BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

LAVERNE G. CLARK,

Claimant,

vs.

CONCRETE CENTRAL, L.L.C.,

Employer,

and

HASTINGS MUTUAL INSURANCE CO.,

Insurance Carrier,
Defendants.

File No. 5049601

ARBITRATION

DECISION

Head Note Nos.: 1402.30; 1402.40; 1801; 2501; 2502; 2907

STATEMENT OF THE CASE

Laverne Clark, claimant, filed a petition for arbitration against Concrete Central, L.L.C., as the employer and Hastings Mutual Insurance Company as the insurance carrier. An in-person hearing occurred on February 9, 2016.

The evidentiary record includes claimant's exhibits 1 through 6, 8 through 11, and 14-17. Claimant offered exhibits 7, 12 and 13. Each of those exhibits was objected to by defendants and excluded from the evidentiary record for the reasons stated in the hearing transcript. (Transcript, pages 7-13) Defendants introduced exhibits A through H without objection into the evidentiary record. The parties also filed joint exhibits AA through FF, which were received into the evidentiary record.

Claimant testified on his own behalf, including on rebuttal. Claimant also called Zerena Gales, his former wife, to testify. Defendants called Mike Nettleton, Kyle Casten and Tyler Greim to testify.

The evidentiary record closed at the end of the February 9, 2016 hearing. However, counsel for the parties requested the opportunity to file post-hearing briefs. The parties were given until March 10, 2016 to file their post-hearing briefs, at which time the case was considered fully submitted to the undersigned.

The parties filed a hearing report, which contains numerous stipulations. Those stipulations were accepted and no factual or legal issues relative to the parties' stipulations will be made or discussed. The parties are now bound by their stipulations.

ISSUES

The parties submitted the following disputed issues for resolution:

1. Whether claimant sustained an injury that arose out of and in the course of his employment with Concrete Central, L.L.C., on November 17, 2014.

2. Whether claimant is entitled to an award of temporary disability, or healing period, benefits and, if so, the extent of such entitlement.

3. Whether claimant is entitled to an award of permanent disability and, if so, the extent of such entitlement.

4. The proper commencement date for any permanent partial disability benefits awarded.

5. Whether claimant is entitled to an award of past medical expenses.

6. Whether claimant is entitled to alternate medical care for ongoing back problems.

7. Whether claimant is entitled to reimbursement of his independent medical evaluation fee pursuant to Iowa Code section 85.39.

8. Whether claimant is entitled to an award of penalty benefits pursuant to Iowa Code section 86.13 for defendants' alleged unreasonable delay or denial in payment of benefits.

9. Whether costs should be assessed against either party.

FINDINGS OF FACTS

The undersigned, having considered all of the evidence and testimony in the record, finds:

Laverne Clark was employed at Concrete Central, L.L.C., between September 2014 and December 5, 2014. On November 17, 2014, claimant was a passenger in the employer's truck. As the employees were traveling from the employer's place of business to a work site, the trailer they were hauling behind their pickup came loose and required the driver of the truck to stop emergently.

The testimony in this record differs about the specific facts of the incident, but all parties concur that the trailer came loose after the cotter pin was either not properly placed or came out of the hitch. Mr. Clark testified that the trailer was swaying side to side, that the driver of the pickup stopped abruptly, and that the trailer struck the pickup causing him low back injuries. Other witnesses contradict the version of events, suggesting that there was not any significant impact between the trailer and the pickup. (Testimony of Kyle Casten; Testimony of Tyler Greim; Testimony of Mike Nettleton; Exhibit 16; Ex. 17) The parties introduce photos of the trailer and dispute whether the alleged incident caused any damage to the trailer or demonstrates any significant impact at the time of claimant's injury.

Ultimately, the differences in the witnesses' recollections and testimony are not of great significance as to the ultimate outcome of this case. The emergency room records from the evening of the alleged injury confirm that claimant was reporting the work injury as the cause of his low back problems within hours of the incident. (Ex. AA, pp. 2, 5-6) I find that the alleged incident occurred and that there was some force, whether by the stopping mechanism or by a slight striking of the trailer against the truck that caused claimant an increase in symptoms and some type of aggravation of his underlying chronic low back problems.

Two physicians have offered opinions in this case about whether the incident on November 17, 2014 caused claimant an injury and whether that injury resulted in any permanent impairment or restrictions. Claimant's independent medical evaluator, Richard L. Kreiter, M.D., opines that claimant had a pre-existing low back condition that was "aggravated, accelerated, and worsened by the truck accident event." (Ex. 1a) Dr. Kreiter supports his conclusion by noting, "The MRI after the event did show some worsening or increasing changes at the L3-4, L4-5, and L5-S1 level [sic]." (Ex. 1a) Dr. Kreiter opines that claimant sustained an 8 percent permanent impairment of the whole person as a result of the November 17, 2014 work injury. Dr. Kreiter also recommends some future medical treatment and imposes permanent restrictions on claimant. (Ex. 1a)

The problem with Dr. Kreiter's analysis and opinion is that the MRI he references as justification to demonstrate an objective change in claimant's low back condition actually occurred on September 19, 2014, before the alleged injury date. (Ex. D, p. 61) Dr. Kreiter's report acknowledges the proper date of the MRI but clearly assumed the MRI occurred after the date of injury. (Ex. 1a; 1c) When it is understood that Dr. Kreiter is using an MRI taken before the date of injury to justify or rationalize that there has been a permanent injury as a result of the November 17, 2014 incident, Dr. Kreiter's opinion is clearly seen as illogical and not convincing in this case.

The second physician offering an opinion about medical causation and permanency is Patrick W. Hitchon, M.D. Dr. Hitchon is a board certified neurosurgeon as well as a professor of neurosurgery and bioengineering at the University of Iowa Hospitals and Clinics. Dr. Hitchon evaluated claimant on January 7, 2016.

Dr. Hitchon's initial report relies upon the history offered by claimant and opines that claimant "did suffer an injury to his lumbar spine on November 17, 2014." (Ex. A, p. 10) He opined that claimant's injury was a "soft tissue injury" that would be "expected to resolve within no more than 3 months from the injury." (Ex. A, p. 10) Dr. Hitchon issued a supplemental report on January 11, 2016, noting that it was less likely that any injury occurred if there was no impact between the trailer and the pickup truck. (Ex. B, p. 14) He issued a supplemental report on defense counsel's letterhead dated January 25, 2016, which suggests that Dr. Hitchon does not believe any permanent impairment is attributable to the November 17, 2014 incident. (Ex. B, p. 17) This is similar to the opinion he offered in his January 11, 2016 report. (Ex. B, p. 14)

Dr. Hitchon specifically noted that the "only MRI available for review is the MRI from 9/19/2014, which antedated the above injury." (Ex. A, p. 9) Clearly, Dr. Hitchon recognized the critical fact and error in Dr. Kreiter's analysis and rationalization. Dr. Hitchon accurately perceived that the MRI relied upon by Dr. Kreiter actually occurred prior to the November 17, 2014 injury date. I find Dr. Hitchon's medical opinions to be more convincing than those of Dr. Kreiter in this case. I accept Dr. Hitchon's opinions as accurate.

Therefore, I find that claimant proved a temporary aggravation of his underlying and chronic low back condition. I find that claimant produced and proved he had medical restrictions precluding work on November 18, 2014. (Ex. AA, p. 11) However, claimant produced no other evidence to establish that he was medically unable to work after November 18, 2014 as a result of the November 17, 2014 work injury. I find that claimant failed to prove he sustained permanent disability as a result of the November 17, 2014 work injury.

Mr. Clark also seeks an award of past medical expenses. Claimant attached an itemization of his past medical expenses to the hearing report. Defendants stipulated that the medical providers would testify as to the reasonableness of their medical fees and treatment. Defendants offered no contrary evidence. Defendants also stipulated that all of the claimed medical expenses are causally connected to the low back injury claimed by Mr. Clark. (Hearing Report) All of the claimed medical expenses occurred within the three month recuperation period assigned by Dr. Hitchon.

Claimant also seeks reimbursement of his independent medical evaluation fee. Dr. Kreiter charged $700.00 for his evaluation and performed his evaluation on October 7, 2015. No physician retained by defendants had performed a permanent impairment evaluation or offered an opinion as to permanent impairment prior to Dr. Kreiter's evaluation in October 2015.

CONCLUSIONS OF LAW

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.

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).

While a claimant is not entitled to compensation for the results of a preexisting injury or disease, its mere existence at the time of a subsequent injury is not a defense. Rose v. John Deere Ottumwa Works, 247 Iowa 900, 76 N.W.2d 756 (1956). If the claimant had a preexisting condition or disability that is materially aggravated, accelerated, worsened or lighted up so that it results in disability, claimant is entitled to recover. Nicks v. Davenport Produce Co., 254 Iowa 130, 115 N.W.2d 812 (1962); Yeager v. Firestone Tire & Rubber Co., 253 Iowa 369, 112 N.W.2d 299 (1961).

In this case, I found that claimant proved he sustained an aggravation of his underlying, chronic low back condition. Specifically, I found that claimant proved the incident at work on November 17, 2014 caused an aggravation of his underlying low back condition. I conclude that claimant has carried his burden of proof to establish he

sustained a work-related low back injury on November 17, 2014. Therefore, I must consider claimant's request for award of both permanent partial disability benefits and temporary disability benefits.

Having accepted Dr. Hitchon's medical opinions and found that claimant failed to prove a permanent aggravation of his underlying low back condition, I conclude that claimant failed to prove entitlement to any permanent partial disability benefits. Iowa Code section 85.34(2).

Nevertheless, claimant may be entitled to an award of temporary total disability benefits. When an injured worker has been unable to work during a period of recuperation from an injury that did not produce permanent disability, the worker is entitled to temporary total disability benefits during the time the worker is disabled by the injury. Those benefits are payable until the employee has returned to work, or is medically capable of returning to work substantially similar to the work performed at the time of injury. Section 85.33(1).

However, Iowa Code section 85.32 provides that temporary total disability benefits "shall begin on the fourth day of disability after the injury." This is often referred to as a three day "waiting period" before temporary total disability benefits commence. In this instance, claimant produced a medical release from work for November 18, 2014. Although claimant missed additional time from work after that date, he did not prove that he was medically unable to work on any date other than November 18, 2014 as a result of the November 17, 2014 work injury. Having proven only one day of disability resulted from the work injury, claimant never qualified for temporary total disability benefits. Iowa Code section 85.32. Therefore, I conclude that claimant's claim for temporary total disability benefits must fail.

Claimant seeks an award of past medical expenses as outlined on his itemization attached to the hearing report. 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).

Having accepted the parties' stipulations on the hearing report and having found that the medical expenses are reasonable and causally connected to the claimant's asserted low back injury, I conclude defendant should be ordered to pay, reimburse, or otherwise satisfy those medical expenses in a manner that will hold claimant harmless for those expenses. Iowa Code section 85.27; Midwest Ambulance Service v. Ruud, 754 N.W.2d 860 (Iowa 2008); Krohn v. State, 420 N.W.2d 463 (Iowa 1988).

Mr. Clark also seeks an award of alternate medical care. Iowa Code section 85.27(4). Having found that claimant proved only a temporary aggravation of his underlying chronic low back condition that should have resolved within three months of the date of injury, I conclude that claimant has not proven that his current medical needs are causally related to the November 17, 2014 work injury. Having concluded that the ongoing or future medical treatment of claimant's low back are causally related to the November 17, 2014 work injury, I further conclude that claimant has failed to prove entitlement to an order for alternate medical care.

Claimant next seeks reimbursement of his independent medical examination fee. 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).

An employer is not obligated to pay for an evaluation unless the employee follows the statutory process and requirements of Iowa Code section 85.39. Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839 (Iowa 2015). In this case, defendants did not obtain a permanent impairment rating from a physician they retained or selected until after Dr. Kreiter's evaluation was completed. Therefore, I conclude that claimant failed to prove the necessary requirement of Iowa Code section 85.39 and did not qualify for reimbursement of Dr. Kreiter's evaluation fee under that statute. Id.

Claimant also seeks an award of penalty benefits pursuant to Iowa Code section 86.13 for an alleged unreasonable denial of healing period and permanent disability benefits. Iowa Code section 86.13(4) provides:

> a. If a denial, a delay in payment, or a termination of benefits occurs without reasonable or probable cause or excuse known to the employer or insurance carrier at the time of the denial, delay in payment, or termination of benefits, the workers' compensation 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 denied, delayed, or terminated without reasonable or probable cause or excuse.

b. The workers' compensation commissioner shall award benefits under this subsection if the commissioner finds both of the following facts:

(1) The employee has demonstrated a denial, delay in payment, or termination in benefits.

(2) The employer has failed to prove a reasonable or probable cause or excuse for the denial, delay in payment, or termination of benefits.

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).

Claimant asserts a claim for penalty benefits and asserts that defendants unreasonably delayed or denied benefits. However, I concluded that no benefits ever came due to be paid. In this sense, I find that claimant failed to prove a delay or denial of benefits. Iowa Code section 86.13(4)(b)(1) requires the claimant establish that a denial or delay in payment of benefits occur before a penalty benefit claim is considered. In this situation, claimant failed to meet the initial requirement of Iowa Code section 86.13(4)(b)(1) because claimant failed to prove that any benefits ever came due to be paid. No penalty benefits are owed.

Finally, claimant seeks assessment of her costs. Costs are assessed at the discretion of the agency. Iowa Code section 85.40. Exercising the agency's discretion and recognizing that defendants have prevailed on the majority of the issues in this case, I conclude that each party should be ordered to bear their own costs.

ORDER

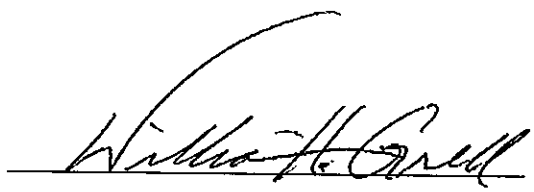
THEREFORE, IT IS ORDERED:

Defendants shall reimburse claimant for all medical expenses paid directly by claimant to medical providers and shall either pay claimant, reimburse any third-party payor, or pay medical providers directly for all past medical expenses outlined in the medical expense itemization attached to the hearing report.

The parties shall bear their own costs.

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

Signed and filed this 19th day of May, 2016.



WILLIAM H. GRELL
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

Copies to:

Matthew A. Leddin
Attorney at Law
5108 Jersey Ridge Rd.
Davenport, IA 52807
matt@soperlaw.com

Cynthia S. Sueppel
Attorney at Law
PO Box 36
Cedar Rapids, IA 52406-0036
csueppel@scheldruplaw.com

WHG/kjw

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.