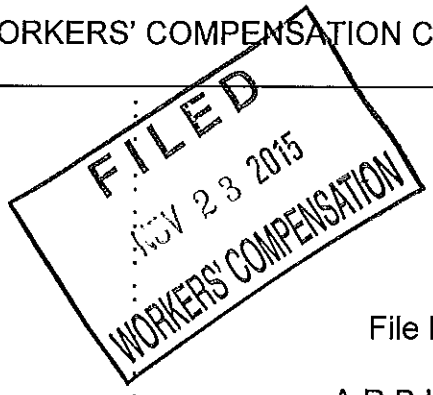
BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER



TIMOTHY RICHARD PETERS,

Claimant,

vs.

KERBER MILLING COMPANY,

Employer,

and

PENN MILLERS INSURANCE COMPANY,

Insurance Carrier,
Defendants.

File No. 5050533

ARBITRATION

DECISION

Head Note No.: 1803

STATEMENT OF THE CASE

Claimant, Timothy Peters, has filed a petition in arbitration and seeks workers' compensation benefits from Kerber Milling Company, employer, and Penn Millers Insurance Company, insurance carrier, defendants.

Deputy Workers' Compensation Commissioner, Stan McElderry, heard this matter in Des Moines, Iowa.

ISSUES

The parties have submitted the following issues for determination:

1. The extent of permanent industrial loss from an injury arising out of and in the course of employment on or about December 18, 2012;
2. Healing period;
3. Rate;
4. Whether the claimant is entitled to payment of medical expenses;
5. Interest; and

6. Penalty.

Defendants agreed at hearing to reimburse the claimant's IME fee of $4,639.39. Claimant's brief indicates that this responsibility of the defendants has not yet been taken care of.

FINDINGS OF FACT

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

The claimant was 62 years old at the time of hearing. He is a high school graduate. His work history consists of generally heavy labor as a truck driver, factory worker, and tank crewman. The claimant began work for the employer herein in August of 1997 as a truck driver/deliveryman. The claimant has a history of right shoulder problems with a least two injuries at Kerber Milling prior to the incident at hand. By October 30, 2012 Rick Wilkerson, D.O. opined that a reverse full shoulder arthroscopy would be needed, and perhaps limitations on work activities were needed. (Exhibit I, pages 244-246)

The claimant suffered a stipulated injury arising out of and in the course of his employment on December 18, 2012. On that date he was making a delivery of feed when he felt his right shoulder pop to the point he had problems getting off the truck trailer. He drove part way home and then his boss took him to the Palo Alto Emergency Room. He was seen there by ARNP Amy Frields who diagnosed shoulder pain and told him to follow up with Dr. Wilkerson.

The claimant saw Dr. Wilkerson on December 19, 2012. Dr. Wilkerson made arrangements for the claimant to have a reverse right shoulder arthroplasty. The right reverse total shoulder arthroplasty was performed on March 19, 2013 by Brian. Johnson, M.D. The claimant was discharged from the hospital on March 22, 2013 having no post-operative complications other than pain control issues.

On March 23, 2013 the claimant fell on his left side because of becoming weak and dizzy from what the claimant associates with the pain medications he was taking. No injury to the right shoulder occurred with this fall. The claimant underwent about 4-1/2 months of physical therapy post-surgery at Palo Alto Rehab. The claimant saw Dr. Johnson again on April 29, 2013 with reports of burning pain in the right shoulder with complaints of numbness and tingling going down the arm in the index, middle, and ring fingers. Dr. Johnson ordered an EMG/NCV study. The study was conducted by James Case, M.D. on May 16, 2013 and showed borderline mild right median neuropathy and moderate to moderately severe right ulnar neuropathy across the elbow. The numbness and tingling resolved before the hearing herein.

The claimant saw Dr. Johnson on March 3, 2014, and Dr. Johnson ordered a functional capacity evaluation (FCE). The FCE was performed by Marcus Witter, P.T.

on March 20, 2014. Mr. Witter performed the FCE and believed that the claimant had shown poor effort and that the efforts were invalid. (Ex. G) Mr. Witter placed the claimant in the light-medium (modified medium) physical demand level. As John D. Kuhnlein, D.O., noted in his independent medical evaluation (IME), Mr. Witter seems to find a great deal of his FCE clients as providing poor effort and describing the results of the testing as invalid. (Ex. 1, p. 249) Claimant's testimony that he provided the best effort he could at the FCE is accepted.

The claimant saw Dr. Kuhnlein for an IME on March 27, 2015. Dr. Kuhnlein opined a 23 percent right upper extremity impairment which he converted to a 14 percent body as a whole impairment (BAW). (Ex. 1, pp. 248-249) Dr. Kuhnlein did not apportion out prior disabilities to the right shoulder, but noted this was a cumulative injury. (Ex. 1, p. 249) Dr. Kuhnlein opined restrictions of lifting with right arm of up to 10 pounds only, and no lifting with the right arm at or above shoulder height. Driving was limited to automatic transmission only. (Ex. 1, p. 249)

Defendants paid the claimant 17 percent BAW for a 2010 right shoulder injury he had that arose out of and in the course of his employment with this employer. Defendants seek credit pursuant to Iowa Code section 85.34(7)(b)(1) for that payment to the claimant.

The claimant seeks payment of bills which are itemized in Exhibit 2, pages 60-61. They are $129.95 for a motel, $155.00 for mileage, $15.48 for a lunch meal for two, and $48.46 for dinner for two. The expenses are for the claimant and a companion/driver for the claimant to attend the IME of Dr. Kuhnlein. Although they are requested as medical bills; if payable, they are more appropriately categorized as expenses related to an IME.

The claimant has physical restrictions and impairment. All his work has been generally heavy, and his restrictions preclude a return to his past relevant work history. His employer did not find him work he could perform post-injury. His physical ability to perform heavy work was a major part of his industrial capacity, and it is largely restricted post-injury. But he still has a CDL, although he is medically restricted to an automatic transmission only per Dr. Kuhnlein. He has not looked for work. He still takes care of steers at his acreage, but does so one handed. He occasionally helps one of his neighbors move mechanized farm equipment. Considering the claimant's medical impairments, training, permanent restrictions, as well as all other factors of industrial disability, the claimant has suffered a 65 percent loss of earnings capacity.

On the date of injury the claimant was married and entitled to two exemptions. The claimant claims that his average gross wages (AGW) were $767.31 per week for a benefits rate of $491.78 (actually $510.85 per rate book); and the defendants asserted in the hearing report that earnings were $580.00 per week and a weekly benefit rate of $398.62. Defendants now claim $703.01 AGW for a rate of $473.17 in their post-hearing brief. The claimant wants to exclude the week of December 9-15, 2012 as non-representative, as he only worked 6.53 hours on December 10, 2012. Yet claimant testified that short days were regular in the winter because of weather. He also appears

to want the weeks of October 14-27, 2012 not included, but it is not readily evident as to why. He worked 90.87 hours in that two-week period. The only non-representative week appears to be October 28-November 10, 2012 when the claimant worked 74.31 hours. If the 96.12 more representative hours of September 1-15 is substituted for October 28-November 10, 2012 the total earnings then are $9,471.75 for a weekly average gross of $728.60. The weekly benefit rate would be $488.47.

The claimant also wants penalty on the basis that the defendants paid benefits every two weeks instead of every week, as required, making 50 percent of payments late. Claimant also seeks penalty on interest, and on underpayment of rate. Defendants paid benefits at $381.60 per week, stated on hearing report it should be $398.62, and then in their post-hearing brief their calculation is for $473.17. The parties stipulated that the claimant would be entitled to a healing period of December 19, 2012 through April 21, 2014, and a commencement date of permanent partial benefits if the award herein was less than a permanent total. The claimant also seeks costs of $123.46 for filing and service of the petition.

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 65 percent loss of earning capacity, he has sustained a 65 percent permanent partial industrial disability entitling him to 325 weeks of permanent partial disability pursuant to Iowa Code section 85.34(2)(u). Defendants are entitled to a credit for the payment on the 2010 injury.

The claimant also states he 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-reopen October 16, 1975).

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). Defendants' liability for claimant's injury need not ultimately be established before defendants are obligated to reimburse claimant for an independent medical examination.

What claimant is actually seeking are costs associated with the necessary travel for an IME. Those expenses are $120.95 for a motel, $15.48 for a lunch meal for two, $48.46 for dinner for two, and 277 miles at 56 cents per mile ($155.00). Those expenses were reasonable and necessary, and defendants shall reimburse those expenses totaling $339.89.

RATE

The Iowa Supreme Court has held that the division should not be handcuffed to such a limited inquiry as afforded by Noel but should be afforded a greater ability to apply the law to the facts of each individual case. Burton v. Hilltop Care Center, 813 N.W.2d 250 (Iowa 2012). In Burton the Supreme Court held that the division, as trier of fact, should not be handcuffed to a limited inquiry, but should be afforded a greater ability to apply the law to the facts of each individual case in order to most accurately determine the gross wages used to calculate the average weekly wage and rate of compensation under Iowa Code section 85.36.

Iowa Code section 85.36 describes the basis for calculating an employee's compensation rate. "The basis of compensation shall be the weekly earnings of the injured employee at the time of the injury." Iowa Code section 85.36.

> In the case of an employee who is paid on a daily or hourly basis, or by the output of the employee, the weekly earnings shall be computed by dividing by thirteen the earnings, not including overtime or premium pay, of the employee earned in the employ of the employer in the last completed period of thirteen consecutive calendar weeks immediately preceding the injury. If the employee was absent from employment for reasons personal to the employee during part of the thirteen calendar weeks preceding the injury, the employee's weekly earnings shall be the amount the employee would have earned had the employee worked when work was available to other employees of the employer in a similar occupation. A week which does not fairly reflect the employee's customary earnings shall be replaced by the closest previous week with earnings that fairly represent the employee's customary earnings.

Iowa Code section 85.36(6)

On the date of injury the claimant was married and entitled to two exemptions. The claimant claims that his average gross wages (AGW) were $767.31 per week for a benefits rate of $491.78 (actually $510.85 per rate book); and the defendants asserted in the hearing report that earnings were $580.00 per week and a weekly benefit rate of $398.62. Defendants now claim $703.01 AGW for a rate of $473.17 in their post-hearing brief. The claimant wants to exclude the week of December 9-15, 2012 as non-representative, as he only worked 6.53 hours on December 10, 2012. Yet claimant testified that short days were regular in the winter because of weather. He also appears to want the weeks of October 14-27, 2012 not included, but this is not readily evident. He worked 90.87 hours in that two-week period. The only non-representative week appears to be October 28-November 10, 2012 when the claimant worked 74.31 weeks. If the 96.12 more representative hours of September 1-15 is substituted for October 28-November 10, 2012 the total earnings then are $9,471.75 for a weekly average gross of $728.60. The claimant's weekly benefit rate therefore is $488.47.

The next 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 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).

Defendants paid benefits every two weeks rather than every week as required. Thus 50 percent of payments were late. The defendants also paid the benefits at $381.60 per week, stated on hearing report it should be $398.62, and then in their post-hearing brief their calculation is for $473.17. It is difficult to find an explanation as to a rationale for the rate actually paid and the rate finally admitted to. In other words, by defendants' own calculation they underpaid benefits by $91.57 per week (per this

decision the underpayment is actually greater, but that difference was fairly debatable). Over $34,000.00 in benefits were unreasonably delayed and/or underpaid by defendants. A penalty of $15,000.00 (which is in the range of 50 percent) is appropriate on this record.

INTEREST

Iowa Code section 85.30 and applicable case law including Christensen v. Snap-On Tools Corp., 554 N.W.2d 254, 261-262 (Iowa 1996) and Robbennolt v. Snap-On Tools Corp., 555 N.W.2d 234-236 (Iowa 1996), defendant(s) shall pay interest at the rate of 10% per annum upon unpaid weekly temporary total disability, healing period, permanent partial or permanent total disability benefits awarded herein as follows:

1) Iowa Code section 85.30 provides for an 11 day grace period after the injury during which time payments of compensation need not be made and interest cannot accrue.

2) Weekly benefits shall be paid by the end of a compensation payment week composed of 7 calendar days. The first compensation payment week begins with the first day of entitlement specified in the award. However, if the first day of entitlement is the injury date or if the first day is within the statutory grace period, the first compensation payment week will begin on the 11th day after the injury.

3) Interest on unpaid amounts for each compensation payment week begins on the first day following the expiration of that compensation payment week and continues until full payment. Interest on unpaid amounts for compensation during the grace period begins on the 11th day after the injury and continues until full payment.

4) All payments shall first be applied to interest due and any excess on the principal amount. Payments are considered made on the date of delivery to claimant or, if mailed, the date the payment was placed in the United States Mail depository.

The claimant claims interest due was $4,722.14 through June 18, 2015 if the weekly rate was $491.78 (weekly rate was found to be $488.47). In the event of disagreement as to interest amounts due and unless otherwise agreed, the parties shall jointly retain a certified public accountant who shall calculate the interest to a specified date in the manner provided above. This accountant's calculations shall be binding upon the parties and the defendants shall pay same.

ORDER

Therefore it is ordered:

That the defendants shall pay the claimant healing period benefits from December 19, 2012 through April 21, 2014 at the weekly rate of four hundred eighty-eight and 47/100 dollars ($488.47).

That the defendants shall pay the claimant three hundred twenty-five (325) weeks of permanent partial disability commencing April 22, 2014 at the weekly rate of four hundred eighty-eight and 47/100 dollars ($488.47).

Defendants shall reimburse IME travel expenses of three hundred thirty-nine and 89/100 dollars ($339.89). Defendants are reminded that they stipulated at hearing to pay the IME fee as well.

Defendants shall pay a penalty of fifteen thousand and 00/100 dollars ($15,000.00); all of which is accrued.

Defendants shall receive credit for all benefits previously paid on this claim.

Defendants shall receive credit for benefits paid on the 2010 injury.

Costs of one hundred twenty-three and 46/100 dollars ($123.46) are taxed to the defendants pursuant to 876 IAC 4.33.

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

Signed and filed this 23rd day of November, 2015.

STAN MCELDERRY
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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