Fenton, Kenneth-5034943d

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

KENNETH FENTON,	:	
Claimant,	:	
vs.	:	
	:	File No. 5034943
MENARDS, INC.,	:	
	:	A R B I T R A T I O N
Employer,	:	
	:	D E C I S I O N
and	:	
ZURICH INSURANCE COMPANY,	:	
Insurance Carrier,	:	
Defendants.	:	Head Note Nos.: 1803, 4000.2

STATEMENT OF THE CASE

Claimant, Kenneth Fenton, filed a petition in arbitration seeking workers' compensation benefits from Menards, Inc., employer, and Zurich Insurance Company, insurer, both as defendants. This case was heard in Des Moines, Iowa on June 7, 2013.

The record in this case consists of claimant's exhibits 1 through 24, defendants' exhibits A through M, and the testimony of claimant and Lance Gessell.

ISSUES

1. The extent of claimant's entitlement to permanent partial disability benefits.

2. Whether defendants are liable for a penalty under Iowa Code section 86.13.

FINDINGS OF FACT

Claimant was 38 years old at the time of hearing. Claimant graduated from high school.

Claimant has worked as a saw operator for a window and door company. He also performed welding and worked as a truck driver. (Exhibit 12, pages 4-5)

Claimant's prior medical history is relevant. In 2002 claimant received treatment for lower back pain radiating into the right leg. He received physical therapy for this pain. (Ex. G, pp. 7-8)

In the summer of 2007 claimant was involved in an accident with a "four-wheeler" that caused worsening radicular pain in the right leg. During the summer of 2007 claimant went to the emergency room for his back pain, received an injection, and was treated with medication for lower back pain radiating into both legs. (Ex. G, pp. 11-14)

In 2008 claimant was taken to the hospital by an ambulance when lower back pain became so severe claimant could not walk. He was kept overnight in the hospital. (Ex. G, pp. 17-18)

Claimant began with Menards in April of 2009. Claimant was an operator. Claimant worked on an assembly line putting hinges on doors. A more detailed description of claimant's job is found in Exhibit 17.

In August of 2009 claimant went to the hospital for lower back pain. He was told he was not a candidate for surgery if he continued to smoke. An epidural steroid injection (ESI) was ordered for claimant. (Ex. D, p. 5) In September of 2010 claimant again treated for lower back pain occurring while laying tile. (Ex. G, p. 22) Claimant indicated in interrogatories he had three to four ESIs prior to November of 2010. (Ex. H, p. 5)

On November 8, 2010 claimant was carrying a box of hinges. He testified the box weighed approximately 50 pounds. He said plastic straps holding the box together broke causing his back to jerk. Claimant returned to work that day. He testified he initially thought his back pain was a flare-up of his chronic lower back pain.

In a note dated November 8, 2010, Nate Molstad, Plant Manager, indicated claimant approached him regarding jerking his back when a box's hinges broke open. The note indicates Mr. Molstad offered to take claimant to the doctor. Claimant indicated he would try to make it through the day and did not receive medical care. (Ex. 22, p. 1)

Claimant testified in deposition that approximately two days after his accident, he went to see his manager Dawn (no last name given) on several occasions. He told Dawn he needed to see a doctor and his back hurt. Claimant said Dawn told him she had no one to replace him at work. Claimant was unsure if he told Dawn that his back pain was due to a work injury. (Ex. L, pp. 43-45)

On November 15, 2010 claimant was evaluated at Atlantic Medical Center by Angela Weppler, M.D. Claimant was assessed as having chronic back problems with recurrent flares. An ESI was recommended. The records indicate the claimant had back pain episodes in 2008. (Ex. 4, pp. 6-7)

An MRI done on November 16, 2010 showed a disc extrusion at the L5-S1 level compromising the S1 nerve root. (Ex. 5, pp. 1-2)

In November of 2010 claimant underwent two ESI injections to the lumbar spine. (Ex. 3, pp. 4-7)

On December 14, 2010 claimant completed an accident report with Menards. Claimant testified in deposition this is when he reported his problem as a work injury. (Ex. D, p. 8; Ex. L, Deposition p. 47)

On December 15, 2010 claimant returned to Atlantic Medical Care Center and was evaluated by Elaine Berry, M.D. Claimant indicated he hurt his back picking up a box of hinges when straps broke. Claimant was assessed as having a ruptured disc with impingement at the L5-S1 nerve root. Claimant had problems with urination and defecation. Dr. Berry classified claimant's condition as a "neurological urgency/emergency." Dr. Berry had claimant fill out a workers' compensation form. Claimant indicated on the form that his employer knew of the injury on December 14, 2010. (Ex. 4, pp. 10-14)

On December 21, 2010 claimant was evaluated by John Hain, M.D., a neurologist. Claimant complained of incontinence and constipation. He was assessed as having a cauda equina syndrome due to the disc herniation at the L5-S1 level. Dr. Hain recommended surgery within the next week. (Ex. 6, pp. 1-3)

A December 22, 2010 note from the employer indicated claimant reported the injury on November 8, 2010 to his manager. The note indicates that because claimant continued to work and did not request medical attention the injury was not brought back to the manager's attention. (Ex. 22, p. 3)

Surgery for claimant was scheduled for December 27, 2010 by Dr. Hain. (Ex. 4, p. 16) Claimant's surgery was not authorized at that time by defendants due to defendants' further investigation of the claim. (Ex. 4, p. 18)

In a January 4, 2011 note Dr. Hain opined claimant had a work-related injury that caused a massive disc herniation at the L5-S1 levels, resulting in a cauda equina syndrome. He recommended surgery to prevent further neurological injury. (Ex. 6, p. 4)

In a January 4, 2011 letter claimant's counsel requested defendants' authorize the surgery recommended by Dr. Hain. Records indicate defendant/insurer did not want to authorize surgery at that time and wanted to further investigate claimant's claim before authorizing surgery. Claimant's counsel indicated he would file a petition for alternate medical care if surgery was not authorized. (Ex. 14, pp. 1-5)

In a January 18, 2011 note Robert Broghammer, M.D. indicated he reviewed claimant's medical records. He noted the records indicated claimant had a pre-existing condition lit up by the November 2010 work injury. (Ex. 7) The same day a letter went to claimant's counsel indicating defendants authorize the surgery recommended by Dr. Hain. (Ex. J, p. 1)

On January 21, 2011 claimant underwent surgery performed by Dr. Hain. Claimant underwent a fusion at the L5-S1 level. (Ex. 8, pp. 1-5)

On October 4, 2011 claimant returned to Dr. Hain in followup. Claimant complained of increased pain in the lower back and hip area. A CT scan was recommended. (Ex. 6, p. 8)

Followup diagnostic testing was performed on claimant in November of 2011 and March of 2012. (Ex. 9, pp. 1-3) Dr. Hain's review of the CT scan from March of 2012 indicated a lack of interbody bone growth between the L5 and S1 levels. Claimant also had radicular symptoms in the right leg. A re-operative fusion at the L5-S1 level with a detethering of the S1 nerve root, and a new decompression for the L4-5 with the extension of the fusion to the L4-5 level was recommended and chosen as a treatment option. (Ex. 6, pp. 12-13) The surgery was performed by Dr. Hain on June 20, 2012. (Ex. 8, pp. 8-9)

Claimant returned to work on September 27, 2012. He used a sacral donut and had a 25-pound lifting restriction. (Ex. 6, p. 17) On November 5, 2012 claimant was returned to work without restrictions. Claimant's back pain had improved. He still had mild radicular symptoms in the right leg. (Ex. C, p. 2)

Claimant returned to Dr. Hain on February 4, 2013. Dr. Hain found claimant at maximum medical improvement (MMI) at that time. Claimant had residual paresthesias in the right leg. Claimant was continued on full duty work. (Ex. C, p. 3)

In a February 12, 2013 note Dr. Hain found claimant had between a 20 to 23 percent permanent impairment based on a finding that claimant fell into the DRE lumbar category 4 under the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition. (Ex. C, p. 5)

On March 19, 2013 claimant underwent a functional capacity evaluation (FCE) performed by John Kruzich, MS, OTR/L. The FCE found claimant could lift up to 55 pounds occasionally floor to waist and could carry 50 pounds occasionally. The FCE recommended claimant not walk or stand continuously and only occasionally kneel, squat, or bend. (Ex. 2)

On April 1, 2013 claimant underwent a second FCE performed by Neal Wachholtz, P.T. It recommended claimant only carry 50 pounds occasionally, and avoid prolonged forward bending. It found claimant was able to work in the medium physical demand level. (Ex. B)

In an April 2, 2013 report Dean Wampler, M.D. gave his opinions of claimant's condition following an IME. Claimant indicated he still had tingling sensation in his leg but that the pain had improved. Claimant also had some tailbone pain that improved after using a donut to sit on. Claimant complained about back pain that increased throughout the day, but that was manageable. (Ex. A)

Dr. Wampler assessed claimant as having an acute disc herniation at the L4-S1 level causing nerve root impingement and cauda equina syndrome. Claimant's second surgery was required to repair hardware that had failed from the first. Dr. Wampler found claimant fit in the DRE category number 4 under the Guides and found claimant had a 23 percent permanent impairment. (Ex. A)

Dr. Wampler opined that claimant had a 10 percent permanent impairment, due to his pre-existing condition, before his 2010 work injury. He found restrictions from the April 1, 2013 FCE applicable and opined claimant could lift up to 20 pounds frequently. (Ex. A)

In a May 7, 2013 report Jacqueline Stoken, D.O. gave her opinion of claimant's condition following an IME. Claimant complained of right buttock pain radiating into the heel. Dr. Stoken assessed claimant as having chronic lower back pain with right lower extremity radiculopathy following a lumbar fusion. She found claimant might benefit from future pain management. (Ex. 1)

Dr. Stoken found claimant had a 13 percent permanent impairment based upon surgical treatment he received. She also found claimant had a 15 percent total permanent impairment due to loss of range of motion. The combined values resulted in a 28 percent permanent impairment to the body as a whole. She disagreed with Dr. Wampler that claimant had a 10 percent pre-existing permanent impairment for his November of 2010 date of injury. Dr. Stoken restricted claimant from lifting more than 50 pounds occasionally and 25 pounds frequently. (Ex. 1)

Claimant testified he worked in the operators' station when he returned to work. He indicated when his employer received work restrictions, he was moved to a "floater" position. Claimant said he wants to continue to work at Menards. He does not feel secure in his job as a floater and does not believe the work is a permanent job.

Lance Gessell said he is plant manager at Menards. In that capacity he is familiar with claimant's workers' compensation claim and claimant's job. He said that following surgery, claimant was returned to work at light duty. After light duty claimant did the operator job for three to four weeks. Mr. Gessell said it did not appear claimant had any problem doing the job at that time. He said after reviewing claimant's restrictions from the FCE, he was concerned with the twisting and bending claimant did as an operator. He said that is when claimant was moved to the floater position. Mr. Gessell said as a floater, claimant does a number of different jobs at Menards. He said claimant worked as a floater in the custom shop department. He said claimant's job in custom shop could potentially be a permanent job.

Claimant testified he still has pain in his right buttocks and the back of his right leg. He said he also feels pressure in his tailbone.

Claimant testified he did not believe he could return to work as a truck driver or welder given his physical restrictions. He said he could return to work as a saw operator at Vermeers.

In 2010 claimant earned $26,040.00. In 2011 claimant earned $19,255.00. In 2012 claimant earned $21,860.00. (Ex. 20)

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 39 years old at the time of hearing. He graduated from high school. Claimant has worked as a saw operator at a window and door company. He also performed welding and worked as a truck driver.

Claimant had two surgeries to the lumbar spine. The first surgery was a fusion at the L5-S1 level. The second surgery involved repair of the first with inclusion of a fusion at the L4-L5 level.

Three experts opined regarding the extent of claimant's permanent impairment.

Dr. Hain treated claimant for an extended period of time and performed both surgeries. He found claimant had between a 21 to 23 percent permanent impairment based on the finding that claimant fell in the DRE category 4 under the Guides. (Ex. C, p. 5)

Dr. Wampler evaluated claimant once for an IME. He found claimant had a 23 percent permanent impairment also based on the finding that claimant fell in the DRE category 4 under the Guides. He also apportioned 10 percent of the permanent impairment to claimant's pre-existing condition. (Ex. A)

Dr. Stoken evaluated claimant on one occasion for an IME. She opined claimant had a 28 percent permanent impairment to the body as a whole based on the range of motion (ROM) method under the Guides. (Ex. 1)

The ROM section of the Guides, found at section 15.8, page 398, indicates " . . . the ROM method should be used only . . . if the DRE method is not applicable (no verifiable injury) . . ." There is no indication in Dr. Stoken's report that the DRE method is not applicable. In addition, this case involves a verifiable injury. It appears that Dr. Stoken found claimant had a 28 percent permanent impairment based upon use of the ROM method, when Dr. Stoken should have applied the DRE categories. For this reason, her opinion regarding the extent of claimant's permanent impairment is not convincing.

As noted, Dr. Wampler also opined that 10 percent of claimant's permanent impairment should be apportioned as a pre-existing permanent impairment. There is no evidence claimant had any permanent impairment prior to his 2010 injury. In addition, Dr. Wampler's suggestion that claimant's permanent impairment be apportioned out due to a pre-existing condition is not supported by law. For these reasons, Dr. Wampler's suggestion that 10 percent of claimant's permanent impairment be apportioned due to a pre-existing condition is not convincing.

Dr. Hain and Dr. Wampler both found claimant had a 23 percent permanent impairment based upon a finding that claimant fell in the DRE category 4 lumbar spine under the

Guides. Dr. Stoken's opinion regarding permanent impairment is not convincing. Based on this, it is found that claimant has a 23 percent permanent impairment to the body as a whole.

Claimant underwent two FCEs. Both limited claimant to occasionally lifting up to 50 pounds, in some capacity, and limiting claimant's bending and twisting. While the Kruzich FCE is more detailed, both FCEs indicate claimant is limited to occasionally lifting in the 50-pound area. Based on Mr. Gessell's testimony, the FCE that is applicable at claimant's work is the FCE that was performed by physical therapist, Wachholtz. For this reason, limitations prescribed in the Wachholtz FCE are found to be more applicable to help determine claimant's loss of earning capacity.

Claimant was returned to work initially in his job as an operator. Because of restrictions in his FCE, he was taken from his operator's job and given a position as a floater. The record indicates that while the floater job could be permanent, the job was not a permanent position at the time of hearing.

Claimant had two lumbar surgeries that resulted in a two-level fusion. He has a 23 percent permanent impairment. He is restricted to lifting up to 30 pounds occasionally and also has limitations regarding his ability to bend. Claimant credibly testified he could not return to work to most of his prior jobs given his limitations. When all factors are considered, it is found claimant has a 50 percent loss of earning capacity or industrial disability.

The next issue to be determined is if defendants are liable for 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."

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. SeeChristensen, 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. SeeChristensen, 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 claim¾the "fairly debatable" basis for delay. SeeChristensen, 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." SeeChristensen, 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).

Claimant contends penalty is warranted for the periods of December 15, 2010 through January 26, 2011 for alleged unreasonable delay of benefits.

Claimant has a long history of pre-existing lower back problems. Claimant injured his back on November 8, 2010. The record indicates claimant spoke with Mr. Molstad about the injury. The record also indicates Mr. Molstad offered claimant medical treatment but that claimant declined this treatment and returned to work. (Ex. 22, p. 1)

Approximately two days after the November 8, 2010 injury claimant approached his manager, Dawn, about getting medical care but was told that there was no one to replace him on his job. Claimant was unsure if he told Dawn that he needed medical care for a work-related back injury. (Ex. L, Deposition pages 43-45)

From mid-November to mid-December claimant received treatment for his back problems. There is no indication in the medical records claimant indicated his back pain was due to a work-related injury. (Ex. 3, pp. 4-7; Ex. 4, pp. 6-7; Ex. 5, pp. 1-2)

On December 14, 2010 claimant completed an accident report with defendant employer indicating he injured his back at work. Records indicate that from December 15, 2010 to late January of 2011 defendants investigated claimant's claim.

I recognize claimant told Mr. Molstad on November 8, 2010 that he "jerked" his back when picking up a box of hinges. (Ex. 22, p. 1) However, claimant returned to work after given the opportunity to receive medical care. He was later denied medical care by a supervisor, Dawn, a few days later, but was unsure if he told Dawn that he had a work-related accident. Claimant was then off work for several weeks. There is no record he told his employer or medical providers during this period of time he was off work for a work-related injury. Medical reports from Atlantic Medical Care Center suggest that claimant's treatment in November of 2010 was for a pre-existing back problem. (Ex. 4, pp. 6-9)

The employer knew claimant had an injury at work, but the record indicates there was no lost time or medical care needed initially for the November 8, 2010 incident. Claimant did not let his employer or providers know that he was off work from mid-November to mid-December for a work injury. It was not until December 14, 2010 that defendant knew of the serious

nature of claimant's injury. Given his pre-existing back condition, the employer had a right to investigate the claim between December 15, 2010 and late January of 2011. SeeChristensen, 554 N.W.2d at 261 (two months' delay in obtaining a medical report found reasonable).

Given this record, a penalty is not appropriate in this case.

ORDER

THEREFORE, IT IS ORDERED:

That defendants shall pay claimant two-hundred fifty (250) weeks of permanent partial disability benefits at three-hundred eighty-eight and 17/100 dollars ($388.17) per week commencing on September 30, 2012.

That defendants shall pay accrued benefits in a lump sum.

That defendants shall pay interest in unpaid weekly benefits as ordered above as set forth in Iowa Code section 85.30.

That defendants shall file subsequent reports of injury as required under rule 876 IAC 3.1(2).

That defendants shall pay the costs of this matter as required under rule 876 IAC 4.33.

Signed and filed this 13th day of September, 2013.

JAMES F. CHRISTENSON
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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