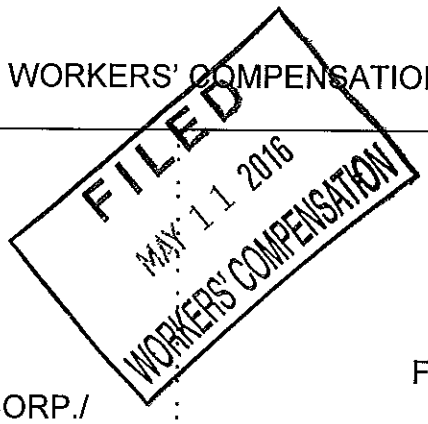
BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER



CASEY R. GRAY,

Claimant,

vs.

ELECTRO MANAGEMENT CORP./
ELECTRIC POWER PRODUCTS, INC.
a/k/a BAKER ELECTRIC, INC.,

Employer,

and

EMC RISK SERVICES,

Insurance Carrier,
Defendants.

File No. 5051688

A R B I T R A T I O N

D E C I S I O N

Head Note Nos.: 1402.20, 1402.30
2502, 2907

STATEMENT OF THE CASE

Casey Gray, claimant, filed a petition for arbitration against defendants, Electro Management Corp./Electric Power Products, Inc. a/k/a Baker Electric, Inc. (hereinafter referred to as "EP2"), as the employer, and EMC Risk Services, as the insurance carrier. An in-person hearing occurred on February 4, 2016 in Des Moines, Iowa. The evidentiary record includes claimant's exhibits 1 through 37 and defendants' exhibits A through X. Claimant testified on his own behalf and called Dirk Vondell Jordan to testify. Defendants called Jerry Rhone, the employer's building department foreman, to testify.

The evidentiary record closed on February 4, 2016, at the end of the live hearing. However, counsel for the parties requested the opportunity to file post-hearing briefs. The parties were given until March 9, 2016 to serve their post-hearing briefs, at which time the case was considered fully submitted to the undersigned.

ISSUES

The parties entered into numerous stipulations on the hearing report submitted at the time of hearing. Those stipulations were accepted, and no factual or legal issues relative to the parties' stipulations will be discussed.

The parties submitted the following disputed issues for resolution:

1. Whether claimant has proven he sustained a neck injury that arose out of and in the course of his employment on September 19, 2014.

2. Whether defendants have established that claimant failed to give notice to the employer within 90 days such that claimant is precluded from recovery of benefits.

3. Whether claimant is entitled to an award of temporary disability, or healing period benefits, from April 28, 2015 through July 20, 2015.

4. The extent of claimant's entitlement to permanent disability benefits, if any.

5. Whether claimant is entitled to an award of past medical expenses.

6. Whether claimant is entitled to reimbursement of his independent medical evaluation fee pursuant to Iowa Code section 85.39.

7. Whether defendants are entitled to a credit pursuant to Iowa Code section 85.34(7) against any award of permanent disability made in this case.

8. Whether claimant is entitled to an award of penalty benefits for an alleged unreasonable delay or denial of weekly benefits.

9. Whether claimant's costs should be assessed against defendants.

FINDINGS OF FACTS

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

Casey Gray worked for EP2 in the building department. Mr. Gray asserts that he sustained a neck injury as a result of his work duties at EP2 on September 19, 2014.

Claimant testified that he initially reported his injury to Heather Cole, who he believed to be a wiring department supervisor. (Transcript, pages 48-50) Ms. Cole provided an affidavit and deposition testimony that she was not a supervisor at EP2 and that she did not receive notification of the alleged injury from Mr. Gray. (Ex. K; Ex. X, p. 94)

Claimant initially sought medical attention through his personal physician, Donald E. Odens, M.D. Dr. Odens first evaluated claimant on October 2, 2014. At that appointment, Dr. Odens recorded a history in which claimant denied "any history of any pertinent medical conditions." (Ex. 7, p. 1) Dr. Odens also noted that claimant, "cannot

think of any inciting event or injury which caused the pain. He denies any history of trauma." (Ex. 7, p. 1)

Review of claimant's medical records demonstrates that claimant sought medical attention for an injury at work in April 2008. That emergency room record demonstrates claimant complained of neck pain and was diagnosed with a cervical sprain. (Ex. C, pp. 10-11) In fact, neck x-rays were taken at that emergency room visit. (Ex. C, p. 14)

In October 2013, claimant also sought evaluation at the Iowa Lutheran Emergency Room. In that instance, claimant reported neck symptoms after he was assaulted by four men, who kicked him in and about the head and neck areas. He was again diagnosed with neck pain. (Ex. C, pp. 16-19) No explanation is provided for the inconsistency between claimant's report to Dr. Odens about no prior neck symptoms or treatment and his actual medical records.

With respect to Dr. Odens' record pertaining to no inciting event, Mr. Gray testified that he told Dr. Odens he was injured at work but that he initially told Dr. Odens this information "off the record." (Tr. p. 100) Dr. Odens provided a report disputing claimant's testimony in this regard. Specifically, Dr. Odens definitively stated, "I would not falsify documentation" and affirmatively stated that he would have documented claimant's statements about a work related injury if such statements were made. (Ex. B, pp. 4-7)

Claimant provided no convincing reason why Dr. Odens would falsify his medical records. Claimant selected Dr. Odens as his personal and treating physician. There is no evidence in this record and no apparent reason why Dr. Odens would lie about his medical records or his documentation of claimant's history provided at the October 2, 2014 evaluation. I find that Dr. Odens' October 2, 2014 medical record accurately records what claimant provided for a history at that evaluation.

Mr. Gray next sought medical attention at Iowa Lutheran's emergency room on October 4, 2014. The emergency room provider recorded that claimant reported he had "upper back pain that has been going on for a month." (Ex. C, p. 24) The emergency room staff specifically recorded that claimant reported, "No history of trauma." (Ex. C, p. 26)

Claimant contends this history was taken inaccurately. Yet, the emergency room history is very similar to that recorded by Dr. Odens with respect to there being no history of trauma. I find that the emergency room record of October 4, 2014 supports the prior finding that Dr. Odens accurately recorded the history. I similarly find that the October 4, 2014 emergency room record accurately records the history provided by Mr. Gray at that evaluation.

Mr. Gray returned for evaluation by Dr. Odens on October 9, 2014. At that visit, claimant complained that his symptoms were making it difficult for him to perform his job

duties. Dr. Odens provided claimant with work restrictions. (Ex. A, p. 2) Claimant did not immediately turn those restrictions into his employer.

Claimant testified that he reported the alleged injury to his supervisor, Jerry Rhone, within a week of the injury occurring. (Tr., pp. 51-52) Mr. Rhone denied that claimant reported this injury to him within a week of the alleged injury date. (Tr., pp. 220-221) Once claimant actually reported his symptoms and restrictions to the employer, he was sent to the safety director's office to complete an injury report. This did not occur until November 22, 2014. (Tr., p. 53)

Although claimant suggests that the employer did not want to acknowledge his injury, the employer promptly reacted once it received noticed of claimant's work restrictions. The employer did not terminate claimant, as he testified he had been threatened by Mr. Rhone. When comparing claimant's testimony about his reports of injury to Mr. Rhone with the testimony of Mr. Rhone and EP2's actual reaction after it learned of claimant's work restrictions, I find the testimony of Mr. Rhone to be more convincing. I find that claimant did not report his injury to Mr. Rhone within a week of the alleged injury date.

After learning of his work restrictions, EP2 sent claimant to the safety director's office. On November 22, 2014, claimant provided the employer a written statement of how his injury occurred. (Ex. 5) In that written report, Mr. Gray indicated that he was injured the third week of August "maybe." He also reported that the injury occurred at 1 o'clock. (Ex. 5)

Claimant also reported in his November 22, 2014 report that he had never had an injury to the same part of his body. (Ex. 5) As noted above, claimant had sought medical care for neck pain in both 2008 and 2013. Claimant's denial of prior neck symptoms on November 22, 2014 is clearly erroneous or misleading.

Mr. Gray contends that he was working with Dirk Jordan at the time of his injury. Claimant requested that Mr. Jordan provide an affidavit in support of his claim for workers' compensation benefits. Mr. Jordan agreed to provide an affidavit and went to claimant's attorney's office and signed an affidavit.

Interestingly, that affidavit referred to Mr. Jordan as "Dirk Vondell Johnson." (Ex. P, pp. 3-4) Mr. Jordan testified that he read the initial affidavit on March 16, 2015, but did not identify that it used an incorrect name. (Tr., pp. 198-199) Mr. Jordan's initial affidavit stated under oath that he was employed by EP2. (Ex. P, p. 3) In fact, Mr. Jordan was not employed by EP2. Instead, he was employed by a temporary employment service and assigned to work at the EP2 facilities. (Tr., p. 199)

Mr. Jordan's affidavit also asserts that claimant was injured on August 19, 2014. (Ex. P, p. 3) This assertion corresponds to claimant's initial allegations in this contested case proceeding as to his date of injury. However, claimant subsequently amended the alleged injury date. Mr. Jordan's only explanation for this additional error in his affidavit

is that he "was off. I didn't have my dates right." (Tr., p. 200) At trial, Mr. Jordan acknowledged that he was "guessing" in his initial affidavit. (Tr., p. 200)

Mr. Jordan's initial affidavit also asserts that claimant's injury "occurred at approximately 9:30 AM – 10:00 AM, but certainly before our first break of the day which occurred at 10:00 AM." (Ex. P, p. 4) Mr. Jordan's assertion specifically contradicts the assertion by claimant in his initial written report of injury that the injury occurred at 1 o'clock. (Ex. K, p. 12)

Given the errors and inconsistencies in the initial affidavit and Mr. Jordan's trial testimony, it is difficult to believe that Mr. Jordan carefully read and pondered his initial affidavit before signing it. No reasonable explanation was offered as to why Mr. Jordan's initial affidavit erroneously asserted his name, why his employer was named erroneously, or why he stated an incorrect injury date that precisely corresponded with the erroneous initial alleged date of injury in claimant's initial petition.

Mr. Jordan subsequently signed a new affidavit, which corrected his name and stated that claimant injured his neck on September 19, 2014. (Ex. P, p. 12) However, he acknowledged at trial that he does not really know the precise date of claimant's injury. (Tr., pp. 211-212) The "corrected" affidavit signed by Mr. Jordan still erroneously named his employer as EP2. (Ex. P, p. 12)

In some unexplained way and at some unexplained time, the initial affidavit of Mr. Jordan was later revised to correct his name. Mr. Jordan confirmed at trial that he did not see the second version of his affidavit located at Exhibit P, pages 8-9. No other explanation of who, how or why this affidavit was revised has been provided. The undersigned is quite troubled that a notarized document, even if inaccurate, was revised and purported to be accurate despite never being re-signed or even seen by the affiant.

The employer later definitively established claimant's initial report of the date of his injury was inaccurate. Therefore, claimant amended his original notice and petition to assert an injury date on September 19, 2014.

Mr. Jordan testified that he witnessed claimant's injury on September 19, 2014. (Tr., pp. 171, 180) He described the events leading up to claimant's injury as follows:

> Once we're inside trying to set it, Casey is pushing the panel, trying to get it to a place where we need to get it. Casey's got all the weight. I can't take the weight off. If I go around here, ain't nobody to stop it from tilting.
>
> So we hit the ply board. When we hit the ply board, it gives. But Casey grabs it, he holds it, but when it gave, all the weight definitely was on him then. And I comes [sic] around—and I can hear Casey.
>
> ...

> When I heard that, I come around and I grabs [sic] it. Now we've got to lift it back up because it's on the wheel. The wheel is stuck. We've got to lift it back up and set it straight up now.

(Tr., p. 180)

Mr. Jordan's version of events and how the injury occurred is not consistent with the description provided by Mr. Gray. Claimant provides the following explanation of how the injury occurred:

> The panel was probably 600—500, 600 pounds. We got that into the building. We got it into place. There's a panel line-up already there and this is going to go on the end of that line-up. I've got marks on the floor to where it's going to go.
>
> We started to tip it up into place. I've got it clear up like this over my head (indicating). I told Dirk to go around and make sure we're not going to hit the other panel because I'll get in trouble if, you know, we damage the other panel.
>
> So Dirk said, "Don't do it because it's going to hit the other panel," so I couldn't let it forward. I had to let it back down like this (indicating), because I had all the weight of the panel because I was teetering it just on the corner pretty much and the dolly.
>
> And when it came down, all the weight came down, and I had it to this point, and then when it got about halfway, it slammed down all the way and something popped in my neck, sprung it."

(Tr., pp. 46-47)

No believable explanation of these variations was offered in trial testimony or in any of the exhibits. Mr. Gray and Mr. Jordan provide different versions of how the injury allegedly occurred on September 19, 2014. Dr. Odens contradicts claimant's history, as do his contemporaneous medical records. The October 4, 2014 emergency room record contradicts claimant's version of events.

Indeed, there is additional credible evidence in the record that also contradicts claimant and Mr. Jordan's testimony. For instance, the employer introduced credible evidence establishing that the electrical panel unit that claimant alleges was involved in his injury had not been released for installation as of September 19, 2014.

In fact, Jerry Rhone testified that the particular unit claimant alleges he was injured moving was not released to the building department until September 26, 2014. (Tr., p. 242) Heather Cole confirmed that the particular unit claimant alleged injured him had not been released to the building department as of September 19, 2014. (Ex. X, p.

97) In other words, the employer's record documents that the injury could not have occurred as alleged on the alleged September 19, 2014 date of injury.

Other facts within this evidentiary record also lead me to accept the testimony of Mr. Rhone and Ms. Cole over the testimony of either claimant or Mr. Jordan. One piece of additional evidence that causes me to doubt claimant's testimony is his assertion that Dr. Odens told him it would be acceptable for him to drink alcohol while taking medications, including muscle relaxers. (Tr., pp. 70-71) I find that to be very unlikely that a physician would tell a patient it was acceptable to drink alcohol in this circumstance. Dr. Odens' medical record specifically contradicts claimant's assertion in this regard. (Ex. A, p. 7) I find Dr. Odens' medical record to be more convincing and accurate on this issue. Again, I find claimant's testimony not credible.

Having found neither Mr. Gray nor Mr. Jordan credible and having found that the particular panel claimant alleges caused his injury had not yet been released for installation; I find that claimant has not proven that he sustained an injury at EP2 on September 19, 2014.

Similarly, I find the medical evidence in this case does not support the conclusion that claimant sustained an injury that is causally related to his work at EP2 on September 19, 2014. Claimant's neck surgeon, David J. Boarini, M.D., does not support claimant's contention that he sustained a work injury. (Ex. D, pp. 13, 16) Another treating physician, Todd Troll, M.D., also declined to express a causal connection opinion that would causally relate claimant's neck injury to his work activities at EP2 on September 19, 2014. (Ex. E, p. 2) Claimant's personal physician, Dr. Odens, similarly declined to causally connect claimant's neck injury to work activities at EP2. (Ex. 2, p. 3)

In contrast, claimant offered an independent medical evaluation performed by Sunil Bansal, M.D. Dr. Bansal opines:

> He was moving a large panel called an RTU, which weighed about 600 pounds on an electric dolly. Once in place, it is stood up. A co-worker was assisting him. They stood the unit up and teetered it on a corner, because of placement considerations. Mr. Gray began to set his side of the unit down, and felt a pop in his neck. He was reaching overhead at the time with the unit tilted toward him. The unit was approximately 10 feet tall.
>
> In my medical opinion, the mechanism of a very heavy lift with the immediate clinical presentation of a "pop" in the neck is consistent with his C6-C7 extruded disc, and need for a fusion operation.

(Ex. 1, p. 14)

Dr. Bansal continued:

> It is important to note that prior to his injury he was not experiencing problems with his neck, and had been able to perform all of his job duties without any difficulty. Therefore, from both mechanistic and temporal standpoints, his current neck condition is related to his September 19, 2014 injury.

(Ex. 1, p. 14)

Interestingly, Dr. Bansal notes in his prior medical record review the treatment claimant received for his neck in both 2008 and 2013. Yet, he provides no explanation of those records and makes no mention of the inconsistency of claimant's denial of prior neck injury or treatment. It does not appear that Dr. Bansal is aware of the varying versions of events or potential different mechanisms of injury. Either way, having found the claimant's version of his injury to be not credible, I do not find Dr. Bansal's opinion stated in reliance upon that history to be credible.

Therefore, I reject Dr. Bansal's causation opinion and accept the opinions offered by Dr. Boarini, Dr. Troll, and Dr. Odens. I specifically find that claimant failed to prove a medical causal link between his neck injury and his work activities on September 19, 2014.

Claimant submitted numerous past medical expenses and seeks award of those expenses. Review of the submitted medical expenses discloses that they are for treatment of claimant's neck injury. For the reasons outlined above, I find that the medical expenses submitted by claimant have not been proven to be causally related to claimant's work activities at EP2 on September 19, 2014.

Mr. Gray also seeks an award of penalty benefits and alleges defendants' denial of his claimed benefits was unreasonable. Having found that claimant failed to prove his injury claim, I find that defendants had a reasonable basis for denial of benefits. I further find that defendants performed a timely and thorough investigation and that their bases for denial were based upon the actual investigation performed. Finally, I find that defendants contemporaneously conveyed the bases for their denial of benefits to claimant. (Ex. K)

Finally, claimant seeks reimbursement for his independent medical evaluation performed by Dr. Bansal. I find that defendants initially authorized an evaluation with Dr. Boarini to investigate this claim. However, defendants denied liability for this claim and claimant was aware that Dr. Boarini was not an authorized physician at the time that he authored a permanent impairment rating report.

Specifically, I find that claimant's personal physician selected and referred claimant to Dr. Boarini. Although Dr. Boarini issued a permanent impairment rating

before the evaluation with Dr. Bansal, Dr. Boarini was not retained by defendants and was not authorized at the time he issued a permanent impairment rating.

CONCLUSIONS OF LAW

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).

Having found that claimant failed to prove he sustained a neck injury that arose out of and in the course of his employment on September 19, 2014, I conclude that claimant has failed to prove entitlement to weekly benefits, medical benefits, or medical

mileage. Having determined that claimant has not proven he sustained an injury that arose out of and in the course of his employment on September 19, 2014, I conclude that the defendants' notice defense is moot. Therefore, no findings or conclusions are made with respect to the asserted notice defense.

Claimant has also requested reimbursement of his independent medical evaluation with Dr. Bansal pursuant to Iowa Code section 85.39. 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).

In this case, I found that Dr. Boarini was not authorized by defendants at the point in time when he rendered a permanent impairment rating. Dr. Boarini was initially selected by claimant via referral from his personal physician. Defendants authorized an evaluation by Dr. Boarini to investigate this claim, but later denied liability for the claim. Claimant elected to proceed with treatment through Dr. Boarini. Therefore, I conclude that claimant failed to establish that a physician retained by defendants provided an initial permanent impairment evaluation. Having failed to meet this threshold requirement, I conclude that claimant failed to prove entitlement to reimbursement of his independent medical evaluation pursuant to Iowa Code section 85.39. Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839 (Iowa 2015).

Finally, claimant asserts a claim for penalty benefits pursuant to Iowa Code section 86.13, asserting that defendants unreasonably delayed or denied weekly benefits in this case. 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).

Having found that claimant failed to prove entitlement to weekly benefits, there are no weekly benefits upon which a penalty could be assessed. Nevertheless, the record clearly establishes that defendants had reasonable bases for denial, that their bases for denial were the result of a timely and thorough investigation, and that defendants contemporaneously conveyed their bases for denial of claimant's benefit claims. See Iowa Code section 86.13(4)(c). Therefore, I conclude that claimant has not proven entitlement to penalty benefits pursuant to Iowa Code section 86.13.

ORDER

THEREFORE, IT IS ORDERED:

Claimant shall take nothing.

The parties shall bear their own costs.

Signed and filed this 11th day of May, 2016.

WILLIAM H. GRELL
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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WHG/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.