrial disability or loss of earning capacity as a result of the January 17, 2013 date of injury to the right shoulder and the accepted injury bilaterally to the elbows.

As healing period benefits are found to have stopped as of September 13, 2015, claimant's permanent partial disability benefits shall commence on September 14, 2015.

As noted above, claimant's claim for the May 21, 2012 date of injury (File No. 5049263) is found barred by application of Iowa Code section 85.26. As a result the dispute in that case regarding rate as it relates to the right shoulder is moot. The parties have stipulated claimant's rate for the January 17, 2013 date of injury (File No. 5049378) is $509.20 per week.

Regarding claimant's rate, as it relates to the bilateral elbow injury, as noted in the Findings of Fact, the parties appear to agree that weekly CIPP payments should be used to determine claimant's AWW. (Defendant's post-hearing brief pp. 18-19; claimant's post-hearing brief pp. 33-35) A semester bonus for CIPP payments is also paid out every six months to employees in CIPP plans. (Tr. 25-28) Defendant contends the CIPP semester bonuses, those paid every six months, should not be used to calculate claimant's AWW, as they are irregular bonuses. (Ex. P; defendant's post-hearing brief pp. 18-19) Claimant contends the semester bonuses should be used to calculate claimant's AWW. (Claimant's post-hearing brief pp. 33-35)

Exhibit 27 is an exhibit prepared by Mr. Hogan. At the time of hearing, Mr. Hogan was the chief shop committee person for the Union claimant belongs to at Deere. Mr. Hogan testified, he routinely calculates CIPP payments in addition to calculating base pay for union workers at Deere. (Tr. 16-27)

Mr. Hogan testified Exhibit 27 shows claimant's AWW factoring in weekly CIPP payments and semester CIPP payments. (Tr.20-27) Claimant contends claimant's

actual AWW is $24.94, for weeks 1 through 6, and $23.14 for weeks 7 through 13. (Ex. 26 and 27)

Exhibit 31 is a wage document for claimant from Deere. I am able to tell, from Exhibit 31, how the parties arrive at the weeks and hours to be used to determine claimant's AWW. I am unable to understand, using figures from Exhibit 31 how claimant and Mr. Hogan arrived at figures for AWW found in Exhibit 27. There is little evidence in the record to explain how the column, found in Exhibit 27 titled "Base Adjustment Allowance" is found in Exhibit 31 and is used to calculate claimant's AWW. Mr. Hogan testified CIPP semester bonuses are paid out every six months. (Tr. 27) These is no evidence in the record that the CIPP semester bonus found in Exhibit 27, was paid out during the 13 weeks between January 29, 2012 and May 13, 2012.

Given these discrepancies, claimant has failed to carry his burden of proof that the AWW, shown in Exhibits 26 and 27, is the applicable AWW for the bilateral elbow injury.

Both parties agree the AWW shown in defendant's Exhibit I reflect weekly CIPP payments made to claimant. (Defendant's post-hearing brief pp. 18-19; claimant's post hearing brief pp. 33-35) Given this record, it is found the AWW shown in Exhibit I is the correct AWW for the bilateral elbow injury.

Claimant's AWW was $922.88 per week. Claimant was single with three exemptions. Claimant's correct rate is $591.05.

Dr. Field found claimant had a 13 percent permanent impairment to the left upper extremity. He found claimant had a 3 percent permanent impairment to the right upper extremity. (Ex. A, pp. 36-38) A 13 percent upper extremity impairment converts to an 8 percent body as a whole impairment. A 3 percent upper extremity impairment converts to a 2 percent impairment to the body as a whole. (Guides p. 435)

Based on the conversion table found in the Guides, claimant is due 50 weeks of permanent partial disability benefits at the rate of $591.05 for bilateral arm injury, under Iowa Code section 85.34(2)(s).

The next issue to be determined is whether there is a causal connection between the injury and the claimed 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-Reopening October 1975).

As detailed above, claimant has carried his burden of proof his shoulder injury is causally connected to his work injury. As a result, defendant is liable for all medical costs associated with the shoulder injury.

The next issue to be determined is if defendant is liable for reimbursement of an IME.

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). Claimant need not ultimately prove the injury arose out of and in the course of employment to qualify for reimbursement under section 85.39. See Dodd v. Fleetguard, Inc., 759 N.W.2d 133, 140 (Iowa App. 2008).

Dr. Field's opinion regarding an impairment to the right shoulder was issued on May 20, 2013. (Ex. 2, pp. 4-5) Dr. Tearse, the employee-retained physician, issued an IME opinion of September 29, 2015. Given this chronology, defendant is liable for costs associated with Dr. Tearse's IME expenses.

The final issue to be determined is if defendant is liable for a penalty under Iowa Code section 86.13.

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).

Claimant contends defendant is liable for a penalty for two reasons. First, claimant contends defendant is liable for penalty due to an underpayment of rate. (Claimant's post-hearing brief, pp. 36-38) As noted, it is found claimant's date of injury is January 17, 2013. As the parties have agreed claimant's rate for a January 17, 2013 date of injury is $509.20, penalty is not appropriate for an alleged underpayment of rate. Penalty is also not appropriate as claimant failed to carry his burden of proof CIPP semester payments should be used to calculate rate.

Second, claimant contends defendant is liable for penalty for failure to pay benefits for claimant's right shoulder injury. Although this issue was not briefed in any detail in claimant's brief, it is mentioned in claimant's post-hearing brief. (Claimant's post-hearing brief, p. 18)

As indicated in the finding of facts, Dr. Field, the treating physician for claimant regarding his right and left elbow injuries, opines claimant's shoulder injury is not work related. Dr. Field's opinions are based, in part, on claimant's painting business conducted outside of work with Deere.

Although it is found claimant's right shoulder injury arose out of and in the course of his employment with Deere, Dr. Field's opinions regarding causation are not unreasonable given claimant's painting business outside of work with Deere. Defendant's reliance on Dr. Field's causation opinions, denying liability for the right shoulder injury, is also not unreasonable. For this reason, a penalty is not appropriate for defendant not accepting liability and paying benefits for claimant's right shoulder injury.

ORDER

THEREFORE IT IS ORDERED:

Regarding File No. 5049263 (date of injury May 21, 2012):

That defendant shall pay claimant fifty (50) weeks of permanent partial disability benefits for claimant's bilateral elbow injury at the rate of five hundred ninety-one and 05/100 dollars ($591.05) per week commencing on January 30, 2015.

That defendant shall pay accrued weekly benefits in a lump sum.

That defendant shall pay interest on unpaid weekly benefits as ordered above and as set forth in Iowa Code section 85.30.

That defendant shall receive a credit for benefits previously paid.

Regarding File No. 5049378 (date of injury January 17, 2013):

That defendant shall pay claimant healing period benefits from May 17, 2015 through September 13, 2015 at the rate of five hundred nine and 20/100 dollars ($509.20) per week.

That defendant shall pay claimant one hundred (100) weeks of permanent partial disability benefits commencing on September 14, 2015 at the rate of five hundred nine and 20/100 dollars ($509.20) per week.

That defendant shall pay accrued weekly benefits in a lump sum.

That defendant shall pay interest on unpaid weekly benefits as ordered above and as set forth in Iowa Code section 85.30.

That defendant shall receive a credit for benefits previously paid.

That defendant shall reimburse claimant for costs associated with Dr. Tearse's IME.

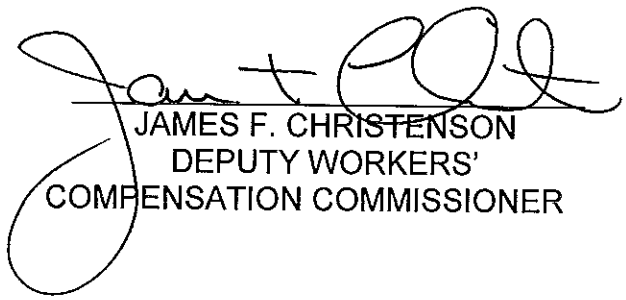
That defendant shall pay all medical costs associated with the treatment of claimant's right shoulder, including medical mileage.

Regarding both files:

That defendant shall pay the costs of this matter.

That defendant shall file subsequent reports of injury as required by this agency under rule 876 IAC 3.1(2).

Signed and filed this 30th day of June, 2016.



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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.