BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

KIMBERLY BUTTLER,

Claimant,

vs.

GUTHRIE COUNTY STATE BANK and GUTHRIE COUNTY ABSTRACT,

Employer,

and

ONE BEACON AMERICA,

Insurance Carrier,
Defendants.

File No. 5056079

ARBITRATION

DECISION

Head Note Nos.: 1803; 4000.2

STATEMENT OF THE CASE

Claimant, Kim Buttler, filed a petition in arbitration seeking workers' compensation benefits from Guthrie County Abstract (GCA), employer, and One Beacon America, insurance carrier, both as defendants. This case was heard in Des Moines, Iowa, on November 29, 2016 with a final submission date of December 21, 2016.

The record in this case consists of claimant's exhibits 1 through 10, defendants exhibits A through I, and the testimony of claimant and Judy Hilgenberg.

ISSUES

1. The extent of claimant's entitlement to permanent partial disability benefits.
2. Whether defendants are liable for a penalty under Iowa Code section 86.13.

FINDINGS OF FACT

Claimant was 35 years old at the time of hearing. Claimant graduated from high school. Claimant has worked as a manager at a convenience store and a cashier at a bowling alley. She has also worked as a laborer and a house keeper at a retirement center. (Exhibit D, pages 3-4)

Claimant began with GCA in January 2005. Claimant's job duties with GCA as an abstracter include, but were not limited to, reading abstracts, conducting courthouse searches of abstracts and legal documents, indexing and verifying recorded documents and court files, and proofing abstracts and reports. (Ex. G)

On February 26, 2013, claimant slipped on ice while going to the courthouse. Claimant was assessed as having a left ankle fracture. (Ex. 3, pp 49-50) On March 1, 2013, claimant underwent surgery for her ankle that involved internal fixation of the ankle with screws. Surgery was performed by Jeffrey Wahl, M.D. (Ex. 3, pp. 52-53)

Claimant returned in follow up with Dr. Wahl from March 2013 through May 2013. (Ex. 3, pp. 55-63)

On July 3, 2013, claimant returned in follow up with Dr. Wahl. Records indicate claimant had symptoms and was being tested for reflex sympathetic dystrophy. (RSD) RSD is also known as complex regional pain syndrome (CRPS). (Ex. 3, p. 64)

Claimant returned to Dr. Wahl on August 21, 2013 with continued complaints of ankle pain. Dr. Wahl recommended claimant see a vascular specialist for her RSD and be allowed to use a bone stimulator. (Ex. 3, p. 67)

In an October 2, 2013 visit, Dr. Wahl noted use of the bone stimulator aggravated claimant's RSD. Dr. Wahl again recommended claimant treat with a specialist for her RSD. (Ex. 3, p. 69)

In a November 13, 2013 report, Irving Wolfe, D.O., gave his opinions of claimant's condition following an independent medical evaluation (IME). Dr. Wolfe opined claimant's fall resulted in a fibular fracture and an aggravation of claimant's pre-existing mood disorder. He also opined that claimant should be treated for RSD and that claimant should be allowed to treat with Alan Koslow, M.D. (Ex. 4)

In a January 22, 2014 note, Dr. Wahl found that claimant was at maximum medical improvement (MMI). He also requested claimant undergo a three-phase bone scan and EMG nerve conduction studies. (Ex. 3, p. 71)

On February 3, 2014, claimant was evaluated by Dr. Koslow. He opined claimant had RSD in the left lower extremity. He recommended paraspinal lumbar sympathetic blocks. (Ex. 5, p. 89-91)

On February 23, 2014, claimant underwent EMG's and nerve conduction studies. The findings were nondiagnostic for neuropathy or radiculopathy. (Ex. 3, pp. 72-73)

Claimant was evaluated by Christopher Stalvey, D.O., a pain management specialist on March 10, 2014. He assessed claimant as having CRPS in the left lower extremity. (Ex. 7, pp. 97-100)

On May 9, 2014, a lumbar sympathetic nerve block was performed by Dr. Stalvey. Dr. Stalvey performed a total of three sympathetic nerve blocks between May 9, 2014 and September 12, 2014. (Ex. 7, pp. 101-112) In January 2016, claimant had a spinal cord stimulator implanted. Surgery was performed by Dr. Stalvey. (Ex. 7, pp. 122-124)

In a February 12, 2016 letter, defendants third-party administrator communicated to claimant that defendants were making voluntary permanent partial disability payments based upon a 5 percent permanent impairment to the body as a whole. (Ex. 8, p. 147)

In a February 24, 2016 note, Dr. Wahl assessed claimant as having a left ankle fracture and RSD. He found claimant at MMI. (Ex. 3, pp. 79-80)

In a May 12, 2016 report, Joshua Kimmelman, D.O., gave his opinions of claimant's condition following an IME. Claimant was assessed as having a post left ankle internal fixation complicated by CRPS. Dr. Kimmelman opined claimant had a 12 percent permanent impairment to the lower extremity converting to a 5 percent permanent impairment to the body as a whole. (Ex. 6)

On October 11, 2016, claimant underwent a functional capacity evaluation (FCE) performed by Charles Goodhue, M.S., MPT. Claimant gave maximum effort. Claimant was assessed as being able to perform in the light work category. Claimant was recommended to be allowed to sit, stand, and walk as needed. She was limited to lifting 30 pounds occasionally from floor to waist and 30 pounds occasionally overhead. (Ex. 2)

In an October 24, 2016 report Jacqueline Stoken, D.O., gave her opinions of claimant's condition following an IME. Claimant had left leg, foot, and ankle pain. The spinal cord stimulator and medications helped with pain. Claimant also complained of lower back pain. Dr. Stoken found claimant had a 7 percent permanent impairment to the body as a whole for her leg injury. Dr. Stoken opined claimant had a 5 percent permanent impairment to the body as a whole for the back condition. She found claimant had a 19 percent permanent impairment to the body as a whole for the CRPS. The combined value of all the impairments resulted in a 30 percent permanent impairment to the body as a whole. Dr. Stoken opined claimant was best found to work in the sedentary category of work. (Ex. 1)

In a November 7, 2016 note, Dr. Stalvey agreed with the FCE limitations and indicated claimant needed a job where she could move between sitting, standing, and walking as needed. (Ex. 7, p. 139)

Claimant said as a result of her leg and ankle pain she avoids walking and climbing stairs at work. Claimant said she also needs help getting abstract ledgers. She said she has difficulty sitting for more than 45 minutes and stands up to type. Claimant said her employer accommodates her limitations.

Claimant said she has difficulties sitting in a car for over 45 minutes and difficulties with sleeping. Claimant said she has difficulty walking on uneven ground. She has difficulty going shopping and doing the laundry.

Claimant testified she does not believe she could return to work at any of her prior employers given her limitations.

Claimant was still employed at the time of hearing with GCA.

Claimant testified she believed the Guthrie County State Bank, which owns GCA, was in the process of selling GCA. Claimant believed that if she did not have a job with GCA, there was no other job she could do in Guthrie County.

Judy Hilgenberg testified she is the manager of GCA. Ms. Hilgenberg testified she also works as an abstracter.

Ms. Hilgenberg said she owned GCA prior to 2008. In 2008, she sold GCA to the bank. She said that while the bank is considering the possibility of selling the abstract company, no sale was occurring at the time of the hearing.

Ms. Hilgenberg testified that she has seen claimant's permanent restrictions and the job claimant performs comports to those restrictions. Ms. Hilgenberg said claimant is allowed to sit, stand, and walk as needed. She said claimant has not asked for accommodations.

Ms. Hilgenberg testified claimant does have limitations since her injury. She says claimant does limp at work. She said she knows claimant is uncomfortable at times, but that claimant does not complain very much.

Ms. Hilgenberg said claimant is the best abstracter that GCA has. She says that claimant has taken on greater responsibility and has been training another abstracter for the job.

According to tax records in 2012, claimant earned $22,319.00. In 2013, claimant earned $20,793.00. In 2014, claimant earned $26,980.00. In 2015, claimant earned $27,478.00. (Ex. 10, pp. 152-155)

CONCLUSIONS OF LAW

The first issue to be determined is the extent of claimant's entitlement to permanent partial disability benefits.

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).

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.

Claimant was 35 years old at the time of hearing. Claimant graduated from high school. She has worked in a convenience store, and as a cashier at a bowling alley. She has also worked as a laborer and a house cleaner at a retirement center.

Claimant has permanent restrictions that limit her to working in the light work category as per the FCE. (Ex. 2) This is contrary to Dr. Stoken's finding that claimant

can only perform sedentary work. (Ex. 1, p. 14) The FCE is far more detailed than the findings and conclusions made by Dr. Stoken regarding claimant's functional limitations. Based on this, it is found that the restrictions detailed in the FCE are more convincing. The record indicates claimant can work within her permanent restrictions at GCA. Claimant has not asked for further accommodations.

The record indicates claimant has CRPS. There is little evidence contradicting that claimant has CRPS. Dr. Stoken is the only expert rating claimant's CRPS. Dr. Stoken found claimant has a 19 percent permanent impairment to the body as a whole for CRPS. It is found claimant has 19 percent permanent impairment to the body as a whole regarding her CRPS.

Dr. Stoken opined claimant had a 5 percent permanent impairment for a back injury. There is scant evidence in the medical records that claimant sustained a back injury related to her February 2013 ankle fracture. Dr. Stoken is the only expert to find claimant has a permanent impairment to her back caused by the February 2013 injury. For these reasons, it is found that the opinions of Dr. Stoken, that claimant has a back condition as a result of the February 2013 ankle fracture is found not convincing.

Dr. Kimmelman opined claimant had a 5 percent permanent impairment to the body as a whole due to the February 2013 fall. (Ex. 6, p. 9) Dr. Stoken opined claimant had an 8 percent permanent impairment to the body as a whole due to the ankle fracture. (Ex. 1, pp. 12-13) I am able to fully understand Dr. Stoken's impairment rating for the lower extremity. Dr. Kimmelman's analysis for his rating is far less detailed and relies solely on Table 13-5, of the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, concerning gait disorder. For these reasons, it is found that Dr. Stoken's opinion that claimant has an 8 percent permanent impairment for her lower extremity injury is more convincing.

According to the combined values charts of the Guides, 19 percent permanent impairment combined with an 8 percent permanent impairment results in 25 percent permanent impairment to the body as a whole. Therefore, it is found claimant has a 25 percent permanent impairment to the body as a whole.

The records indicates claimant worked at GCA 40 hours per week as an abstracter before the date of injury. Claimant continues to work full time as an abstracter since the date of injury. There is some evidence in the record the owner of GCA is planning to sell the business. The record also indicates there was no sale of the business at the time of the hearing. There is no evidence that claimant will lose her job at GCA if the abstract company is or is not sold. Considering the potential sale of the abstracting company in determining industrial disability is speculative at best. As a result, a potential sale of GCA is not considered a factor in determining claimant's industrial disability. Claimant has the option of filing a review-reopening petition if the sale of GCA occurs, and if this sale results in loss of earning capacity for claimant.

Claimant has permanent restrictions that limit her to the light work category. She has a 25 percent permanent impairment to the body as a whole. Claimant continues to work full time as an abstracter and her earnings have increased since the date of injury. (Ex. 10, pp. 152-155) When all factors are considered, it is found claimant has a 30 percent industrial disability loss of earning capacity.

The next issue to be determined is if defendants are liable for a 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."
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> 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.
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> (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.
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> (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 contends defendants are liable for penalty because they only paid claimant permanent partial disability benefits based upon a 5 percent permanent impairment to the body as a whole. (Claimant's post-hearing brief, p. 5)

Claimant was found to have a 5 percent permanent impairment by Dr. Kimmelman. Claimant worked full time as an abstracter before the date of injury. She continues to work full time as an abstracter after the date of injury. The record indicates claimant has increased income every year since the date of injury. (Ex. 10, pp. 152-155) Given this record, a penalty is not appropriate.

ORDER

THEREFORE IT IS ORDERED:

That defendants shall pay claimant one hundred fifty (150) weeks of permanent partial disability benefits at the rate of three hundred sixty-two and 06/100 dollars ($362.06) per week commencing on February 24, 2016.

That defendants shall pay accrued weekly benefits in lump sum.

That defendants shall pay interest on unpaid weekly benefits as ordered above and as set forth in Iowa Code section 85.30.

That defendants shall receive a credit for benefits previously paid.

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 3rd day of February, 2017.

JAMES F. CHRISTENSON
DEPUTY WORKERS'
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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.