BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

EDITA GARCIA DE CEA,

Claimant,

vs.

CONAGRA FOODS, INC.,

Employer,

and

OLD REPUBLIC INSURANCE COMPANY,

Insurance Carrier,
Defendants.



File No. 5063613

ARBITRATION

DECISION

Head Note Nos.: 1402.30; 2402; 2701

## STATEMENT OF THE CASE

Claimant, Edita Garcia De Cea, filed a petition in arbitration seeking workers' compensation benefits from ConAgra Foods, Inc., (ConAgra), employer and Old Republic Insurance Company, insurer, both as defendants. This case was heard in Council Bluffs, on April 11, 2018 with a final submission date of May 3, 2018.

The record in this case consists of Joint Exhibits 1 through 11, Claimant's Exhibits 12 through 17, and 23, Defendants Exhibits A through D, and the testimony of claimant.

Serving as the interpreter was Janet Bonet.

The parties filed a hearing report at the commencement of the arbitration hearing. On the hearing report, the parties entered into various stipulations. All of those stipulations were accepted and are hereby incorporated into this arbitration 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.

## ISSUES

1. Whether claimant sustained an injury to her left wrist on June 15, 2015 that arose out of and in the course of employment.

2. Whether claimant's claim is barred by application of Iowa Code section 85.26.

3. Whether claimant is entitled to alternate medical care under Iowa Code section 85.27.

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

## FINDINGS OF FACT

Claimant was 48 years old at the time of hearing. Claimant graduated from high school in El Salvador.

Claimant worked with a company in production printing flyers for stores. She worked as a decorator at a garden in Omaha. Claimant began with ConAgra in September 2008. (Exhibit C, page 14-15)

Claimant testified in deposition that since 2012 she has worked as a belt inspector and a tray denester. (Ex. A, Deposition pp. 18-19) Claimant testified that as a tray denester, she fills a denesting machine approximately every four minutes. Claimant testified she worked between nine to ten and one-half hours per shift.

Claimant's prior medical history is relevant. In October 2011, claimant was treated for an alleged work injury to her left hand. Claimant was assessed as having a generalized peripheral neuropathy. Claimant was told, by an authorized provider, her condition was not work related and that she should seek care with her personal physician. (Ex. 1, p. 1; Ex. 4, p. 1)

Claimant testified that on June 15, 2015, she injured her left arm while adjusting a belt on a frozen food production line. Claimant was given ice packs, Biofreeze and ibuprofen from the company nurse over the next few days. (Ex. 2, Ex. 3)

On June 17, 2015, claimant was evaluated by Harry Diaz, M.D., for left finger numbness that began at work. Claimant was recommended to have EMG and nerve conduction studies. (Ex. 5)

Claimant testified that on June 19, 2015, she spoke with Angie Moon, a ConAgra Chief Nurse regarding her injury at work. Ms. Moon indicated to claimant that she believed claimant's symptoms were similar to those experienced in 2011. As the 2011 symptoms were found not work related, claimant was told by Ms. Moon that she would need to see her personal physician for treatment. (Ex. 3, pp. 3-4)

Claimant had EMG/NCV studies on November 17, 2015. Claimant was consistent with bilateral median neuropathy at the wrist. (Ex. 10)

Claimant testified she gave Nurse Moon the testing results. She said Nurse Moon again told her the injury was not work related.

On August 5, 2016, claimant was evaluated for left arm pain by Donna Faber, M.D. Dr. Faber is claimant's family physician. Claimant complained of continued left arm numbness. Claimant was prescribed a wrist splint and recommended to have physical therapy. (Ex. 6, Ex. 7)

In an August 19, 2016 response to questions, Dr. Faber indicated claimant had a left median neuropathy caused by repetitive activity at work. She recommended physical therapy and potential surgery. Dr. Faber also recommended claimant be given a wrist splint. (Ex. 8)

Claimant returned to Dr. Faber on September 29, 2016. Claimant was assessed as having a median neuropathy on the left. An injection or referral to an orthopedic surgeon was discussed if symptoms did not improve. (Ex. 9)

On May 11, 2017, claimant underwent an independent medical evaluation (IME) with Michael Morrison, M.D. Claimant was assessed as having mild carpal tunnel syndrome with tingling and numbness on the left ring and little finger. Dr. Morrison did not recommend surgery. He believed claimant had reached maximum medical improvement (MMI). (Ex. B, pp. 1-4)

In an October 4, 2017 follow up letter, Dr. Morrison indicated he reviewed claimant's job description at ConAgra. He opined that based on her job description, claimant did not engage in repetitive activity. As such, he was unable to say her work duties caused her carpal tunnel syndrome. (Ex. B, p. 5)

In a February 23, 2018 report, Gavin O'Mahony, M.D., gave his opinions of claimant's condition following an IME. He assessed claimant as having a left carpal tunnel syndrome. He opined the cause of claimant's carpal tunnel syndrome was likely her work at ConAgra. He noted claimant's problems first manifested as carpal tunnel syndrome in 2011 while working at ConAgra. He opined that claimant's injury of June 15, 2015 exacerbated her left carpal tunnel syndrome. Dr. O'Mahony found that claimant was not at MMI. He recommended claimant decrease or eliminate left upper extremity activity at work to help the carpal tunnel situation resolve. He recommended claimant use a night splint. (Ex. 12)

In a April 1, 2018 note, written by defense counsel, Dr. Morrison indicated he reviewed Dr. O'Mahony's report and still opined that claimant's job duties at ConAgra were not a factor in causing claimant's left carpal tunnel syndrome. (Ex. B, pp. 6-7)

Claimant testified she continues to have pain in the left hand and arm. She said her fingers are weak and she has decreased grip strength. Claimant says her pain increases with work activities. She says she has not taken any time off from work due to her injury and continues to work through her pain.

## CONCLUSIONS OF LAW

The first issue to be determined is whether claimant sustained an injury that arose out of and in the course of employment.

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.

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).

A personal injury contemplated by the workers' compensation law means an injury, the impairment of health or a disease resulting from an injury which comes about, not through the natural building up and tearing down of the human body, but because of trauma. The injury must be something that acts extraneously to the natural processes of nature and thereby impairs the health, interrupts or otherwise destroys or damages a part or all of the body. Although many injuries have a traumatic onset, there is no requirement for a special incident or an unusual occurrence. Injuries which result from cumulative trauma are compensable. Increased disability from a prior injury, even if brought about by further work, does not constitute a new injury, however. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); Ellingson v. Fleetguard, Inc., 599 N.W.2d 440 (Iowa 1999); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995); McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985). An occupational disease covered by chapter 85A is specifically excluded from the definition of personal injury. Iowa Code section 85.61(4) (b); Iowa Code section 85A.8; Iowa Code section 85A.14.

When the injury develops gradually over time, the cumulative injury rule applies. The date of injury for cumulative injury purposes is the date on which the disability manifests. Manifestation is best characterized as that date on which both the fact of injury and the causal relationship of the injury to the claimant's employment would be plainly apparent to a reasonable person. The date of manifestation inherently is a fact based determination. The fact-finder is entitled to substantial latitude in making this determination and may consider a variety of factors, none of which is necessarily dispositive in establishing a manifestation date. Among others, the factors may include missing work when the condition prevents performing the job, or receiving significant medical care for the condition. For time limitation purposes, the discovery rule then becomes pertinent so the statute of limitations does not begin to run until the employee, as a reasonable person, knows or should know, that the cumulative injury condition is serious enough to have a permanent, adverse impact on his or her employment. Herrera v. IBP, Inc., 633 N.W.2d 284 (Iowa 2001); Oscar Mayer Foods Corp. v. Tasler, 483 N.W.2d 824 (Iowa 1992); McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985).

Claimant testified her work at ConAgra involved repetitive use of both upper extremities in "denesting" trays and feeding the trays into machines at work. (Ex. A, pp. 18-19)

Claimant underwent EMG studies which indicated claimant had a mild carpal tunnel syndrome on the left. (Ex. 10) All experts who evaluated claimant have assessed claimant as having a median neuropathy on the left. (Ex. 6, 8, 9, and 12; Ex. B)

Dr. Faber is claimant's family physician. Dr. Faber opined that claimant's left upper extremity injury is caused by her repetitive activities at work. (Ex. 8, p. 1)

Dr. O'Mahony evaluated claimant once for an IME. Dr. O'Mahony opined that claimant's carpal tunnel syndrome first manifested in 2011 and it was materially aggravated by conditions at work in June 2015. (Ex. 12)

Dr. Morrison opined that he reviewed claimant's job description. Based upon his review of claimant's job description, he could not find claimant's work contributed to her carpal tunnel syndrome. (Ex. B, pp. 5-7)

Claimant testified at hearing and in deposition, that she worked between nine to ten hours per day. She testified in both hearing and in deposition that she was required to fill a tray denester approximately every four minutes throughout the course of her shift. Claimant's job duties, found at Exhibit 13, do not indicate claimant is involved with repetitive activity during her entire shift. It does not appear that Dr. Morrison was aware of the repetitive nature of claimant's work at ConAgra. For this reason, Dr. Morrison's opinion regarding causation are found not convincing.

Claimant credibly testified that her work at ConAgra involved repetitive activity throughout her shift. Dr. Faber and Dr. O'Mahony both opine that claimant's work activities caused or materially aggravated her left upper extremity injury. Dr. Morrison's opinions regarding causation is found not convincing. Based upon this record, it is found claimant has carried her burden of proof that she sustained an injury to her left upper extremity that arose out of and in the course of her employment.

The next issue to be determined is whether claimant's claim is barred by application of Iowa Code section 85.26.

> Iowa Code requires an employee to bring an original proceeding for benefits within two years from the date of the occurrence of the injury if the employer has paid the employee no weekly indemnity benefits for the claimed injury. Iowa Code § 85.26(1) (2016). If the employer has paid the employee weekly benefits on account of the claimed injury, however, the employee must bring an original proceeding within three years from the date of last payment of weekly compensation benefits. Id.
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> That the employee failed to bring a proceeding within the required time period is an affirmative defense which the employer must plead and prove by a preponderance of the evidence. See Dart v. Sheller-Globe Corp., II Iowa Industrial Comm'r Rep. 99 (App. 1982).

In response to a request for admissions, defendants indicate that claimant's petition was properly filed under Iowa Code section 85.26. (Ex. 16, p. 2) Claimant filed her petition on April 27, 2017 for a June 15, 2015 work injury. For these reasons, it is found that claimant timely filed her petition under Iowa Code section 85.26 does not bar claimant's claim for benefits.

The next issue to be determined is if claimant is entitled to alternate medical care.

Iowa Code section 85.27(4) provides, in relevant part:

> For purposes of this section, the employer is obliged to furnish reasonable services and supplies to treat an injured employee, and has the right to choose the care. . . . The treatment must be offered promptly and be reasonably suited to treat the injury without undue inconvenience to the employee. If the employee has reason to be dissatisfied with the care offered, the employee should communicate the basis of such dissatisfaction to the employer, in writing if requested, following which the employer and the employee may agree to alternate care reasonably suited to treat the injury. If the employer and employee cannot agree on such alternate care, the commissioner may, upon application and reasonable proofs of the necessity therefor, allow and order other care.

An application for alternate medical care is not automatically sustained because claimant is dissatisfied with the care he has been receiving. Mere dissatisfaction with the medical care is not ample grounds for granting an application for alternate medical care. Rather, the claimant must show that the care was not offered promptly, was not reasonably suited to treat the injury, or that the care was unduly inconvenient for the claimant. Long v. Roberts Dairy Co., 528 N.W.2d 122 (Iowa 1995).

Defendants have not authorized care for claimant's injury as they did not believe it was work related. It is noted above, claimant has carried her burden of proof her injury arose out of and in the course of employment. Dr. Faber and Dr. O'Mahony both indicate claimant requires further treatment for her carpal tunnel syndrome. Given this record, claimant has carried her burden of proof she is entitled to alternate medical care. Defendants shall furnish claimant alternate medical care recommended by Dr. Faber and Dr. O'Mahony, specifically the care recommended by Dr. O'Mahony as detailed in Exhibit 12, page 3.

The final issue to be determined is whether defendants are liable for penalty.

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 is not seeking temporary benefits or permanent partial disability benefits. As a result, there is nothing to base a penalty upon. In addition, defendants relied upon the opinions of Dr. Morrison in denying claimant's injury arose out of and in the course of employment. Based upon these reasons, defendants are not liable for a penalty.

## ORDER

THEREFORE, IT IS ORDERED:

That claimant's left carpal tunnel syndrome is found to have arisen out of and in the course of employment.

That defendants shall authorize medical care as recommended by Dr. O'Mahony.

That defendants shall pay costs.

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

Signed and filed this 8th day of June, 2018.

JAMES F. CHRISTENSON
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.