BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

KENNETH REED,

Claimant,

vs.

CITY OF DES MOINES,

Employer,
Self-Insured,
Defendant.

File No. 5058582

ARBITRATION

DECISION

Head Notes: 1803, 2501, 2502, 4000.2

STATEMENT OF THE CASE

Claimant, Kenneth Reed, filed a petition in arbitration seeking workers' compensation benefits from the City of Des Moines (Des Moines), self-insured employer. This matter was heard in Des Moines, Iowa on May 1, 2019 with a final submission date of May 22, 2019.

The record in this case consists of Joint Exhibits 1-6, Defendants' Exhibits A through D, Claimant's Exhibits 1-4, and the testimony of claimant and Terry Moss.

ISSUES

1. The extent of claimant's entitlement to permanent partial disability benefits.
2. Whether there is a causal connection between the injury and the claimed medical expenses.
3. Whether claimant is entitled to reimbursement for an independent medical evaluation (IME) under Iowa Code section 85.39.
4. Whether defendant is liable for a penalty.
5. Costs.

At hearing, defendant objected to Claimant's Exhibits 3 and 4. In a May 2, 2019 email, defendant's counsel indicated defendant withdrew its objections to those exhibits and were attempting to pay claimant's outstanding medical expenses. Because claimant did not withdraw the issue of claimant's entitlement to medical expenses, as an issue in dispute, this decision will still consider medical expenses as an issue in dispute.

FINDINGS OF FACT

Claimant was 60 years old at the time of hearing. Claimant graduated from high school. Claimant went to Grandview College in Des Moines for two semesters but did not graduate.

Claimant has worked doing maintenance on amusement park rides. From 1984 through 1994 claimant had his own business doing heating, ventilation and air conditioning (HVAC) services for residential properties. From 1994 through 2006 claimant worked at Maytag. At Maytag claimant was involved in repair and replacement of boilers, pumps, hydraulic pumps, and other large industrial equipment at the Maytag plant.

Claimant testified given the condition of his shoulders, he could not return to work at any of his prior jobs.

Claimant began employment with Des Moines in 2006. Claimant works at the city's wastewater treatment plant as a plant mechanic. Generally, claimant's job required him to repair, replace and maintain all equipment at the Des Moines Wastewater Treatment Plant. Claimant testified the job required working with large pieces of equipment using heavy wrenches, hammers, cheater bars, and other heavy tools. Claimant said bolts and nuts on most equipment were large and rusted. Breaking bolts and nuts required a great deal of force. Claimant testified the job could be very physical at times. A job description of claimant's position as a plant mechanic is found at Exhibit A.

On June 16, 2016 claimant was working on a conveyor. Claimant said this conveyor is essentially an auger. Claimant was using a hammer to drive out a bolt that was corroded. Claimant said when he became tired with hammering on one arm, he switched hands and hammered with his other hand. Claimant said his shoulders began to burn at the end of the day.

Claimant returned to work the next day. He stated when he started working on June 17, 2016 he noticed his shoulders had not gotten better. Claimant reported his problem regarding his shoulders to his supervisor.

On June 17, 2016 claimant was evaluated by Von Miller, PA-C. Claimant was assessed as having a right shoulder strain. Claimant was given work restrictions and told to take ibuprofen three times a day. (Joint Exhibit 3, p. 55)

Claimant returned to Physician's Assistant Miller on December 19, 2016. An MRI showed a right shoulder labral tear. Claimant was referred for an orthopedic evaluation.

On December 21, 2016 claimant was evaluated by Joseph Brunkhorst, D.O. Claimant had a right shoulder subacromial injection. (Jt. Ex. 1, pp. 1-3)

Claimant returned to Dr. Brunkhorst on March 15, 2017. Conservative treatment had failed. Surgery was discussed and chosen as a treatment option. (Jt. Ex. 1, p. 4)

On April 4, 2017 claimant underwent a subacromial decompression and a subpectoral biceps tenodesis. Surgery was performed by Dr. Brunkhorst. (Jt. Ex. 1, pp. 5-6) Claimant testified the surgery did not help his symptoms.

Claimant returned to Dr. Brunkhorst in July, August and September of 2017. Claimant's condition had not improved. Claimant had another right subacromial injection. He also had a manipulation under anesthesia in September of 2017. (Jt. Ex. 1, pp. 7-12) Claimant testified the manipulation increased his shoulder pain.

On October 30, 2017 claimant saw Dr. Brunkhorst. Claimant was given physical therapy three times a week and still had pain shooting from his neck. Claimant was given another right subacromial injection. (Jt. Ex. 1, pp. 15-16)

On November 27, 2017 claimant had an MRI of the cervical spine. (Jt. Ex. 1, p. 17) Dr. Brunkhorst noted the MRI was negative for cervical pathology. An MRI of the right shoulder was recommended. (Jt. Ex. 1, pp. 17-19)

On December 6, 2017 claimant had a right shoulder MRI. It showed a right labral tear. An EMG was recommended. (Jt. Ex. 1, pp. 20-22)

Claimant testified his left shoulder condition continued to hurt after the June 16, 2016 work injury. He said on March 24, 2018 he slipped on ice while holding onto a door handle with his left hand and further injured his left shoulder.

Based, in part, on claimant's abnormal EMG studies, claimant was assessed as having brachial plexopathy. (Ex. 2)

Claimant returned to Dr. Brunkhorst on May 16, 2018. Claimant had pain in both shoulders. Claimant was given bilateral glenohumeral joint injections. (Jt. Ex. 1, pp. 28-29)

Claimant treated with Dana Simon, M.D., a pain specialist, on May 23, 2018 through June 6, 2018. Claimant was given trigger point injections. (Jt. Ex. 4, pp. 57-63)

Claimant returned to Dr. Brunkhorst on June 27, 2018. Claimant's left shoulder had improved, but his right shoulder was worse. Surgery was discussed and chosen as a treatment option for the right shoulder. (Jt. Ex. 1, p. 31)

On July 17, 2018 claimant underwent right shoulder anterior and posterior labral repair and glenoid chondroplasty. Surgery was performed by Dr. Brunkhorst. (Jt. Ex. 1, pp. 33-35) Claimant testified this surgery did not improve his symptoms.

Claimant testified he had a collapsed right lung following surgery. He also said he had a pulmonary embolism from the surgery.

On November 7, 2018 claimant was given another subacromial injection on the right by Dr. Brunkhorst. (Jt. Ex. 1, pp. 40-41)

On November 14, 2018 claimant underwent another set of trigger point injections with Dr. Simon. (Jt. Ex. 4, pp. 71-73) On January 7, 2018 claimant underwent a three-level intercostal nerve block with Dr. Simon. (Jt. Ex. 4, pp. 76-77)

Claimant returned to Dr. Brunkhorst February 18, 2019. Claimant still had right shoulder pain. Stem cell injections were discussed as a potential treatment option. (Jt. Ex. 1, pp. 46-47)

On February 19, 2019 claimant underwent a functional capacity evaluation (FCE). Testing found claimant gave maximal effort. Claimant was found to be in the upper end of the light work category. The FCE limited claimant to occasionally carrying 10 pounds on the right and 20 pounds on the left. It also limited claimant to occasionally pushing 20 pounds and occasionally pulling up to 25 pounds. Claimant was limited to occasionally lifting 30 pounds from floor to waist, and occasionally lifting up to 10 pounds from waist to overhead. (Ex. 2)

Claimant was also limited by the FCE to rarely doing prolonged work on the right. He was recommended to avoid work activities that required lifting from waist to overhead. (Ex. 2)

In a March 1, 2019 note, written by claimant's attorney, Dr. Brunkhorst indicated he had reviewed the FCE and agreed with the permanent restrictions outlined in the report. He indicated it accurately represented claimant's functional limitations. (Jt. Ex. 1, p. 49)

In a March 20, 2019 report, Jacqueline Stoken, D.O., gave her opinions of claimant's condition following an IME. Claimant had constant right and left shoulder pain. Dr. Stoken opined claimant had a 15 percent permanent impairment to the body as a whole regarding the right shoulder condition, using the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition. She found claimant had a 5 percent permanent impairment to the body as a whole regarding the left shoulder. The combined values for both permanent impairments resulted in a 19 percent permanent impairment to the body as a whole. She opined the work restrictions detailed in the February 2019 FCE were reasonable. (Ex. 1)

On April 8, 2019 claimant underwent another glenohumeral injection on the right shoulder given by Dr. Brunkhorst. (Jt. Ex. 1, p. 50a)

Claimant testified he had returned to work for approximately six months before hearing. He said he did not do the duties of a plant mechanic. Claimant said he spent his time at work in a guard shack, performing lock out/tag out procedures, and occasionally watching and advising other mechanics.

Claimant said he cannot do the job of a plant mechanic any more. He said it hurts for him to pick up and lift tools. Claimant said he is unable to climb ladders. Claimant said he has difficulty climbing over and around pumps and other equipment.

Claimant said he is very limited in his recreational activities because of his shoulders. He says he has difficulty with sleep due to shoulder pain. Throughout the course of hearing claimant was seen to have difficulty sitting or standing for extended periods of time due to pain in his shoulders.

Terry Moss testified he is a plant mechanic for Des Moines Water Works Treatment Facility and claimant is a co-worker. He said the plant mechanic job is a physically demanding job. He said the job requires working with large wrenches and rusted bolts and nuts. He said replacing and rebuilding pumps requires a great deal of force and torque. Mr. Moss said claimant has difficulty climbing ladders and opening doors at work.

CONCLUSIONS OF LAW

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

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).

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 60 years old at the time of hearing. He graduated from high school. Claimant has worked repairing amusement park rides. He operated his own HVAC business. He worked at Maytag and worked on industrial boilers, pumps and

other industrial equipment. Since 2006 claimant has worked for the City of Des Moines and the Waste Water Treatment Plant. Claimant's unrebutted testimony is he cannot perform any of his prior jobs given his restrictions and limitations.

Dr. Stoken is the only expert who has given opinions regarding claimant's permanent impairment. She found claimant had 19 percent permanent impairment to the body as a whole. Given this record it is found claimant has a 19 percent permanent impairment to the body as a whole.

The FCE restricted claimant to working the upper end of the light work category. The FCE limits claimant in a number of ways. In part, claimant is limited to occasionally carrying 10 pounds on the right and 20 pounds on the left. He is also limited to occasionally lifting 30 pounds from floor to waist, and occasionally lifting up to 10 pounds from waist to overhead. Claimant is limited to rarely doing prolonged work on the right. He is also recommended to avoid work activities that require lifting from waist to overhead. (Ex. 2)

Dr. Brunkhorst is the authorized treating physician. He performed two surgeries and manipulation on claimant. He has also treated claimant for an extended period of time. Dr. Brunkhorst reviewed the FCE and agreed with those restrictions. Based on this record, it is found the restrictions detailed in the February of 2019 FCE report are claimant's permanent restrictions.

Claimant is still employed with the City of Des Moines. However, it is clear from the unrebutted testimony of claimant and his coworker, Mr. Moss, claimant is not able to physically perform the work duties of a plant mechanic. Claimant's unrebutted testimony is he cannot do the job of a plant mechanic any more. Claimant testified he is unable to pick up heavy tools at work. Claimant said he spends his time at work manning a guard shack, performing lock out/tag out procedures, and occasionally watching and advising other mechanics.

When all relevant factors are considered it is found claimant has a 70 percent loss of earning capacity or industrial disability.

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).

Claimant received medical care for his June of 2016 work injury. The medical expenses for this care are found at Exhibits 3 and 4. There is no evidence that expenses detailed in Exhibits 3 and 4 are not related to treatment claimant received for his June of 2016 work injury. There is no evidence in the record that charges made by providers were not fair and reasonable. Defendant is liable for the claimed medical expenses.

The next issue to be determined is whether claimant is entitled to reimbursement for an IME under 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.

Defendant is 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).

Regarding the IME, the Iowa Supreme Court provided a literal interpretation of the plain-language of Iowa Code section 85.39, stating that section 85.39 only allows the employee to obtain an independent medical evaluation at the employer's expense if dissatisfied with the evaluation arranged by the employer. Des Moines Area Reg'l Transit Auth. v. Young, 867 N.W.2d 839, 847 (Iowa 2015).

Under the Young decision, an employee can only obtain an IME at the employer's expense if an evaluation of permanent disability has been made by an employer-retained physician.

Iowa Code section 85.39 limits an injured worker to one IME. Larson Mfg. Co., Inc. v. Thorson, 763 N.W.2d 842 (Iowa 2009).

The Supreme Court, in Young noted in cases where Iowa Code section 85.39 is not triggered to allow for reimbursement of an independent medical examination (IME), a claimant can still be reimbursed at hearing the costs associated with the preparation of the written report as a cost under rule 876 IAC 4.33. Young at 846-847.

In this case, only Dr. Stoken, the employee-retained expert, issued an opinion regarding permanent impairment. As a result, claimant is not entitled to full reimbursement of the IME under Iowa Code section 85.39.

A review of Dr. Stoken's billing indicates Dr. Stoken charged $2,000.00 in preparation of the report. (Ex. 1, p. 24) Claimant is entitled to reimbursement of $2,000.00 for the preparation of the report, as a cost, under 876 IAC 4.33, pursuant to the decision in Young.

The final issue to be determined is whether 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."
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> Christensen, 554 N.W.2d at 260.

The supreme court has stated:

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

Dr. Stoken issued her opinions regarding claimant's permanent impairment in a March 20, 2019 report. (Ex. 1) There is no other opinion regarding permanent impairment other than that of Dr. Stoken. Despite the unrebutted evidence from Dr. Stoken regarding claimant's permanent impairment, defendant did not make any permanent partial disability payments to claimant at the time of hearing.

There is no evidence in the record when the Stoken report was served on defendant. Given the rules before this agency, it is assumed the Stoken report was served on defendant 30 days before hearing, or approximately four weeks. Given this record, defendant is liable for a penalty of $1,676.70 ($838.35 x 4 weeks x 50%).

ORDER

Therefore, it is ordered:

That defendant shall pay claimant three hundred fifty (350) weeks of permanent partial disability benefits at the rate of eight hundred thirty-eight and 35/100 dollars ($838.35) per week commencing on March 1, 2019.

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

Defendant shall pay accrued weekly benefits in a lump sum together with interest at the rate of ten percent for all weekly benefits payable and not paid when due which accrued before July 1, 2017, and all interest on past due weekly compensation benefits accruing on or after July 1, 2017, shall be payable at an annual rate equal to the one-year treasury constant maturity published by the federal reserve in the most recent H15 report settled as of the date of injury, plus two percent. See Gamble v. AG Leader Technology File No. 5054686 (App. Apr. 24, 2018).

That defendant shall pay a penalty of one thousand six hundred seventy-six and 70/100 dollars ($1,676.70).

That defendant shall pay claimant's medical expenses as detailed in Exhibits 3 and 4.

That defendant shall pay costs, including the two thousand and 00/100 dollars ($2,000.00) assessed as a report cost for the Stoken IME, under 876 IAC 4.33.

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

Signed and filed this 10th day of June, 2019.

JAMES F. CHRISTENSON
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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JFC/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.