

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

BOB HEM,	:	
	:	
Claimant,	:	File No. 19700066.01
	:	
vs.	:	ARBITRATION DECISION
	:	
WIRTJES CONCRETE,	:	
	:	
Employer,	:	
Defendant.	:	Headnotes: 1801, 1803

Claimant Bob Hem filed a petition in arbitration on July 1, 2019, alleging he sustained an injury to his right hand and right arm and severe chronic pain while working for the defendant, Wirtjes Concrete, on November 16, 2018. On June 28, 2019, Hem mailed the petition by certified mail, return receipt to Wirtjes Concrete's last known address. Wirtjes Concrete did not file an answer.

On August 22, 2019, Hem filed a Motion for Entry of Default against Wirtjes Concrete. Hem served Wirtjes Concrete with a letter attaching a copy of the Motion for Entry of Default by ordinary mail, at Wirtjes Concrete's last known address, notifying Wirtjes Concrete that if it failed to respond to the petition and the Motion for Entry of Default, it would lose certain rights and that it should immediately contact legal counsel to obtain advice. Wirtjes Concrete did not file an answer or a response to the Motion for Default.

On September 12, 2019, a Ruling on Motion for Entry of Default was entered and a hearing for consideration and award of appropriate relief was scheduled. The Ruling provided, in part, because default has been entered against Wirtjes Concrete, the issues of whether there was an employer-employee relationship, whether claimant sustained an injury that arose out of and in the course of employment, and whether there is a causal connection between the injury and the alleged disability would not be discussed. The hearing for consideration and award of appropriate relief was continued to October 21, 2019.

The hearing for consideration and award of relief was held on October 21, 2019. Attorney Edwin Detlie represented Hem. Hem appeared and testified. Joint Exhibit ("JE 1") and Exhibit 1 were admitted into the record. Hem submitted a hearing report, which was received into the record. The hearing was recorded through digital means

pursuant to rule 876 Iowa Administrative Code 4.49. A transcript of the hearing will not be prepared by this agency. If any party wishes to appeal this decision, that party is charged with requesting a copy of the digital audio recording and obtaining a transcript to be prepared and filed by a certified shorthand reporter. The matter was fully submitted on October 21, 2019.

STIPULATIONS

1. An employer-employee relationship existed by Hem and Wirtjes Concrete at the time of the alleged injury.
2. Hem sustained an injury arising out of and in the course of his employment with Wirtjes Concrete on November 16, 2018.
3. The alleged injury is a cause of temporary and permanent disability.
4. The commencement date for permanent partial disability benefits, if any are awarded is August 16, 2019.
5. At the time of the alleged injury Hem's gross earnings were \$357.50 per week, he was single and entitled to no exemptions, and Hem believes the weekly rate is \$238.54.
6. Costs have been paid.

ISSUES

1. Is Hem entitled to healing period benefits?
2. Is Hem entitled to 30 weeks of permanent partial disability benefits based on the amputation beyond the first phalange of his right second finger?
3. Is Hem entitled to recover medical bills?
4. Should penalty benefits be awarded against Wirtjes Concrete?
5. Should costs be assessed against Wirtjes Concrete?

FINDINGS OF FACT

Hem worked for Wirtjes Concrete in 2018 as a general laborer on a concrete crew. (Hem Testimony) Wirtjes Concrete paid Hem \$11.00 per hour and he worked between 30 and 35 hours per week. (Hem Testimony) At the time of the hearing Hem was fifty-nine. (Hem Testimony)

On November 16, 2018, Hem told his foreman, Bobby Fox, his right long finger was hurting. (Hem Testimony) Hem had a bandage on his right long finger which was

submerged in concrete. (JE 1, p. 10) Hem later told Cris Wirtjes, the owner of Wirtjes Concrete, he had hurt his right long finger at work. (Hem Testimony) Hem testified at hearing Cris Wirtjes told him to file under his own health insurance to treat the injury. (Hem Testimony) At the time of the injury Hem was receiving medical benefits through Medicaid and Medicare. (Hem Testimony) Wirtjes Concrete did not provide any medical care to Hem. (Hem Testimony) Hem testified he owes outstanding medical bills, but he has no income to pay the bills. (Hem Testimony)

Hem testified his right long finger became infected and badly swollen. (Hem Testimony) Hem reported his finger hurt and it was full of infection and noted physicians had told him he had experienced concrete burn, a poisoning, which caused the infection. (Hem Testimony)

On November 25, 2018, Hem went to the Mahaska Health Partnership Emergency Department complaining of finger pain with swelling. (JE 1, p. 22) Hospital staff drained Hem's finger, which they documented reduced the size of his finger by twenty-five to thirty percent. (JE 1, p. 22) Glenda Roefer, D.O., listed an impression of a right third finger infection caused by cement exposure, right third finger pain, and prescribed antibiotics. (JE 1, p. 22)

On November 28, 2018, Hem went to the Mahaska Health Partnership Emergency Department, complaining of swelling and pain in his right long finger. (JE 1, p. 18) Hem was examined by Paul Riggs, M.D., a surgeon. (JE 1, p. 18) Hospital staff documented Dr. Riggs recommended Hem be examined by a hand surgeon, and he was transferred to the University of Iowa Hospitals and Clinics ("UIHC"). (JE 1, p. 19)

Hem was admitted to the UIHC on November 28, 2018, and discharged on December 1, 2018. (JE 1, p. 39) Neeru Agarwal, M.D., diagnosed Hem with right middle finger purulent cellulitis. (JE 1, p. 40) Dr. Agarwal prescribed Adderall and gabapentin. (JE 1, p. 42)

On December 12, 2018, Hem attended an appointment with Mark Zacharjasz, M.D., a family medicine physician. (JE 1, p. 14) Dr. Zacharjasz assessed Hem with a right finger infection, prescribed antibiotics, and recommended a referral to Iowa Hand. (JE 1, p. 15)

On January 2, 2019, Hem attended an appointment with Dr. Riggs. (JE 1, p. 10) Dr. Riggs diagnosed Hem with extensor tenosynovitis of the right long finger, an earlier "concrete burn" to the dorsal surface of the distal interphalangeal joint in November 2018, and congestive heart failure. (JE 1, p. 10)

On January 4, 2019, Dr. Hem performed an exploratory surgery on Hem's finger, and prescribed cephalexin. (JE 1, pp. 1, 5, 7) Dr. Riggs noted a distal interphalangeal joint complete amputation just proximal to the joint may be very helpful in the long term.

(JE 1, p. 5) Hem returned to Dr. Riggs on January 8, 2019, reporting his pain had lessened in his middle phalanx, but he could not fully extend his distal interphalangeal joint. (JE 1, p. 1)

On April 16, 2019, Hem returned to Dr. Riggs, complaining of pain in his finger. (JE 1, p. 34) Dr. Riggs prescribed Norco for pain, and noted Hem may not recover any extension of the distal interphalangeal joint. (JE 1, p. 34)

On May 30, 2019, Hem returned to the UIHC and he was examined by Timothy Fowler, M.D., an orthopedic surgeon, complaining of edema and erythema in his right finger with significant pain. (JE 1, pp. 43, 62) Dr. Fowler noted a Dr. Hohn had recommended amputation on May 8, 2019, and he was providing a second opinion. (JE 1, pp. 43, 62) Dr. Fowler examined Hem, listed an impression of chronic osteomyelitis in the right long finger distal phalanx and middle phalanx, and recommended amputation through the middle phalanx. (JE 1, pp. 44, 48, 62, 67) Dr. Fowler performed a right long finger amputation through the middle phalanx distal to the flexor digitorum superficialis insertion on Hem. (JE 1, pp. 49, 51)

Hem testified his right long finger was amputated over half way between his two knuckles. (Hem Testimony) Hem relayed he has experienced right finger phantom pain since his finger was amputated, with a burning and tingling feeling. (Hem Testimony) He reported he was taking gabapentin for pain at the time of the hearing. (Hem Testimony)

On August 15, 2019, Dr. Zacharjasz released Hem to return to work and noted he should avoid cement exposure with his hands unless supplied with chemical gloves. (JE 1, p. 38)

Hem was off work from November 16, 2018 through August 2019, when he was released to return to work. (Hem Testimony) Hem reported Wirtjes Concrete never offered him employment after his work injury. (Hem Testimony) Hem returned to work for a bricklayer in September 2019, for a few weeks. (Hem Testimony) At the time of the hearing Hem was not working. (Hem Testimony)

I. Extent of Disability

Given the default judgment entered against Wirtjes Concrete, it was established before hearing Hem sustained an injury to his right long finger arising out of and in the course of his employment with Wirtjes Concrete on November 16, 2018. The issue to be decided is the extent of disability. Hem avers he has sustained a 100 percent impairment to his right long finger.

An injury to the second long finger is a scheduled member injury under Iowa Code section 85.34(2)(c) (2018). Under the schedule, thirty weeks is the maximum number of weeks of compensation for loss of the second long finger. Iowa Code §

85.34(2)(c). Iowa Code section 85.34(2)(x) provides when determining functional disability under Iowa Code section 85.34(2)(c), “the extent of loss or percentage of permanent impairment shall be determined solely by utilizing the guides to the evaluation of permanent impairment, published by the American medical association, as adopted by the workers’ compensation commissioner by rule pursuant to chapter 17A.” The Commissioner has adopted the Guides to the Evaluation of Permanent Impairment (AMA Press, 5th Ed. 2001) (“AMA Guides 5th Edition”). 876 IAC 2.4.

Dr. Fowler performed a right long finger amputation through the middle phalanx distal to the flexor digitorum superficialis insertion on Hem. (JE 1, pp. 49, 51) Hem testified his second long finger was amputated below the proximal interphalangeal joint, more than halfway toward the metacarpophalangeal joint. Figure 16-5 of the AMA Guides at page 443 is a chart of digit impairment percentages for finger amputations at various levels. An amputation through the proximal interphalangeal joint is an eighty percent digit impairment and an amputation at the metacarpophalangeal joint is 100 percent permanent impairment. AMA Guides p. 443. Under Figure 16-5, an amputation past the proximal interphalangeal joint, and more than halfway toward the metacarpophalangeal joint is a ninety percent digit impairment. *Id.* Hem has established he sustained a ninety percent impairment to his right long finger, entitling him to twenty-seven weeks of permanent partial disability benefits at the rate of \$238.54 per week, commencing on August 16, 2019.

II. Healing Period Benefits

Iowa Code section 85.33 (2018) governs temporary disability benefits, and Iowa Code section 85.34 governs healing period and permanent disability benefits. Dunlap v. Action Warehouse, 824 N.W.2d 545, 556 (Iowa Ct. App. 2012). Under Iowa Code section 85.34, if an employee has suffered a personal injury causing a permanent partial disability, the employer shall pay the employee compensation for a healing period, “beginning on the first day of disability after the injury, and until the employee has returned to work or it is medically indicated that significant improvement from the injury is not anticipated or until the employee is medically capable of returning to employment substantially similar to the employment in which the employee was engaged at the time of injury, whichever occurs first.”

Hem sustained his work injury on November 16, 2018. Hem testified he did not return to work after the work injury until Dr. Zacharjasz released him to return to work on August 15, 2019. There is no indication in the medical record Hem was medically capable of returning to substantially similar employment Hem was engaged in at the time of the injury before August 15, 2019. Hem is entitled to healing period benefits from November 17, 2018 through August 14, 2019, at the rate of \$238.54 per week.

III. Medical Bills

An employer is required to furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance, hospital

services and supplies, and transportation expenses for all conditions compensable under the workers' compensation law. Iowa Code § 85.27(1). The employer has the right to choose the provider of care, except when the employer has denied liability for the injury. *Id.* "The treatment must be offered promptly and be reasonably suited to treat the injury without undue inconvenience to the employee." *Id.* § 85.27(4). If the employee is dissatisfied with the care, the employee should communicate the basis for the dissatisfaction to the employer. *Id.* If the employer and employee cannot agree on alternate care, the commissioner "may, upon application and reasonable proofs of the necessity therefor, allow and order other care." *Id.* The statute requires the employer to furnish reasonable medical care. *Id.* § 85.27(4); Long v. Roberts Dairy Co., 528 N.W.2d 122, 124 (Iowa 1995) (noting "[t]he employer's obligation under the statute turns on the question of reasonable necessity, not desirability"). The Iowa Supreme Court has held the employer has the right to choose the provider of care, except when the employer has denied liability for the injury, or has abandoned care. Iowa Code § 85.27(4); Bell Bros. Heating & Air Conditioning v. Gwinn, 779 N.W.2d 193, 204 (Iowa 2010).

Hem submitted medical bills in Exhibit 1. The pages of Exhibit 1 are not numbered. Some of the bills in Exhibit 1 are for cardiac and knee conditions unrelated to the work injury. Some of the bills are not explained. Hem is not entitled to recover the cost of medical bills for conditions unrelated to the work injury and that are not explained. The following dates of service are related to the work injury: November 24 through November 25, 2018, November 28, 2018 through December 1, 2018, December 12, 2018, December 27, 2018, December 31, 2018, January 2, 2019, January 4, 2019 through January 5, 2019, May 8, 2019, June 12, 2019, and August 15, 2019. Some of the bills were paid by Medicaid and Medicare, and a portion to be paid by Hem remains outstanding. Wirtjes Concrete is responsible for all causally related medical bills incurred for the above dates related to the work injury.

IV. Penalty

Hem seeks an award of penalty benefits. Iowa Code section 86.13 governs compensation payments. Under the statute's plain language, if there is a delay in payment absent "a reasonable or probable cause or excuse," the employee is entitled to penalty benefits, of up to fifty percent of the amount of benefits that were denied, delayed, or terminated without reasonable or probable cause or excuse. Iowa Code § 86.13(4); see also Christensen v. Snap-On Tools Corp., 554 N.W.2d 254, 260 (Iowa 1996) (citing earlier version of the statute). "The application of the penalty provision does not turn on the length of the delay in making the correct compensation payment." Robbennolt v. Snap-On Tools Corp., 555 N.W.2d 229, 236 (Iowa 1996). If a delay occurs without a reasonable excuse, the commissioner is required to award penalty benefits in some amount to the employee. *Id.*

The statute requires the employer or insurance company to conduct a "reasonable investigation and evaluation" into whether benefits are owed to the employee, the results of the investigation and evaluation must be the "actual basis"

relied on by the employer or insurance company to deny, delay, or terminate benefits, and the employer or insurance company must contemporaneously convey the basis for the denial, delay, or termination of benefits to the employee at the time of the denial, delay, or termination of benefits. Iowa Code § 86.13(4). An employer may establish a “reasonable cause or excuse” if “the delay was necessary for the insurer to investigate

the claim,” or if “the employer had a reasonable basis to contest the employee’s entitlement to benefits.” Christensen, 554 N.W.2d at 260. “A ‘reasonable basis’ for denial of the claim exists if the claim is ‘fairly debatable.’” Burton v. Hilltop Care Ctr., 813 N.W.2d 250, 267 (Iowa 2012). “Whether a claim is ‘fairly debatable’ can generally be determined by the court as a matter of law.” Id. The issue is whether the employer had a reasonable basis to believe no benefits were owed to the claimant. Id. “If there was no reasonable basis for the employer to have denied the employee’s benefits, then the court must ‘determine if the defendant knew, or should have known, that the basis for denying the employee’s claim was unreasonable.’” Id.

Benefits must be paid beginning on the eleventh day after the injury, and “each week thereafter during the period for which compensation is payable, and if not paid when due,” interest will be imposed. Iowa Code § 85.30. In Robbennolt, the Iowa Supreme Court noted, “[i]f the required weekly compensation is timely paid at the end of the compensation week, no interest will be imposed As an example, if Monday is the first day of the compensation week, full payment of the weekly compensation is due the following Monday.” Robbennolt, 555 N.W.2d at 235. A payment is “made” when the check addressed to the claimant is mailed, or personally delivered to the claimant. Meyers v. Holiday Express Corp., 557 N.W.2d 502, 505 (Iowa 1996) (abrogated by Keystone Nursing Care Ctr. v. Craddock, 705 N.W.2d 299 (Iowa 2005) (concluding the employer’s failure to explain to the claimant why it would not pay permanent benefits upon the termination of healing period benefits did not support the commissioner’s award of penalty benefits)).

When considering an award of penalty benefits, the commissioner considers “the length of the delay, the number of delays, the information available to the employer regarding the employee’s injuries and wages, and the prior penalties imposed against the employer under section 86.13.” Schadendorf v. Snap-On Tools Corp., 757 N.W.2d 330, 336 (Iowa 2008). The purposes of the statute are to punish the employer and insurance company and to deter employers and insurance companies from delaying payments. Robbennolt, 555 N.W.2d at 237.

Hem did not return to work until September 2019. (Hem Testimony) Wirtjes Concrete has paid him no weekly benefits in this case. (Hem Testimony) Wirtjes Concrete did not convey any reason to Hem why it has refused to pay weekly benefits. Imposition of a penalty is warranted. Hem is awarded \$7,000.00 in penalty benefits.

V. Costs

Hem seeks to recover the \$100.00 filing fee. Iowa Code section 86.40, provides, “[a]ll costs incurred in the hearing before the commissioner shall be taxed in the discretion of the commissioner.” Rule 876 IAC 4.33(6), provides,

[c]osts taxed by the workers’ compensation commissioner or a deputy commissioner shall be (1) attendance of a certified shorthand reporter or presence of mechanical means at hearings and evidential depositions, (2) transcription costs when appropriate, (3) costs of service of the original notice and subpoenas, (4) witness fees and expenses as provided by Iowa Code sections 622.69 and 622.72, (5) the costs of doctors’ and practitioners’ deposition testimony, provided that said costs do not exceed the amounts provided by Iowa Code sections 622.69 and 622.72, (6) the reasonable costs of obtaining no more than two doctors’ or practitioners’ reports, (7) filing fees when appropriate, (8) costs of persons reviewing health service disputes.

Hem is entitled to recover the \$100.00 filing fee.

ORDER

IT IS THEREFORE ORDERED, THAT:

Defendant shall pay the claimant twenty-seven (27) weeks of permanent partial disability benefits at the weekly rate of two hundred thirty-eight and 54/100 dollars (\$238.54) per week, commencing on August 16, 2019.

Defendant shall pay the claimant healing period benefits from November 17, 2018 through August 14, 2019, at the rate of two hundred thirty-eight and 54/100 dollars (\$238.54) per week.

Defendant shall pay accrued weekly benefits in a lump sum together with interest 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.

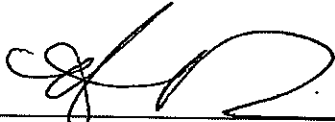
Defendant is responsible for all causally related medical bills set forth in Exhibit 1 consistent with this decision.

Defendant shall pay the claimant seven thousand and 00/100 dollars (\$7,000.00) in penalty benefits.

Defendant shall reimburse the claimant one hundred and 00/100 dollars (\$100.00) for the filing fee.

Defendant shall file subsequent reports of injury as required by this agency pursuant to rules 876 IAC 3.1(2) and 876 IAC 11.7.

Signed and filed this 13th day of November, 2019.



HEATHER L. PALMER
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

H. Detlie (via WCES)

Wirtjes Construction
PO Box 128
1800 South "E" Avenue
Lovilia, IA 50150
(VIA U.S. AND CERTIFIED MAIL)

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.