BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

ALISHA CARR,

Claimant,

vs.

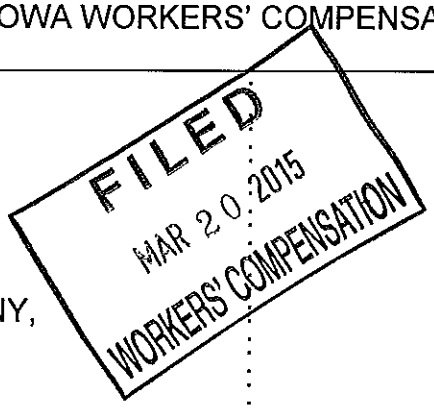
NEW YORK & COMPANY,

Employer,

and

SENTINEL INSURANCE COMPANY,

Insurance Carrier,
Defendants.



File No. 5045323

ARBITRATION

DECISION

Head Note No.: 1100, 1803

STATEMENT OF THE CASE

The claimant, Alisha Carr, has filed a petition in arbitration and seeks workers' compensation benefits from New York & Company, employer, and Sentinel Insurance Company, insurance carrier defendants.

This matter was heard by Deputy Workers' Compensation Commissioner Ron Pohlman on November 7, 2014 at Des Moines, Iowa. The record in the case consists of claimant's exhibits 1-12, and 14; defendants' exhibits A-C, as well as the testimony of the claimant.

ISSUES

The parties submitted the following issues for determination:

1. Whether the claimant sustained an injury on October 20, 2011, which arose out of and in the course of her employment;

2. Whether the injury was the cause of any disability;

3. Whether the claimant is entitled to temporary total disability/healing period benefits from June 22, 2012 through October 1, 2013;

4. The extent of claimant's entitlement to permanent partial disability benefits pursuant to Iowa Code section 85.34(2)(u);

5. Whether the claimant is entitled to payment of medical expenses pursuant to Iowa Code section 85.27;

6. Whether the claimant is entitled to reimbursement for an independent medical evaluation pursuant to Iowa Code section 85.39;

7. Whether the defendant is entitled to a credit under Iowa Code section 85.38(2); and

8. Whether the claimant is entitled to penalties pursuant to Iowa Code section 86.13.

FINDINGS OF FACT

The claimant at the time of the hearing was 54 years of age. She is an Urbandale, Iowa resident. She is right-hand dominant. She graduated high school and graduated from Baker University with degrees in psychology and education. She was an outstanding student in college and was on the Dean's List. She attended on an athletic/academic scholarship. While in college she played softball in the Women's World Series.

The claimant had worked for New York & Company for five years by the time of her work injury. She was recruited to this employment from another retail establishment (Things Remembered) where she had been a manager. Her work at New York & Company was remarkable, lead to her promotion and lead to her being called upon many times to troubleshoot problems at other stores the company owned. She has traveled to Arizona, Wisconsin and Minnesota to help out stores in those states because of her skill and value to the employer. The claimant's primary work location was the Jordan Creek Mall in West Des Moines, Iowa. However, the employer also has a store in Davenport, Iowa, and the claimant was often called upon to travel to that store to correct matters there. Sometimes the claimant drove to Davenport and stayed in a hotel. She would be paid then for her mileage. The claimant was a salaried employee and was being paid at the time of the accident in this case.

On October 20, 2011 she was directed by her district manager to go to the Davenport, Iowa store. She left from her home in Urbandale, Iowa and traveled on Interstate 80 to the Davenport, Iowa store. She worked in the store all day. At some time between 5:15 and 5:30 she attempted to leave the mall parking lot where the store was located in Davenport, Iowa and was involved in an automobile accident. The claimant was driving down an aisle in the parking lot when she was struck by another automobile. The claimant reported this incident and afterwards drove home on Interstate 80, the same way she had traveled to Davenport. She was paid mileage for her trip by the employer.

The claimant sought medical care on October 21, 2011 with Patricia Fasbender, D.O., her family physician. The assessment was cervicalgia. She

was treated with medication. The claimant continued to work throughout the rest of 2011 and the first six months of 2012. On June 22, 2012 the claimant's physician, Dr. Fasbender, took the claimant off of work for physical therapy. The claimant continued off of work under Dr. Fasbender's care through 2013. On September 11, 2013 Dr. Fasbender imposed restrictions and released the claimant to return to work:

Work/School Release

RESTRICTION TYPE

No lifting, pushing, pulling over 10 lbs.

No repeated lifting over 5 lbs.

No reaching with right arm.

Limited use of right hand/arm.

No work above shoulder height.

No repeated bending or twisting of neck.

No use of vibratory tools.

COMMENTS/IDEAS: She is able to return to work with the above restrictions.

(Exhibit 1, page 49)

Based on these restrictions, the claimant was unable to return to her job at New York & Company, as managers were expected to perform physical work such as putting clothes away and working on the floor of the store.

On October 1, 2013 the claimant obtained employment at Walgreens as a part-time cashier. This paid $11.00 per hour. The claimant continued in that employment until June 2014 when she obtained employment at Dairy Queen with a salary of $32,000.00 per year. Dairy Queen accommodates the claimant's work restrictions. She works approximately 50 hours per week in this employment.

The claimant saw Sunil Bansal, M.D. for an independent medical evaluation on May 2, 2014. Dr. Bansal's diagnosis is cervical myofascial pain syndrome and right rotator cuff tendinitis. He placed the claimant at maximum medical improvement on December 18, 2013. Dr. Bansal causally connects the claimant's medical condition to the accident of October 20, 2011. Dr. Bansal opines that the claimant has a four percent whole person impairment related to the cervical condition and a two percent body as a whole permanent impairment for the right arm. Dr. Bansal opines that the claimant is restricted to lifting no greater than 20 pounds occasionally with the right arm

and no lifting greater than 10 pounds overhead with the right arm, and no repetitive overhead lifting with the right arm.

The claimant sued the driver of the car that hit her and obtained a settlement in May 2014 of $80,000.00. Less 25 percent for attorney fees, her net is $60,000.00.

REASONING AND CONCLUSIONS OF LAW

The first issue in this case is whether the claimant sustained an injury that arose out of and in the course of her employment on October 20, 2011.

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).

The claimant has the burden of proving by a preponderance of the evidence that the alleged injury actually occurred and that it both arose out of and in the course of the employment. Quaker Oats Co. v. Ciha, 552 N.W.2d 143 (Iowa 1996); Miedema v. Dial Corp., 551 N.W.2d 309 (Iowa 1996). The words "arising out of" referred to the cause or source of the injury. The words "in the course of" refer to the time, place, and circumstances of the injury. 2800 Corp. v. Fernandez, 528 N.W.2d 124 (Iowa 1995). An injury arises out of the employment when a causal relationship exists between the injury and the employment. Miedema, 551 N.W.2d 309. The injury must be a rational consequence of a hazard connected with the employment and not merely incidental to the employment. Koehler Electric v. Wills, 608 N.W.2d 1 (Iowa 2000); Miedema, 551 N.W.2d 309. An injury occurs "in the course of" employment when it happens within a period of employment at a place where the employee reasonably may be when performing employment duties and while the employee is fulfilling those duties or doing an activity incidental to them. Ciha, 552 N.W.2d 143.

Defendants argue that the injury is not work connected pursuant to the going and coming rule.

Generally, absent special circumstances, injuries occurring off the employer's premises while the employee is on the way to or from work are not compensable. This is known as the going and coming rule. 2800 Corp. v. Fernandez, 528 N.W.2d 124, 129 (Iowa 1995).

The claimant in this case was sent to the Davenport, Iowa location on a special errand to help with the operation of that store. She was paid mileage for her trip to Davenport, Iowa to perform that job. Her normal work location was not Davenport, Iowa. Instead, it was the Jordan Creek Mall in West Des Moines, Iowa. This injury occurred while the claimant was on this special errand and returning from that special errand and thus arose out of and in the course of her employment.

The next issue is whether the injury was the cause of any disability.

The claimant has the burden of proving by a preponderance of the evidence that the injury is a proximate cause of the disability on which the claim is based. A cause is proximate if it is a substantial factor in bringing about the result; it need not be the only cause. A preponderance of the evidence exists when the causal connection is probable rather than merely possible. George A. Hormel & Co. v. Jordan, 569 N.W.2d 148 (Iowa 1997); Frye v. Smith-Doyle Contractors, 569 N.W.2d 154 (Iowa App. 1997); Sanchez v. Blue Bird Midwest, 554 N.W.2d 283 (Iowa App. 1996).

The question of causal connection is essentially within the domain of expert testimony. The expert medical evidence must be considered with all other evidence introduced bearing on the causal connection between the injury and the disability. Supportive lay testimony may be used to buttress the expert testimony and, therefore, is also relevant and material to the causation question. The weight to be given to an expert opinion is determined by the finder of fact and may be affected by the accuracy of the facts the expert relied upon as well as other surrounding circumstances. The expert opinion may be accepted or rejected, in whole or in part. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); IBP, Inc. v. Harpole, 621 N.W.2d 410 (Iowa 2001); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995). Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417 (Iowa 1994). Unrebutted expert medical testimony cannot be summarily rejected. Poula v. Siouxland Wall & Ceiling, Inc., 516 N.W.2d 910 (Iowa App. 1994).

The claimant's treating physician opined that the claimant had permanent restrictions as a result of this work injury. Dr. Bansal also opines that the claimant has permanent work restrictions and permanent impairment. The record shows that the claimant was taken off of work by Dr. Fasbender and was unable to work for a substantial period of time. The claimant has established that she sustained healing period and permanent disability.

The next issue is whether the claimant is entitled to healing period benefits for the period from June 22, 2012 through October 1, 2013. Section 85.34(1) provides that healing period benefits are payable to an injured worker who has suffered permanent partial disability until (1) the worker has returned to work; (2) the worker is medically capable of returning to substantially similar employment; or (3) the worker has achieved maximum medical recovery. The healing period can be considered the period during which there is a reasonable expectation of improvement of the disabling condition. See Armstrong Tire & Rubber Co. v. Kubli, 312N.W.2d 60 (Iowa App. 1981). Healing period benefits can be interrupted or intermittent. Teel v. McCord, 394 N.W.2d 405 (Iowa 1986).

The record shows that the claimant was off of work and receiving medical care for treatment of her work injury from June 22, 2012 through September 11, 2013. She was unable to return to substantially similar work until October 1, 2013. She is entitled to healing period for this time frame.

The next issue is the extent of claimant's entitlement to permanent partial disability pursuant to Iowa Code section 85.34(2)(u).

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.

The claimant has work restrictions that precluded her return to her former employment. She has secured new employment and has found a job now that is consistent with her work restrictions. At the time of her injury she was earning $60,000.00 per year, and now she earns $32,000.00 per year. Her job with New York & Company provided opportunity to earn bonuses as well. The claimant has sustained an industrial loss of 50 percent. She is entitled to 250 weeks of permanent partial disability benefits pursuant to Iowa Code section 85.34(2).

The next issue is whether the claimant is entitled to payment of medical expenses pursuant to Iowa Code section 85.27.

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).

The claimant has submitted an itemized list of her medical expenses in claimant's Exhibits 6 and 7. The defendants have offered no evidence other than with respect to whether the injury arose out of and in the course of employment to indicate

that the charges submitted by the claimant's medical providers are not reasonable and necessary to treat her work injury. The claimant is entitled to payment of these medical expenses directly and to be reimbursed for those expenses that she has personally paid.

The next issue is whether the claimant is entitled to reimbursement of the independent medical evaluation with Dr. Bansal pursuant to 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.

Defendants are responsible only for reasonable fees associated with claimant's independent medical examination. Claimant has the burden of proving the reasonableness of the expenses incurred for the examination. See Schintgen v. Economy Fire & Casualty Co., File No. 855298 (App. April 26, 1991). 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).

The claimant is entitled to payment of this medical evaluation pursuant to Iowa Code section 85.39.

The next issue is whether the defendants are entitled to credit in the amount of $14,658.20 pursuant to Iowa Code section 85.38(2). The defendants are not entitled to such credit, as they have failed to present evidence indicating that the benefits were received at a time when they would not have been paid had workers' compensation benefits been paid.

The next issue is whether the claimant is entitled to penalties pursuant to 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. See Christensen, 554 N.W.2d at 260 (substantial evidence found to support commissioner's finding of legitimate reason for delay pending receipt of medical report); Robbennolt, 555 N.W.2d at 236.

(2) If no reason is given for the delay or if the "reason" is not one that a reasonable fact-finder could accept, we will hold that no such cause or excuse exists and remand to the commissioner for the sole purpose of assessing penalties under section 86.13. See Christensen, 554 N.W.2d at 261.

(3) Reasonable causes or excuses include (a) a delay for the employer to investigate the claim, Christensen, 554 N.W.2d at 260; Kiesecker v. Webster City Meats, Inc., 528 N.W.2d at 109, 111 (Iowa 1995); or (b) the employer had a reasonable basis to contest the claim—the "fairly debatable" basis for delay. See Christensen, 554 N.W.2d at 260 (holding two-month delay to obtain employer's own medical report reasonable under the circumstances).

(4) For the purpose of applying section 86.13, the benefits that are underpaid as well as late-paid benefits are subject to penalties, unless the employer establishes reasonable and probable cause or excuse. Robbennolt, 555 N.W.2d at 237 (underpayment resulting from application of wrong wage base; in absence of excuse, commissioner required to apply penalty).

> If we were to construe [section 86.13] to permit the avoidance of penalty if any amount of compensation benefits are paid, the purpose of the penalty statute would be frustrated. For these reasons, we conclude section 86.13 is applicable when payment of compensation is not timely . . . or when the full amount of compensation is not paid.

Id.

(5) For purposes of determining whether there has been a delay, payments are "made" when (a) the check addressed to a claimant is

mailed (Robbennolt, 555 N.W.2d at 236; Kiesecker, 528 N.W.2d at 112), or (b) the check is delivered personally to the claimant by the employer or its workers' compensation insurer. Robbennolt, 555 N.W.2d at 235.

(6) In determining the amount of penalty, the commissioner is to consider factors such as the length of the delay, the number of delays, the information available to the employer regarding the employee's injury and wages, and the employer's past record of penalties. Robbennolt, 555 N.W.2d at 238.

(7) An employer's bare assertion that a claim is "fairly debatable" does not make it so. A fair reading of Christensen and Robbennolt, makes it clear that the employer must assert facts upon which the commissioner could reasonably find that the claim was "fairly debatable." See Christensen, 554 N.W.2d at 260.

Meyers v. Holiday Express Corp., 557 N.W.2d 502 (Iowa 1996).

Weekly compensation payments are due at the end of the compensation week. Robbennolt, 555 N.W.2d 229, 235.

Penalty is not imposed for delayed interest payments. Davidson v. Bruce, 593 N.W.2d 833, 840 (Iowa App. 1999). Schadendorf v. Snap-On Tools Corp., 757 N.W.2d 330, 338 (Iowa 2008).

When an employee's claim for benefits is fairly debatable based on a good faith dispute over the employee's factual or legal entitlement to benefits, an award of penalty benefits is not appropriate under the statute. Whether the issue was fairly debatable turns on whether there was a disputed factual dispute that, if resolved in favor of the employer, would have supported the employer's denial of compensability. Gilbert v. USF Holland, Inc., 637 N.W.2d 194 (Iowa 2001).

The defendants have argued in this case and denied the claim apparently on the basis of the going and coming rule. The undersigned has concluded for reasons previously set out in this decision that that defense or contention fails. However, the undersigned cannot conclude that such a defense is wholly unreasonable and that the compensability of this claim is not fairly debatable. The claimant is not entitled to penalties.

ORDER

THEREFORE IT IS ORDERED:

Defendants shall pay claimant for sixty-six point five seven one (66.571) weeks for the period from June 22, 2012 through October 1, 2013 at the weekly rate of six-hundred fifty and 46/100 dollars ($650.46).

Defendants shall pay claimant two-hundred fifty (250) weeks of permanent partial disability benefits commencing October 1, 2013 at the weekly rate of six-hundred fifty and 46/100 dollars ($650.46).

Accrued benefits shall be paid in lump sum together with interest pursuant to Iowa Code section 85.30 with subsequent reports of injury filed as directed by this agency.

Defendants shall pay claimant's medical expenses directly and reimburse her for those expenses she has personally paid pursuant to Iowa Code section 85.27.

The claimant has received a third party settlement, and the defendants are entitled to credit as appropriate under Iowa Code section 85.22.

Defendants shall reimburse the claimant for the independent medical evaluation with Dr. Bansal in the amount of two-thousand seven-hundred ninety-five and 00/100 dollars ($2,795.00).

Costs of this action are taxed to the defendants pursuant to rule 876 IAC 4.33.

Signed and filed this 20th day of March, 2015.

Ron Pohlman

RON POHLMAN
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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