BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

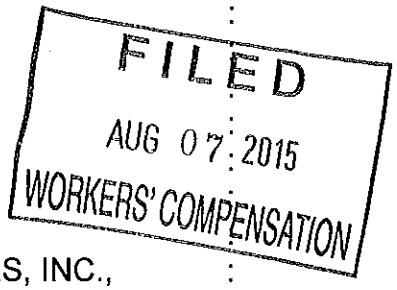
JACK BRANDT,

Claimant,

vs.

LOWE'S HOME CENTERS, INC.,

Employer,
Self-Insured,
Defendants.



File No. 5045361

ARBITRATION

DECISION

Head Note No.: 1803

STATEMENT OF THE CASE

Claimant, Jack Brandt, has filed a petition in arbitration and seeks worker's compensation benefits from, Lowe's Home Centers, Inc., self-insured employer, defendant.

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

ISSUES

The parties have submitted the following issues for determination:

1. The extent of permanent industrial loss from an injury arising out of an in the course of employment on or about July 9, 2012;

2. Whether the claimant is entitled to payment of medical expenses; and

3. Penalty.

FINDINGS OF FACT

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

The claimant was 41 years old at the time of hearing. The claimant did not graduate high school, but has a GED. He was approximately a C level student and has a learning disability diagnosed in childhood. His work history consists of being a welder/truck driver/laborer for a concrete company, wire pulling for an electrical

contractor, and Lowe's as a delivery driver since December 14, 2006. All would be classified as low to perhaps semi-skilled heavy work.

He suffered a stipulated injury arising out of and in the course of his employment with Lowe's on July 9, 2012. On that date he was moving a large freezer weighing perhaps 600 pounds out of a customer's basement when he heard and felt a pop in his back with immediate severe pain. After reporting the injury he went to Allen Occupational Health (AOH) in Waterloo, Iowa for treatment. After a six visit course of treatment Robert Broghammer, M.D., released the claimant back to work without restrictions on August 16, 2012. (Exhibit 4, pages 22-25) This was despite claimant reporting that he had leg pain at 7 on a 10 point scale. Claimant returned to AOH on August 21, 2012 complaining of 6 out of 10 pain. (Ex. 4, pp. 26-29) At this visit, Dr. Steven Olsen recommended a referral to a pain specialist. On September 24, 2012 Arnold E. Delbridge, M.D., board-certified orthopedic surgeon, was authorized to provide care. Dr. Delbridge determined that claimant's condition was not a candidate for surgical intervention and provided prescriptions and a series of injections. (Ex. 6, pp. 6-11) The bill of Dr. Delbridge has still not been paid by defendant. The injections did not provide relief and the claimant ended up hospitalized in December 2012 and January 2013. (Ex. 7) Dr. Delbridge placed the claimant at maximum medical improvement on June 10, 2013 and opined a 6 percent body as a whole impairment (BAW). (Ex. 6, p. 33) On July 9, 2013, Dr. Delbridge imposed permanent restrictions of 20 pound lifting limit, minimal standing time (less than 2 hours per day on feet, and should not bend or twist. (Ex. 6, p. 33)

The claimant attempted to return to work at Lowe's in December of 2012 and March of 2013. Both attempts failed due to pain experienced with the work activities. Lowe's has not offered the claimant work since despite multiple calls by the claimant. After the silent discharge from Lowe's, the claimant worked one week as a cleaner at a movie theatre making $10.00 per hour before quitting due to pain. Lowe's also contacted the theatre to make sure they were aware of claimant's restrictions. Claimant then obtained employment marking underground utilities for approximately $12.00 per hour. Although the job required him to violate his restrictions, he stuck it out for about three to four months before quitting due to pain. He then obtained employment for a co-op making deliveries of propane and diesel. The job violates the claimant's restrictions the claimant has continued the employment.

The claimant was seen by Farid Manshadi, M.D., for an independent medical evaluation. (Ex. 12) Dr. Manshadi's opinions closely mirror those of Dr. Delridge. Dr. Manshadi opined 5-6 percent BAW impairment, lift no more than 10-20 pounds and to avoid repetitious bending, stooping, or twisting at the waist. (Ex. 12, p. 3)

The claimant seeks payment of medical bills which are itemized in an attachment to the hearing report. They are $330.00 for Dr. Gayathry Inamdar, CVS pharmacy $92.00, and Allen Memorial Hospital for $366.25, $1,701.28, $460.00, and $3,359.84. All are reasonable, and necessary for care and treatment of the work injury.

Claimant has physical restrictions and impairment. He only has a GED and has a learning disability. All his work has been heavy and his restrictions preclude a return to his past relevant work history. His large employer did not find him work he could perform post-injury. All employment he could obtain post-injury has violated his restrictions. His physical ability to perform heavy work was his main industrial capacity and it is largely restricted post-injury. Employment post-injury has paid less post-injury; up to one-third less. Considering the claimant's medical impairments, training, permanent restrictions, as well as all other factors of industrial disability, the claimant has suffered a 50 percent loss of earnings capacity.

REASONING AND CONCLUSIONS OF LAW

Permanent disability.

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

The claimant has the burden of proving by a preponderance of the evidence that the alleged injury actually occurred and that it both arose out of and in the course of the employment. Quaker Oats Co. v. Ciha, 552 N.W.2d 143 (Iowa 1996); Miedema v. Dial Corp., 551 N.W.2d 309 (Iowa 1996). The words "arising out of" referred to the cause or source of the injury. The words "in the course of" refer to the time, place, and circumstances of the injury. 2800 Corp. v. Fernandez, 528 N.W.2d 124 (Iowa 1995). An injury arises out of the employment when a causal relationship exists between the injury and the employment. Miedema, 551 N.W.2d 309. The injury must be a rational consequence of a hazard connected with the employment and not merely incidental to the employment. Koehler Elec. v. Wills, 608 N.W.2d 1 (Iowa 2000); Miedema, 551 N.W.2d 309. An injury occurs "in the course of" employment when it happens within a period of employment at a place where the employee reasonably may be when performing employment duties and while the employee is fulfilling those duties or doing an activity incidental to them. Ciha, 552 N.W.2d 143.

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

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

Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963); Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961).

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

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

Based on the finding that the claimant has suffered a 50 percent loss of earning capacity, he has sustained a 50 percent permanent partial industrial disability entitling him to 250 weeks of permanent partial disability pursuant to Iowa Code section 85.34(2)(u).

The claimant also seeks payment of medical expenses.

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

The claimant seeks payment of medical expenses. The claimant seeks payment of medical bills which are itemized in an attachment to the hearing report. They are $330.00 for Dr. Gayathry Inamdar, CVS pharmacy $92.00, and Allen Memorial Hospital for $366.25, $1,701.28, $460.00, and $3,359.84. All are reasonable, and necessary for care and treatment of the work injury and the defendant shall pay/reimburse those bills as appropriate.

The last issue is penalty.

Iowa Code section 86.13(4) provides:

> a. If a denial, a delay in payment, or a termination of benefits occurs without reasonable or probable cause or excuse known to the employer or insurance carrier at the time of the denial, delay in payment, or termination of benefits, the workers' compensation commissioner shall award benefits in addition to those benefits payable under this chapter, or chapter 85, 85A, or 85B, up to fifty percent of the amount of benefits that were denied, delayed, or terminated without reasonable or probable cause or excuse.
>
> b. The workers' compensation commissioner shall award benefits under this subsection if the commissioner finds both of the following facts:
>
> (1) The employee has demonstrated a denial, delay in payment, or termination in benefits.
>
> (2) The employer has failed to prove a reasonable or probable cause or excuse for the denial, delay in payment, or termination of benefits.

In Christensen v. Snap-on Tools Corp., 554 N.W.2d 254 (Iowa 1996), and Robbennolt v. Snap-on Tools Corp., 555 N.W.2d 229 (Iowa 1996), the supreme court said:

> Based on the plain language of section 86.13, we hold an employee is entitled to penalty benefits if there has been a delay in payment unless the employer proves a reasonable cause or excuse. A reasonable cause or excuse exists if either (1) the delay was necessary for the insurer to investigate the claim or (2) the employer had a reasonable basis to contest the employee's entitlement to benefits. A "reasonable basis" for denial of the claim exists if the claim is "fairly debatable."

Christensen, 554 N.W.2d at 260.

The supreme court has stated:

> (1) If the employer has a reason for the delay and conveys that reason to the employee contemporaneously with the beginning of the delay, no penalty will be imposed if the reason is of such character that a reasonable fact-finder could conclude that it is a "reasonable or probable cause or excuse" under Iowa Code section 86.13. In that case, we will defer to the decision of the commissioner. See Christensen, 554 N.W.2d at 260 (substantial evidence found to support commissioner's finding of legitimate reason for delay pending receipt of medical report); Robbennolt, 555 N.W.2d at 236.

(2) If no reason is given for the delay or if the "reason" is not one that a reasonable fact-finder could accept, we will hold that no such cause or excuse exists and remand to the commissioner for the sole purpose of assessing penalties under section 86.13. See Christensen, 554 N.W.2d at 261.

(3) Reasonable causes or excuses include (a) a delay for the employer to investigate the claim, Christensen, 554 N.W.2d at 260; Kiesecker v. Webster City Meats, Inc., 528 N.W.2d at 109, 111 (Iowa 1995); or (b) the employer had a reasonable basis to contest the claimthe "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).

Defendant paid May 16, 2013 through June 5, 2013 benefits late on June 19, 2013, March 27, 2013 through April 2, 2013 late on April 11, 2013, March 18, 2013 March 26, 2013 late on April 5, 2013, December 17, 2012 through December 30, 2012 late on January 7, 2013, December 8, 2012 through December 16, 2012 benefits paid late on December 20, 2012. Defendant also paid only a 10 percent disability when they would not offer work based on the level of industrial loss. A minimum payment of industrial disability should have exceeded 25 percent. Defendant has a history before this agency of penalties so a penalty in the range of the maximum 50 percent is appropriate. A penalty of $20,000.00, which in the range of but under 50 percent is imposed.

ORDER

THEREFORE IT IS ORDERED:

That the defendant shall pay the claimant permanent partial disability benefits commencing June 12, 2013 at the weekly rate of four hundred eighty five and 53/100 dollars ($485.53).

Defendant shall pay/reimburse as appropriate medical expenses as detailed above.

Defendant shall pay a penalty of twenty thousand and no/100 dollars ($20,000.00); all of which is accrued.

Defendant shall receive credit for all benefits previously paid.

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

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

Signed and filed this 7th day of August, 2015.

STAN MCELDERRY
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

Copies To:

Robert C. Andres
Attorney at Law
P.O. Box 2634
Waterloo, IA 50704
Rcalaw2@qwestoffice.net

Stephanie L. Glenn Techau
Attorney at Law
700 Walnut, Ste. 1600
Des Moines IA 50309-3899
sgtechau@nyemaster.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.