IN THE COURT OF APPEALS OF IOWA

No. 6-422 / 95-2133

FILED
OCT 25 1996
CLERK SUPREME COURT

LeANN J. HANNA,
Petitioner-Appellant,

vs.

FLEETGUARD, INC., and LIBERTY MUTUAL INSURANCE CO.,
Respondents-Appellees.

Appeal from the Iowa District Court for Cerro Gordo County, Jon Stuart Scoles, Judge.

LeAnn Hanna appeals from the district court's order affirming in part and remanding in part a decision of the industrial commissioner. **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.**

Mark S. Soldat, Algona, for appellant.

Tito Trevino of Trevino & Leehey, Fort Dodge, for appellees.

Heard by Sackett, P.J., and Huitink and Streit, JJ.

STREIT, J.

Petitioner, plagued with emotional trauma in her personal life and physical pain at work, appeals from the district court's order affirming in part and remanding in part a decision of the industrial commissioner in a work-related injury case. While the court sympathizes with the Petitioner, we affirm the majority of the district court's order.

LeAnn Hanna worked on the assembly line at Fleetguard, a manufacturer of engine filters. From 1985 through 1990, Hanna felt pain in her wrists, shoulders and back at work. She saw multiple doctors that prescribed immobilizers, physical therapy, and medication, but nothing helped her situation. She was off work on doctors orders for one month in 1995 and received temporary total disability benefits. While she did get better while being off of work, when she returned, her symptoms and pain also returned. In 1990 she was doing better and denied any wrist pain.

During this time, Hanna underwent psychiatric evaluation and counseling concerning the termination of a long relationship. She was also admitted to a hospital/medical center with symptoms of major depressive disorder related to the deaths of two friends. In 1992, she became pregnant with twins which added to her discomfort.[1] In June 1992, she returned to her doctor, again complaining of wrist, shoulder, and back pain. She saw five doctors over the next six months and was

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[1] Plaintiff gave birth after her termination and suffered the loss of one of her twins several days after birth.

diagnosed with fibromyalgia/muscle contraction syndrome.[2] She received temporary total disability benefits from June 1992 through September 1992. Severe restrictions placed on her activities at work made it impossible for Fleetguard to accommodate her limitations and terminated her employment in February 1993.

Following her termination, Hanna received temporary total disability benefits until October 1993, and then unemployment benefits until February 1994. She was still being treated for clinical depression. Hanna sought additional workers' compensation benefits for the time period from September 1992 through February 1993, and from February 1993 through October 1993, which the parties stipulated to at a hearing by arbitration held before a deputy industrial commissioner in March 1994. The parties stipulated Hanna had suffered a work-related injury in June 1992, however, the deputy concluded Hanna was not entitled to temporary total, temporary partial or healing period benefits after September 1992, because Hanna had reached maximum medical improvement. The deputy also concluded Hanna had suffered no permanent disability as a result of the June 1992 work injury.

The deputy further concluded the calculation of the rate of Hanna's temporary total disability benefits from June 1992 through September 1992, and from February 1993 through October 1993 correctly excluded bonuses paid by Fleetguard. The deputy

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[2] Fibromyalgia is a systemic disease which symtoms include joint pain, sleep disorder, limitations on physical activity and chronic fatigue. The cause of fibromyalgia is often idiopathic or unknown.

refused to award penalty benefits under Iowa Code section 86.13 because the deputy found that Hanna's claim for permanency benefits were fairly debatable. Further, the deputy ordered the respondents to "pay interest pursuant to section 85.30." Costs of the agency appeal were assessed to claimant.

The industrial commissioner adopted the deputy's opinion in full on Hanna's appeal.

Hanna sought judicial review by the district court. The district court found substantial evidence supported the commissioner's finding that Hanna suffered no permanent impairment. The court also concluded that since her wages were not reduced by her assignment to light duty, Hanna was not temporarily partially disabled between September 1992 and February 1993. The court, however, remanded to the industrial commissioner to determine whether Hanna left work during that time period to receive medical services and, if so, to determine the appropriate compensation due her under section 85.27 of the Iowa Code. The court also concluded that Hanna's rate of temporary total disability benefits should have included one of two bonuses she received during the calculation period and remanded to the commissioner to establish Hanna's weekly compensation rate based on this amended earning calculation and the amount of interest due.

The court affirmed the commissioner's failure to determine Hanna had suffered an industrial disability associated with her work activity. The court concluded the

commissioner did not err in failing to authorize future medical care at Fleetguard's expense since the commissioner's finding of no permanent work-related disability was adequately supported in the record. The court also affirmed the refusal to award Iowa Code section 86.13 penalties. The court reassessed costs for the appeal at the agency level, one-half to each party, and assessed costs on appeal to the district court the same.

Hanna appeals. She contends the commissioner and the district court erred in failing to: (1) determine that the disability she now bases her claim is causally connected to her work at Fleetguard and her injury sustained in 1985; (2) determine that she suffered an industrial disability; (3) include both regular bonuses within the compensation rate computation; and (4) award her Iowa Code section 83.16 penalty benefits for the respondents' repeated delays in paying rehabilitative benefits and interest. Further, she asserts the appellate court should provide guidance to the commissioner and bar on the correct calculation of interest due and credit dates for the Iowa Code section 85.70 rehabilitation benefits. Finally, Hanna seeks a reassessment of costs.

I. Standard of Review. We review decisions of the industrial commissioner for errors of law. *Terwilliger v. Snap-On Tools Corp.*, 529 N.W.2d 267, 271 (Iowa 1995). Reversal of an agency's findings occurs only if, after reviewing the record as a whole, we determine substantial evidence does not support them. *Id.* Evidence is substantial if a reasonable mind would accept it as adequate to reach the conclusion at issue. *Id.*

to be drawn from the evidence, we are bound to accept the commissioner's findings. *Freeland v. Employment Appeal Bd.*, 492 N.W.2d 193, 197 (Iowa 1992). After reviewing the entire record, we find there was evidence to support the commissioner's and the district court's findings and conclusion.

II. Appellant's 1992 Injury. Hanna contends the commissioner and the district court failed to find the emotional/psychological injury she now bases her claim on is a work-related injury. She argues the district court failed to determine (1) whether she had a scheduled member or whole body injury, (2) what parts of her body were affected by her work-related injury; (3) whether her emotional and psychological problems resulted from her 1992 injury for which she should receive benefits, and (4) whether her 1992 injury extends back to 1985.

The industrial commissioner and the district court found Hanna's injury in 1992 was an aggravation of a pre-existing fibromylagia. The claimant has the burden of proving by a preponderance of the evidence the disability on which she now bases her claim is causally related to injuries arising out of and in the course of her employment. *Lithcote Co. v. Ballenger*, 471 N.W.2d 64, 66 (Iowa App. 1991). A possibility of causation is not sufficient; a probability is necessary. *See Holmes v. Bruce Motor Freight, Inc.*, 215 N.W.2d 296, 297 (Iowa 1974).

"The law does not require the commissioner to discuss each and every fact in the record and explain why or why not he has rejected it." *Terwilliger v. Snap-On*

Tools Corp., 529 N.W.2d 267, 274 (Iowa 1995). The question of causal connection is essentially within the domain of expert testimony. *Lithcote Co.*, 471 N.W.2d at 66. However, the weight to be given the expert opinion is for the agency as fact finder. Expert opinion testimony, even if uncontroverted, may be accepted or rejected in whole or in part by the trier of fact. *Id.*

The commissioner need not address every sub-issue presented by Hanna in her opinion. Hanna saw five different physicians from May 1992 through February 1993 for pain in her wrists, shoulders, and back. Each physician attempted to treat Hanna with physical therapy, medications, and restrictions at work or completely laying her off of work. All testing, including x-rays, EMG, nerve conduction studies and MRI evaluation, were negative and within normal limits. The commissioner found after considering the total evidence, Hanna's disability she now basis her claim on was not casually connected to her work with Fleetguard or her 1985 injury. The district court agreed with the commissioner and we affirm.

III. Industrial Disability. Hanna argues that the commissioner failed to determine whether she suffered an industrial disability. Industrial disability, within the meaning of the worker's compensation statute, means reduced earning capacity. *Guyton v. Irving Jensen, Co.*, 373 N.W.2d 101, 103 (Iowa 1985). Among the factors to be considered are the employee's bodily impairment, age, intelligence, education, qualifications, experience, and the effect of the injury on the worker's ability to obtain

to be considered are the employee's bodily impairment, age, intelligence, education, qualifications, experience, and the effect of the injury on the worker's ability to obtain suitable work. *Id.* There are no guidelines establishing the weight to be given to each of the factors. *Lithcote Co. V. Ballenger*, 471 N.W.2d 64, 68 (Iowa App. 1991). Rather, it is necessary for the commissioner to draw upon prior experience and general and specialized knowledge to make a finding in regard to the degree of industrial disability. *Id.* It is in this context that we review the evidence.

The industrial commissioner concluded that the "claimant has not proved by a preponderance of the evidence that the disability on which she now basis (sic) her claim is causally connected to her work with employer." Further, he found that Hanna had not suffered any permanent impairment as a result of the June 1992 injury. The district court affirmed. We find no reason to disturb the decisions of the commissioner and the district court in this regard.

IV. Rate of Compensation. Hanna contends the commissioner did not explain how Fleetguard's quarterly bonuses were irregular under section 85.61(3) which resulted in the exclusion of two bonuses received in April 1992 and July 1992 from the compensation rate computation. The district court found that the bonuses were properly includable in Hanna's earnings for the purpose of determining gross weekly earnings. Since Hanna was paid on the hourly basis under Iowa Code section 85.36(6), the weekly earnings are computed by dividing by thirteen, not including overtime or

have been included in her gross earnings since it was within the 13 weeks preceding her injury. The calculation including the one bonus had the effect of increasing her gross weekly earnings from $345.84 determined by the commissioner to $365.02 per week. The district court remanded to the industrial commissioner for the purpose of establishing Hanna's weekly compensation rate based upon gross weekly earnings in that amount and we affirm.

*V. **Healing Period Benefits.*** Hanna claims the commissioner erred in determining September 21, 1992, as a single ending date for the healing period, and thereby did not award compensation from February 13, 1993, through October 8, 1993, which the parties had stipulated. Further, Hanna argues she should have received temporary disability benefits from September 1992 through February 1993 under Iowa Code section 85.33. The district court determined if the time was missed for alleged medical problems, but no services were rendered on those days, then Hanna would not be entitled to temporary total disability benefits, pursuant to section 85.32 and 85.33(1), nor would she be entitled to healing period benefits pursuant to section 85.34(1). The court remanded to the industrial commissioner to determine whether any of Hanna's missed time from work between September 1992 and February 1993 was for the purpose of obtaining medical services, pursuant to section 85.27, and is therefore, compensable.

We affirm the district court's remand on that issue. We further remand to the industrial commissioner to determine whether the parties stipulated in the Hearing Report (March 9, 1994) that Hanna should receive temporary disability benefits from February 1993 through October 1993 and is therefore compensable. Appellant properly preserved this issue on appeal in her motion to Enlarge, Amend, Modify and/or Substitute which was met with a denial by the district court.

*VI. **Penalty Benefits.*** Hanna next claims the commissioner erred in not awarding her penalty benefits for the respondents' repeated delays in paying rehabilitative benefits and interest. An employee is entitled to penalty benefits under Iowa Code section 86.13 (1995), which states:

> If a delay in commencement or termination of benefits occurs without reasonable or probable cause or excuse, the industrial 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 unreasonably delayed or denied.

Id.

Our reading of Iowa Code section 86.13 does not support the allowance of penalties on late interest payments. *See Weishaar v. Snap-On Tools Corp.*, 506 N.W.2d 786, 791 (Iowa App. 1993). We agree with the district court and find the commissioner did not abuse his discretion in failing to award penalties on repeated delays of making interest payments.

An employee is entitled to penalty benefits if there has been a delay in payment unless the employer proves a reasonable cause or excuse. *Christensen v. Snap-On*

An employee is entitled to penalty benefits if there has been a delay in payment unless the employer proves a reasonable cause or excuse. *Christensen v. Snap-On Tools Corp.*, ___ N.W.2d ___ (Iowa 1996). 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 exists if the claim is "fairly debatable." *Dolan v. Aid Insurance Co.*, 431 N.W.2d 790, 794 (Iowa 1988). Therefore, benefits may be delayed, without penalty, during such time as the employer's liability is "fairly debatable." *Kiesecker v. Webster City Custom Meats, Inc.*, 528 N.W.2d 109, 111 (Iowa 1995) (citing *Covia v. Robinson*, 507 N.W.2d 411, 416 (Iowa 1993).

The commissioner found based upon the medical evidence, Hanna's claim for permanency benefits "fairly debatable." Hanna must establish that benefits were withheld unreasonably in order to receive additional benefits. Iowa Code § 86.13 (1995). The commissioner found she did not establish an entitlement to benefits pursuant to section 86.13 because Hanna did not suffer a permanant disability. Fleetguard did not act unreasonably in delaying payment because they contested whether Hanna suffered a permanent partial disability. The district court affirmed the commissioner's denial to impose a penalty. We affirm the district court and commissioner.

The district court remanded this issue back to the industrial commissioner to resolve the dispute over interest recoverable for late payment of weekly benefits. The parties were not in agreement over whether the checks were received on a timely basis and the compensation rate which was determined to be an amount in excess of that paid by Fleetguard, thus affecting the accrual of interest. We affirm the district court. It is the commissioner's obligation in enforcing the provision of section 85.30. *See Thilges v. Snap-On-Tools Corp.*, 531 N.W.2d 644 (Iowa 1995). We further affirm the district court on Hanna's claim regarding Iowa Code section 85.70 benefits that the issue is moot because Hanna did not sustain any permanent disability relating to her employment.

VIII. Assessment of Costs. Finally, Hanna argues all costs have been assessed against her because of her lack of success. The commissioner assessed costs to her on the agency appeal. The district court concluded under Iowa Code section 86.40 the commissioner has discretion in taxing all costs to the parties. In any event, the court assessed each party should pay one-half associated with the appeal at the agency level and one-half of the costs associated with the appeal to the district court. We reverse the district court and find all costs associated with the appeal at the agency level assessed to Hanna based on statute. *See* Iowa Code § 86.40 (1995). We affirm the district court's assessment of one half of the costs associated with the appeal to the district court to Hanna and further assess all costs associated with this appeal to appellant.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

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Mark S. Soldat, Algona, for appellant.

Tito Trevino and Joseph W. Fernandez of Trevino Law Office, Fort Dodge, for appellees.

Heard by Sackett, P.J., and Huitink and Streit, JJ.

STREIT, J.

Petitioner, plagued with emotional trauma in her personal life and physical pain at work, appeals from the district court's order affirming in part and remanding in part a decision of the industrial commissioner in a work-related injury case. While the court sympathizes with the Petitioner, we affirm a majority of the district court's order. This court filed an opinion on October 25, 1996, and later ordered that Appellant's Petition for Rehearing should be granted and deemed submitted on briefs only. We vacate the October 25, 1996 opinion.

LeAnn Hanna worked on the assembly line at Fleetguard, a manufacturer of engine filters. From 1985 through 1990, Hanna felt pain in her wrists, shoulders and back at work. She saw multiple doctors that prescribed immobilizers, physical therapy, and medication, but nothing helped her situation. She was off work on doctors orders for one month in 1985 and received temporary total disability benefits. While she did get better while being off of work, when she returned, her symptoms and pain also returned. In January 1990 she was doing better and denied any wrist pain.

In 1990, Hanna was admitted to a hospital/medical center with symptoms of major depressive disorder related to the deaths of two friends. She also underwent psychiatric evaluation and counseling concerning the termination of a long relationship. She received therapy and medication management until June 1991.

In June 1992, she returned to her doctor, again complaining of wrist, shoulder, and back pain. She saw four medical doctors over the next six months for her physical complaints, including a regular physician, two orthopedic surgeons, and a rheumatologist. She also saw a licensed social worker for counseling.

In January 1993, among multiple diagnoses relating to her wrist, shoulder and back, she was diagnosed with fibromyalgia/muscle contraction syndrome. She received temporary total disability benefits from June 1992 through September 1992. In addition to her wrist and shoulder complaints, Hanna suffered discomfort from her being pregnant with twins.[1] Severe restrictions placed on her activities at work made it impossible for Fleetguard to accommodate her limitations and terminated her employment in February 1993.

Following her termination, Hanna received temporary total disability benefits until October 1993, and then unemployment benefits until February 1994. She was still being treated for clinical depression. Hanna sought additional workers' compensation benefits for the time period from September 1992 through February 1993, and from February 1993 through October 1993, which the parties stipulated to at a hearing by arbitration held before a deputy industrial commissioner in March 1994. The parties stipulated Hanna had suffered a work-related injury in June 1992, however, the deputy concluded Hanna was not entitled to temporary total, temporary partial, or healing

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period benefits after September 1992, because Hanna had reached maximum medical improvement. The deputy also concluded Hanna had suffered no permanent disability as a result of the June 1992 work injury.

The deputy further concluded the calculation of the rate of Hanna's temporary total disability benefits from June 1992 through September 1992, and from February 1993 through October 1993 correctly excluded bonuses paid by Fleetguard. The deputy refused to award penalty benefits under Iowa Code section 86.13 because the deputy found that Hanna's claim for permanency benefits were fairly debatable. Further, the deputy ordered the respondents to "pay interest pursuant to section 85.30." Costs of the agency appeal were assessed to claimant.

The industrial commissioner adopted the deputy's opinion in full on Hanna's appeal.

Hanna sought judicial review by the district court. The district court found substantial evidence supported the commissioner's finding that Hanna suffered no permanent impairment. The court also concluded that since her wages were not reduced by her assignment to light duty, Hanna was not temporarily partially disabled between September 1992 and February 1993. The court, however, remanded to the industrial commissioner to determine whether Hanna left work during that time period to receive medical services and, if so, to determine the appropriate compensation due her under section 85.27 of the Iowa Code. The court also concluded that Hanna's rate

of temporary total disability benefits should have included one of two bonuses she received during the calculation period and remanded to the commissioner to establish Hanna's weekly compensation rate based on this amended earning calculation and the amount of interest due.

The court affirmed the commissioner's failure to determine Hanna had suffered an industrial disability associated with her work activity. The court concluded the commissioner did not err in failing to authorize future medical care at Fleetguard's expense since the commissioner's finding of no permanent work-related disability was adequately supported in the record. The court also affirmed the refusal to award Iowa Code section 86.13 penalties. The court reassessed costs for the appeal at the agency level, one-half to each party, and assessed costs on appeal to the district court the same

Hanna appeals. She contends the commissioner and the district court erred in failing to: (1) determine that the disability she now bases her claim is causally connected to her work at Fleetguard and her injury sustained in 1985; (2) determine that she suffered an industrial disability; (3) include both regular bonuses within the compensation rate computation; and (4) award her Iowa Code section 86.13 penalty benefits for the respondents' repeated delays in paying rehabilitative benefits and interest. Further, she asserts the appellate court should provide guidance to the commissioner and bar on the correct calculation of interest due and credit dates for the

Iowa Code section 85.70 rehabilitation benefits. Finally, Hanna seeks a reassessment of costs.

I. Standard of Review. We review decisions of the industrial commissioner for errors of law. *Terwilliger v. Snap-On Tools Corp.*, 529 N.W.2d 267, 271 (Iowa 1995). Reversal of an agency's findings occurs only if, after reviewing the record as a whole, we determine substantial evidence does not support them. *Id;* Iowa Code § 17A.19(8)(f) (1995); *Sierra v. Employment Appeal Bd.*, 508 N.W 2d 719, 720 (Iowa 1993). Evidence is substantial if a reasonable mind would accept it as adequate to reach the conclusion at issue. *Terwilliger,* 529 N.W.2d at 271; *Suluki v. Employment Appeal Bd.*, 508 N.W.2d 402, 404 (Iowa 1993). If the evidence is in conflict or reasonable minds might disagree about the conclusions to be drawn from the evidence, we are bound to accept the commissioner's findings. *Freeland v. Employment Appeal Bd.*, 492 N.W.2d 193, 197 (Iowa 1992). After reviewing the entire record, we find there was evidence to support the commissioner's and the district court's findings and conclusions except as noted below.

II. Appellant's 1992 Injury. Hanna contends the commissioner and the district court failed to find the emotional/psychological injury she now bases her claim on is a work-related injury. She argues the district court failed to determine (1) whether her present emotional and psychological problems resulted from her 1992 injury for which she should receive benefits, and (2) whether her 1992 injury extends back to 1985 (3)

whether she had a scheduled member or whole body injury, and (4) what parts of her body were affected by her work-related injury.

The industrial commissioner and the district court found Hanna's injury in 1992 was an aggravation of a pre-existing fibromylagia. The claimant has the burden of proving by a preponderance of the evidence the disability on which she now bases her claim is causally related to injuries arising out of and in the course of her employment. *Lithcote Co. v. Ballenger*, 471 N.W.2d 64, 66 (Iowa App. 1991). A possibility of causation is not sufficient; a probability is necessary. *See Holmes v. Bruce Motor Freight, Inc.*, 215 N.W.2d 296, 297 (Iowa 1974).

"The law does not require the commissioner to discuss each and every fact in the record and explain why or why not he has rejected it." *Terwilliger v. Snap-On Tools Corp.*, 529 N.W 2d 267, 274 (Iowa 1995). The question of causal connection is essentially within the domain of expert testimony. *Lithcote Co.*, 471 N.W.2d at 66. However, the weight to be given the expert opinion is for the agency as fact finder. Expert opinion testimony, even if uncontroverted, may be accepted or rejected in whole or in part by the trier of fact. *Id.*

Hanna saw five different physicians from May 1992 through February 1993 for pain in her wrists, shoulders, and back. Each physician attempted to treat Hanna with physical therapy, medications, and restrictions at work or completely laying her off of work. Although numerous trigger points and muscles were tender and she had limited

movement in her neck and shoulder, her x-rays, EMG, nerve conduction studies and MRI evaluation were negative and within normal limits. The commissioner found after considering the total evidence, Hanna's emotional/psychological injury she now basis her claim on was not casually connected to her work with Fleetguard or her 1985 injury The commissioner's conclusion is supported with substantial evidence.

The commissioner need not address every sub-issue presented by Hanna in her brief. *See Second Injury Fund of Iowa v. Braden*, 459 N.W.2d 467, 471 (Iowa 1990). Since the commissioner found Hanna's injury she now bases her claim on was not work-related, the commissioner need not address whether Hanna had a scheduled member or whole body injury and what parts of her body were affected by her work-related injury or whether the pain she now suffers from stems from her 1985 injury. Hanna's argument revolves more around a complaint that the commissioner did not properly assess the soft tissue evidence of her injury. On judicial review of agency action, the court's review is not de novo. *Robbennolt*, __N.W.2d ___ (Iowa 1996). The court must not reassess the weight of the evidence because the weight of the evidence remains within the agency's exclusive domain. *Id.*;(citing *Burns v. Board of Nursing*, 495 N.W.2d 698, 699 (Iowa 1993). The district court agreed with the commissioner's finding and we affirm.

III. Industrial Disability. Hanna argues that the commissioner failed to determine whether she suffered an industrial disability. Industrial disability, within the

meaning of the worker's compensation statute, means reduced earning capacity *Guyton v. Irving Jensen, Co.*, 373 N W 2d 101, 103 (Iowa 1985). Among the factors to be considered are the employee's bodily impairment, age, intelligence, education, qualifications, experience, and the effect of the injury on the worker's ability to obtain suitable work. *Id.* There are no guidelines establishing the weight to be given to each of the factors. *Lithcote Co. V. Ballenger*, 471 N.W.2d 64, 68 (Iowa App. 1991). Rather, it is necessary for the commissioner to draw upon prior experience and general and specialized knowledge to make a finding in regard to the degree of industrial disability. *Id.* It is in this context that we review the evidence.

The industrial commissioner concluded that the "claimant has not proved by a preponderance of the evidence that the disability on which she now basis [sic] her claim is causally connected to her work with employer." Further, he found that Hanna had not suffered any permanent impairment as a result of the June 1992 injury. The district court affirmed. We find no reason to disturb the decisions of the commissioner and the district court in this regard that Hanna has not suffered an industrial injury.

IV. Rate of Compensation. Hanna contends the commissioner did not explain how Fleetguard's quarterly bonuses were irregular under section 85.61(3) which resulted in the exclusion of two bonuses received in April 1992 and July 1992 from the compensation rate computation. The district court found that the bonuses were properly includable in Hanna's earnings for the purpose of determining gross weekly

earnings Since Hanna was paid on the hourly basis under Iowa Code section 85 36(6), the weekly earnings are computed by dividing by thirteen, not including overtime or premium pay, the earnings she earned during the 13 consecutive calendar weeks immediately preceding the injury. The bonus Hanna received in April 1992 should have been included in her gross earnings since it was within the 13 weeks preceding her injury. The calculation including the one bonus had the effect of increasing her gross weekly earnings from $345.84 determined by the commissioner to $365.02 per week. The district court remanded to the industrial commissioner for the purpose of establishing Hanna's weekly compensation rate based upon gross weekly earnings in that amount and we affirm.

*V. **Penalty Benefits.*** An employee is entitled to penalty benefits under Iowa Code section 86 13 (1995), which states:

> If a delay in commencement or termination of benefits occurs without reasonable or probable cause or excuse, the industrial 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 unreasonably delayed or denied.

Id.

The Iowa Supreme Court has discussed the application of section 86.13 penalties in three recent cases. *See Christensen v. Snap-On Tools Corp.*, ___ N.W.2d ___ (Iowa 1996); *Robbennolt v. Snap-On Tools Corp.* ___ N.W.2d ___ (Iowa 1996); *Meyers v. Holiday Express Corp.* __ N.W.2d __ (Iowa 1996). In *Meyers*, the Supreme Court set out several principles from the penalty provisions of Iowa Code section 86.13:

(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.

(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.

(3) Reasonable causes or excuses include (a) a delay for the employer to investigate the claim, or (b) the employer had a reasonable basis to contest the claim--the "fairly debatable" basis for delay.

(4) For the purpose of applying section 86.13, the benefits that are *under*paid as well as *late*-paid benefits are subject to penalties, unless the employer establishes reasonable and probable cause or excuse.

(5) For purposes of determining whether there has been a delay, payments are "made" when (a) the check addressed to a claimant is mailed, or (b) the check is delivered personally to the claimant by the employer or its workers' compensation insurer.

(6) In determining the amount of penalty, the commissioner is to consider factors such as 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.

(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."

Meyers, __ N.W.2d at __ (citations omitted).

Hanna claims Fleetguard did not calculate correctly her weekly compensation for temporary disability. In addition her payments were delayed as a result of the carrier

mailing Hanna's checks to Fleetguard Fleetguard then failed to add accrued interest to the principal amounts which were paid late She claims the commissioner erred in not awarding her penalty benefits for the Fleetguards' repeated delays in paying rehabilitative benefits and interest.

Applying the principles distilled from the penalty provisions of Iowa Code section 86.13, as set out in *Meyers*, we find the commissioner should have awarded penalty benefits. The commissioner stated the standard of evaluating Fleetguard's delay in making payments was under the reasonableness test. The commissioner found "based on the medical evidence in the case, specifically statements from physicians who had treated and/or examined claimant, claimant's claim for permanency benefits was fairly debatable." The Commissioner relied on this evidence in making the determination that Fleetguard acted reasonable in delaying payments and thus, since Fleetguard had a basis to contest the claim--the "fairly debatable" basis for delay, no penalty should be imposed. *See Christensen*, __ N.W.2d at __.

Benefits that are underpaid as well as late-paid benefits, however, are subject to penalties, unless the employer establishes reasonable and probable cause for excuse. *Robbennolt*, __ N.W.2d at __. Fleetguard paid benefits at the rate of $197.20 per week, while the commissioner found a weekly compensation rate of $210.86. In absence of excuse, the commissioner is required to apply a penalty. Fleetguard offered an excuse for its miscalculation that the calculation included "short weeks" which were later

excluded by the Commissioner. Such an excuse is not reasonable We find the commissioner should have applied a penalty for under paid weekly compensation.

For purposes of determining whether there has been a delay as a result of the carrier sending Hanna's checks to Fleetguard, payment is not "made" for penalty purposes until the claimant actually receives the check. *Robbennolt*, __ N.W.2d at _ __. Hanna did not receive her check timely because of this transfer from the carrier through Fleetguard and thus, the commissioner should also have applied a penalty for late payment.

We order the district court to remand to the commissioner for determination of the amount of penalty to be awarded. In determining the amount of penalty, the commissioner shall consider such factors as the length of 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. *Robbennolt*, _ N.W.2d at ___.

VI. Healing Period Benefits. Hanna claims the commissioner erred in determining September 21, 1992, as a single ending date for the healing period, and thereby did not award compensation from February 13, 1993, through October 8, 1993, which the parties had stipulated. Further, Hanna argues she should have received temporary disability benefits from September 1992 through February 1993 under Iowa Code section 85.33. The district court determined if the time was missed for alleged medical problems, but no services were rendered on those days, then Hanna would not

be entitled to temporary total disability benefits, pursuant to section 85 32 and 85 33(1), nor would she be entitled to healing period benefits pursuant to section 85 34(1). The court remanded to the industrial commissioner to determine whether any of Hanna's missed time from work between September 1992 and February 1993 was for the purpose of obtaining medical services, pursuant to section 85.27, and is therefore, compensable.

We affirm the district court's remand on that issue. We further remand to the industrial commissioner to determine whether the parties stipulated in the Hearing Report (March 9, 1994) that Hanna should receive temporary disability benefits from February 1993 through October 1993 and is therefore compensable. Appellant properly preserved this issue on appeal in her motion to Enlarge, Amend, Modify and/or Substitute which was met with a denial by the district court.

VII. Section 85.30 Interest and Credit. Hanna argues the commissioner failed to resolve the issue of how much compensation principal was paid by Fleetguard and how the interest provided in section 85.30 accrued for late payment of compensation. The district court remanded this issue back to the industrial commissioner to resolve the dispute over interest recoverable for late payment of weekly benefits. The parties were not in agreement over whether the checks were received on a timely basis and the compensation rate which was determined to be an amount in excess of that paid by Fleetguard, thus affecting the accrual of interest. We affirm the district court. It is the commissioner's obligation to enforce the provision of section 85.30. *See Thilges v.*

Snap-On-Tools Corp., 531 N.W 2d 644 (Iowa 1995). We further affirm the district court on Hanna's claim regarding Iowa Code section 85 70 benefits that the issue is moot because Hanna did not sustain any permanent disability relating to her employment.

VIII. Assessment of Costs. Finally, Hanna argues all costs have been assessed against her because of her lack of success. The commissioner assessed costs to her on the agency appeal. The district court concluded under Iowa Code section 86.40 the commissioner has discretion in taxing all costs to the parties. In any event, the court assessed each party should pay one-half associated with the appeal at the agency level and one-half of the costs associated with the appeal to the district court. We review the district court's and industrial commissioner's action in taxing cost for an abuse of discretion. Iowa Code §§ 86.32, .40 (1995). When reviewing the taxation of costs, the court considers the success of the applicant on the issues raised on appeal as shown by the record. *Robbennolt*, __ N.W.2d at __. We remand the assessment of costs to the commissioner for redetermination of the costs. We affirm the district court's assessment of one half of the costs associated with the appeal to the district court to each party and further assess each party one-half the costs associated with this appeal.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.