BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

COLLEEN QUASTAD, Claimant, vs. POLARIS INDUSTRIES, Employer, Self-Insured, Defendant.		File Nos. 5043011 5050065 5053613 REVIEW-REOPENING and ARBITRATION DECISION Head Note No.: 2403

STATEMENT OF THE CASE

Claimant filed a petition in review-reopening from an arbitration decision dated February 24, 2014, which awarded a 25 percent permanent partial disability (35 percent had been paid at the time of this hearing, or 35 percent). Claimant also filed petitions in arbitration alleging new injuries on September 16, 2013, October 3, 2013, February 28, 2014, and/or July 6, 2015.

Deputy workers' compensation commissioner, Stan McElderry, heard this matter in Des Moines, Iowa.

ISSUES

The issues are as the parties stipulated on the hearing reports. The stipulations on those reports are also accepted and will not be repeated here.

The parties filed a hearing report at the commencement of the arbitration/review-reopening hearing. On the hearing report, the parties entered into various stipulations. All of those stipulations were accepted and are hereby incorporated into this arbitration/review-reopening decision and no factual or legal issues relative to the parties' stipulations will be raised or discussed in this decision. The parties are now bound by their stipulations.

FINDINGS OF FACT

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

The claimant was 57 years old at the time of hearing. She is a high school graduate, and completed an office specialist program at Iowa Lakes Community College in 1990. Previous employment includes bartending, office work, cook, pizza maker and assistant manager, and manufacturing line assembly. She began her employment with Polaris (hereinafter employer) in September of 1994. She was hired as a lead position, a position which required lifting up to 70 pounds. Part of this was in the rear swing arm position where she installed shocks. Later, she went to the clutch area where she installed clutches. After 9-1/2 years she moved to a warehouse position as a material handler. This position mostly involved use of a forklift to load and unload trucks and move materials in the warehouse.

On November 24, 2010, the claimant was working in the warehouse area salting ice from a storm when she slipped and fell. She sustained a labral tear to her left shoulder and a fracture of the acromion. Dr. Jason Hough performed surgery on May 19, 2011 to repair the shoulder. (Exhibit 8, page 2) He placed her at maximum medical improvement (MMI) on July 12, 2012 and released her to full duty work without restrictions. For the back she had an L4-5 and L5-S1 fusion on January 9, 2013 by Dr. Wellman. He eventually returned the claimant to work without restrictions. Marc Hines, M.D., saw the claimant for an independent medical evaluation (IME). He also did not assign any restrictions. The claimant also had a functional capacity evaluation (FCE) which placed her in the sedentary work category with lifting restrictions. The employer did not follow the FCE recommendations and returned claimant to work without restrictions.

The petition in File No. 5050065 alleges new injuries to the shoulder occurring on September 16, 2013, October 3, 2013, and/or February 28, 2014. For reasons discussed below these are a continuation of the November 24, 2010 injury, and not new separate injuries.

A hearing was held on January 9, 2014 and a decision issued February 24, 2014 on the November 24, 2010 injury (File Number 5043011). That decision awarded a 25 percent permanent partial disability. It appears that eventually 35 percent was paid. (See hearing report).

The claimant had a second left shoulder surgery consisting of a decompression and AC joint resection on February 28, 2014 by Keith Baumgarten, M.D. Although the surgery had been planned and was known before the hearing, it cannot be said that the results of it were contemplated. The claimant did not fully recover from the surgery. Additionally she was given a rating of 3 percent of the body as a whole impairment for the surgery. (Ex. 3, p. 10) This is an increase in impairment. The claimant last saw Dr. Baumgarten March 3, 2015. He noted difficulties with the shoulder, and pain and fatigue with any repetitive work or work above the head. Without seeing the claimant again he opined no need for restriction on January 18, 2017. (Ex. A, p. 1)

On July 6, 2015 the claimant injured her back when manually moving boxes on a pallet at Polaris. She had immediate symptoms that continued to get worse. (Ex. 1, p. 2) They have not improved.

The claimant saw Jacqueline Stoken, M.D., for an IME on November 16, 2016. (Ex. 8) Dr. Stoken opines that the July 6, 2015 injury was a substantial and material permanent aggravation of an underlying back condition. (Ex. 8, p. 12) Dr. Stoken opines a 24 percent of the BAW impairment from the back injury. (Ex. 8, p. 13) She also agreed with an October 16, 2013 FCE that the claimant had been reduced to sedentary work. (Ex. 8, p. 14)

As for the shoulder injury Dr. Stoken opines an 11 percent BAW as a whole impairment. (Ex. 8, p. 13) She also opines that the events with the shoulder after May 9, 2011 all relate to the original injury and continue a substantial change in condition. (Ex. 8) It is so found. Overall, Dr. Stoken opines a combined BAW rating of 37 percent (8 percent for the neck). (EX. 8, p. 14)

The claimant does, at least at the date of hearing, continue to work. However, she is working above her restrictions and her continued work at that level is why this hearing was necessary. Vocation expert Rick Ostrander is correct that the situation will not continue as is. (Ex. 9) Considering the claimant's medical impairments, training, education, permanent restrictions, as well as all other factors of industrial disability as detailed above, it is found that the claimant has suffered a 60 percent loss of earnings capacity from the 2010 injury. As to the 2015 back injury, using all the factors of industrial disability it is found that the claimant has suffered a 20 percent loss of earnings capacity.

The claimant's weekly benefit rate was previously established at $545.95 per week for the 2010 injury. For the 2015 injury (File No. 5053613), the claimant was single, entitled to one exemption, and had average weekly wages of $914.00. As such, her weekly benefit rate for the 2015 injury is $547.92. The claimant seeks payment/reimbursement of the Dr. Stoken IME in the amount of $3,000. That fee was reasonable and followed a rating(s) from a defendant selected doctor. The claimant also seeks penalties for defendant failure to make any payments on the 2010 injury following adverse decisions from the deputy commissioner, workers' compensation commissioner, district court and court of appeals decisions.

REASONING AND CONCLUSIONS OF LAW

The claimant was not found to have suffered a new injury on September 16, 2013, October 3, 2013, and/or February 28, 2014. That finding, and now conclusion, is contingent on the review-reopening being granted, however. So the next issue is whether claimant is entitled to additional permanent disability benefits via a claim for review-reopening on the 2010 injury.

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 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).

In a proceeding to reopen an award for payments or agreement for settlement as provided by section 86.13, inquiry shall be into whether or not the condition of the employee warrants an end to, diminishment of, or increase of compensation so awarded or agreed upon. Iowa Code section 86.14(2).

The Iowa Supreme Court has held that a claimant does not need to prove that the change in the condition was not contemplated at the time of the original decision(s). Kohlhaas v. Hog Slat, Inc., 777 N.W.2d 387 (Iowa 2010).

The claimant has had a substantial change of condition as evidenced by diminished physical capacity and increased impairment.

Iowa Code section 85.34(2)(u) states:

> u. In all cases of permanent partial disability other than those hereinabove described or referred to in paragraphs "a" through "t" hereof, the compensation shall be paid during the number of weeks in relation to five hundred weeks as the reduction in the employee's earning capacity caused by the disability bears in relation to the earning capacity that the employee possessed when the injury occurred.

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).

A finding of impairment to the body as a whole found by a medical evaluator does not equate to industrial disability. Impairment and disability are not synonymous. The degree of industrial disability can be much different than the degree of impairment because industrial disability references to loss of earning capacity and impairment references to anatomical or functional abnormality or loss. Although loss of function is to be considered and disability can rarely be found without it, it is not so that a degree of industrial disability is proportionally related to a degree of impairment of bodily function.

Factors to be considered in determining industrial disability include the employee's medical condition prior to the injury, immediately after the injury, and presently; the situs of the injury, its severity, and the length of the healing period; the work experience of the employee prior to the injury and after the injury and the potential for rehabilitation; the employee's qualifications intellectually, emotionally, and physically; earnings prior and subsequent to the injury; age; education; motivation; functional impairment as a result of the injury; and inability because of the injury to engage in employment for which the employee is fitted. Loss of earnings caused by a job transfer for reasons related to the injury is also relevant. Likewise, an employer's refusal to give any sort of work to an impaired employee may justify an award of disability. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980). These are matters which the finder of fact considers collectively in arriving at the determination of the degree of industrial disability.

There are no weighting guidelines that indicate how each of the factors is to be considered. Neither does a rating of functional impairment directly correlate to a degree of industrial disability to the body as a whole. In other words, there are no formulae which can be applied and then added up to determine the degree of industrial disability. It therefore becomes necessary for the deputy or commissioner to draw upon prior experience as well as general and specialized knowledge to make the finding with regard to degree of industrial disability. See Christensen v. Hagen, Inc., Vol. 1 No. 3 State of Iowa Industrial Commissioner Decisions, 529 (App. March 26, 1985); Peterson v. Truck Haven Cafe, Inc., Vol. 1 No. 3 State of Iowa Industrial Commissioner Decisions, 654 (App. February 28, 1985).

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.

Based on the finding that the claimant has suffered a 60 percent loss of earning capacity from the 2010 injury, she has sustained a 60 percent permanent partial industrial disability entitling her to 300 weeks of permanent partial disability pursuant to Iowa Code section 85.34(2)(u).

Penalty.

The next issue for determination is whether claimant is entitled to penalty benefits pursuant to Iowa Code section 86.13 and if so, how much.

If weekly compensation benefits are not fully paid when due, section 86.13 requires that additional benefits be awarded unless the employer shows reasonable cause or excuse for the delay or denial. Robbennolt v. Snap-on Tools Corp., 555 N.W.2d 229 (Iowa 1996).

Delay attributable to the time required to perform a reasonable investigation is not unreasonable. Kiesecker v. Webster City Meats, Inc., 528 N.W.2d 109 (Iowa 1995).

It also is not unreasonable to deny a claim when a good faith issue of law or fact makes the employer's liability fairly debatable. An issue of law is fairly debatable if viable arguments exist in favor of each party. Covia v. Robinson, 507 N.W.2d 411 (Iowa 1993). An issue of fact is fairly debatable if substantial evidence exists which would support a finding favorable to the employer. Gilbert v. USF Holland, Inc., 637 N.W.2d 194 (Iowa 2001).

An employer's bare assertion that a claim is fairly debatable is insufficient to avoid imposition of a penalty. The employer must assert facts upon which the commissioner could reasonably find that the claim was "fairly debatable." Meyers v. Holiday Express Corp., 557 N.W.2d 502 (Iowa 1996).

If the employer fails to show reasonable cause or excuse for the delay or denial, the commissioner shall impose a penalty in an amount up to 50 percent of the amount unreasonably delayed or denied. Christensen v. Snap-on Tools Corp., 554 N.W.2d 254 (Iowa 1996). The factors to be considered in determining the amount of the penalty include the length of the delay, the number of delays, the information available to the employer and the employer's past record of penalties. Robbennolt, 555 N.W.2d at 238.

Iowa Code section 86.13, as amended effective July 1, 2009, states:

> 4. 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 of 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.

c. In order to be considered a reasonable or probable cause or excuse under paragraph *"b"*, an excuse shall satisfy all of the following criteria:

(1) The excuse was preceded by a reasonable investigation and evaluation by the employer or insurance carrier into whether benefits were owed to the employee.

(2) The results of the reasonable investigation and evaluation were the actual basis upon which the employer or insurance carrier contemporaneously relied to deny, delay payment of, or terminate benefits.

(3) The employer or insurance carrier contemporaneously conveyed the basis for the denial, delay in payment, or termination of benefits to the employee at the time of the denial, delay, or termination of benefits.

The claimant also seeks penalties for defendant's failure to make any payments on the 2010 injury following adverse decisions from the deputy commissioner, workers' compensation commissioner, district court and court of appeals decisions. Parties have the right to appeal. But at some point it should become clear that no payments on a clear work injury involving surgery is an unreasonable position placing the party in danger of penalty, and if insured bad faith, on the insurer. Such was the case here. Over $65,000 in permanent partial disability (PPD) was ordered by the arbitration decision. Nearly all was accrued at the time of the decision. Although a penalty of up to 50 percent is allowable, it is believed that a lesser penalty is sufficient to remind the defendant of its statutory duties, and to deter future such behavior. A $10,000 penalty is concluded to be sufficient to accomplish these purposes.

For the July 6, 2015 injury, (File No. 5053613):

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.

It was found that the claimant suffered a permanent injury to the body as a whole on July 6, 2015.

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.

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). Total disability does not mean a state of absolute helplessness. Permanent total disability

occurs where the injury wholly disables the employee from performing work that the employee's experience, training, education, intelligence, and physical capacities would otherwise permit the employee to perform. See McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Diederich v. Tri-City R. Co., 219 Iowa 587, 258 N.W. 899 (1935).

Based on the finding that the claimant has suffered a 20 percent loss of earning capacity from the July 6, 2015 injury, she has sustained a 20 percent permanent partial industrial disability entitling her to 100 weeks of permanent partial disability pursuant to Iowa Code section 85.34(2)(u).

ORDER

THEREFORE IT IS ORDERED:

That the defendant pay claimant one hundred (100) weeks of permanent partial disability at the weekly rate of five hundred forty-seven and 92/100 dollars ($547.92) commencing July 7, 2015 on File No. 5053613.

That the defendant pay claimant three hundred (300) weeks of permanent partial disability at the weekly rate of five hundred forty five and 95/100 dollars ($545.95) commencing September 14, 2015 on File No. 5043011.

That the defendant pay a penalty of ten thousand and no/100 dollars ($10,000.00), all of which is accrued.

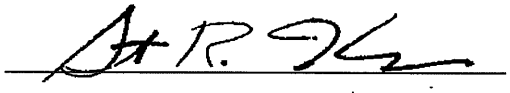
That defendant pay/reimburse as appropriate the three thousand and no/100 dollars ($3,000.00) IME fee of Dr. Stoken.

Defendant shall pay the costs of this action pursuant to 876 IAC 4.33, including the vocational report of Rick Ostrander.

Defendant shall receive credit for benefits previously paid.

Defendant shall file subsequent reports of injury as required by the agency.

Signed and filed this 14th day of June, 2017.



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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.