BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

DORA M. GOULD, Claimant, vs. SERTA/NATIONAL BEDDING CO., LLC, Employer, and SAFETY NATIONAL CASUALTY CORP., Insurance Carrier, Defendants.	FILED SEP 15 2017 WORKERS COMPENSATION	File No. 5055887 ARBITRATION DECISION Head Note Nos.: 1803, 4000.2

STATEMENT OF THE CASE

Claimant, Dora Gould, filed a petition in arbitration seeking workers' compensation benefits from Serta/National Bedding Company, LLC, employer, (Serta) and Safety National Casualty Corporation, insurer, both as defendants. This case was heard in Des Moines, Iowa on May 8, 2017, with a final submission date of May 30, 2017.

The record in this case consists of Joint Exhibits 1 through 10, Claimant's Exhibits 1 through 12, Defendants' Exhibits A through E, and the testimony of claimant.

At hearing, the parties identified claimant's entitlement to reimbursement of an independent medical evaluation (IME) as an issue. Following hearing, the parties indicated that claimant's IME had been paid. As a result, the issue of claimant's entitlement for reimbursement of an IME is not discussed in this decision.

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

The extent of claimant's entitlement to permanent partial disability benefits.

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

FINDINGS OF FACT

Claimant was 63 years old at the time of hearing. Claimant graduated from high school. Claimant took some community college classes but has no post-high school certificates or degrees.

Claimant worked for Unisys installing chips on boards from 1986 through 1988. She worked as a sheet metal fabricator from 1989 through 2007. Claimant worked as a debt collector from 2008 through 2012.

Claimant began employment with Serta in September 2013. At the time of the injury, claimant worked as a stager for Serta. This job is also referred to as a "sort and match" position. (Joint Exhibit 1, pages 7-8, Transcript pp. 21-24) Claimant testified her job as a stager required her to pick up panels, or the top parts of mattress coverings. Claimant also picked up the bottom halves of the mattress coverings. Claimant would lay the panels on the floors and look for imperfections in the panels. Claimant would then take the panels to co-workers to repair. If the panels were good, she would take the panels to an aisle where they were stored. Claimant testified she sometimes had to toss panels seven feet up in the air.

Claimant testified the panels usually weighed between 10 to 20 pounds, but could weigh up to 30 pounds.

Claimant's medical history is relevant. A 1999 MRI of claimant's lumbar spine showed degenerative changes at the L5-S1 levels. (Ex. E, p. 4)

A 2006 chiropractic note indicated claimant suffered from chronic lower back pain. (Ex. E, p. 16) In 2007, claimant received a number of chiropractic treatments for lower back pain and was noted to have lower back spasms. (Ex. E, pp. 16-20)

In 2008, claimant continued to receive chiropractic care for lower back pain and was prescribed Lortab. (Ex. E, pp. 21, 46-47)

From 2009 through 2013, claimant received multiple chiropractic treatments for lower back pain and had continued use of Lortab. (Ex. E, pp. 24, 47-48, 51-54)

Before being hired by Serta, claimant was required to have a pre-employment physical with Iowa Specialty Hospitals.

On September 17, 2013, claimant was evaluated by Teresa Lee, PA-C, with Iowa Specialty. Claimant indicated in the evaluation she had a history of neck and back pain. Claimant was referred for a functional capacity evaluation (FCE). (Jt. Ex. 1, pp. 2-5, Tr. p. 23)

Claimant underwent an FCE with Accelerated Rehabilitation with Ernie Christensen, P.T., on October 1, 2013. The FCE found claimant could lift up to 50 pounds with frequent lifts up to 30 pounds. PT Christensen indicated he did not feel comfortable with making the determination if claimant was appropriate for the "sort and match" job and left that determination up to HR at Serta. (Ex. 1, pp. 1-2)

There is no evidence claimant had any permanent impairment or permanent restrictions prior to injuries with Serta.

On October 21, 2013, claimant threw some panels on a large cart. Claimant testified she felt a twinge in her lower back.

On October 24, 2013, claimant was evaluated by Sam Hunt, M.D. Claimant had complaints of lower back pain after moving a mattress quilt. She was assessed as having an acute back spasm. She was treated with medication. (Jt. Ex. 3, p. 1)

On November 21, 2013, claimant underwent an MRI of the lumbar spine. (Jt. Ex. 4, pp. 1-2) Claimant was evaluated by David Beck, M.D., an orthopedic surgeon, on December 11, 2013. Dr. Beck interpreted the MRI to show an L3-4 herniated disc affecting an L3 nerve root. Surgery was recommended and chosen as a treatment option. (Jt. Ex. 5, pp. 1-2)

On December 20, 2013, claimant underwent surgery with Dr. Beck consisting of an L3-4 laminectomy and lateral discectomy on the left. (Jt. Ex. 6, pp. 1-3)

On or about February 26, 2014, claimant returned in follow up with Dr. Beck. Claimant had thigh pain. Claimant was taken off work. A second MRI was recommended. (Jt. Ex. 5, p. 4)

Dr. Beck reviewed the MRI and believed claimant had recurrent disc herniation at the L3-4 levels on April 15, 2014. Dr. Beck gave claimant an epidural steroid injection (ESI) at the L3-4 interspace to help with claimant's pain. (Jt. Ex. 6, pp. 6-8)

Claimant saw Dr. Beck in follow up on April 21, 2014. The ESI did not help with claimant's pain. A second surgery was recommended. (Jt. Ex. 5, p. 8)

On June 3, 2014, claimant underwent a second surgery with Dr. Beck. The second procedure involved an L3-4 laminectomy, discectomy and fusion. (Jt. Ex. 6, pp. 9-12)

Claimant testified at hearing that her pain improved following the fusion for a few months. She said that after a few months, her pain gradually returned.

Between July 21, 2014 through January 11, 2015, defendants paid claimant permanent partial disability benefits. (Ex. D, pp. 7-14; Ex. 5, p. 11)

On October 30, 2014, claimant had another ESI at the L4-5 interspace. (Jt. Ex. 6, p. 18)

Claimant saw Dr. Beck in follow up in December 2014 and January 2015. During that time, Dr. Beck recommended a spinal cord stimulator. Claimant requested a second opinion regarding the spinal cord stimulator. (Jt. Ex. 5, pp. 20-21)

On March 23, 2015, claimant saw Charles Mooney, M.D., for a second opinion. Dr. Mooney believed claimant should have a follow up MRI and EMG of the left lower extremity to document radiculopathy. He believed if the additional MRI was negative, then claimant should be at maximum medical improvement (MMI). He believed claimant fell into DRE Category IV under the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition. Based on that, Dr. Mooney found claimant had a 25 percent permanent impairment to the body as a whole. (Jt. Ex. 7, pp. 1-4)

In an April 22, 2015 letter, Dr. Beck found claimant at MMI. Dr. Beck recommended an FCE. (Jt. Ex. S, p. 22)

On May 2, 2015, claimant underwent an FCE. The FCE found claimant gave maximum effort. The FCE found claimant could work at the medium category of work and was limited to lifting 40 pounds from 9 inches to waist level occasionally. (Jt. Ex. 7, pp. 5-14)

In a May 20, 2015 letter, Dr. Beck limited claimant to working half time in the office and half time on the floor 8 hours a day with a maximum lift of 20 pounds from floor to waist. (Jt. Ex. 5, p. 23) On May 22, 2015, Dr. Beck found claimant had a 12 percent permanent impairment to the body as a whole. (Jt. Ex. 5, p. 25)

On March 2, 2016, defendants paid claimant a permanent partial disability check for $10,195.10. This check represented a 12 percent rating given by Dr. Beck, less prior permanent partial disability benefits paid back in 2015. (Ex. 5, pp. 11-14)

Claimant testified she had continued back pain and radiculopathy in her left leg following her return to work. As a result, defendants authorized claimant to be seen by a pain specialist.

On October 24, 2016, claimant was evaluated by Ashar Afzal, M.D., an anesthesiologist specializing in pain management. Claimant had lower back pain radiating into the left lower extremity. Claimant was assessed as having a failed back syndrome and neuropathic pain. Dr. Afzal discussed a spinal cord stimulator and

sacroiliac joint injections with claimant. (Jt. Ex. 9, pp. 1-4) On November 22, 2015, claimant underwent a sacroiliac joint injection with Dr. Afzal. (Jt. Ex. 9, pp. 5-7)

In an April 6, 2017 report, John Kuhnlein, D.O., gave his opinion of claimant's condition following an IME. Claimant complained of continued lower back pain radiating down to the left lower extremity. Dr. Kuhnlein recommended claimant participate in a pain management program at the University of Iowa Hospitals or the Mayo Clinic. If claimant did not participate in a pain program, Dr. Kuhnlein found claimant at MMI as of December 13, 2016. Dr. Kuhnlein found claimant had a 23 percent permanent impairment to the body as a whole based on the finding that claimant fit into the DRE lumbar Category IV under the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition. He limited claimant to lifting 30 pounds occasionally from floor to waist and 40 pounds occasionally from waist to shoulder. (Ex. 1)

In an April 7, 2017 report, Kate Schrot, M.S., CDMS, gave her opinions of claimant's vocational opportunities. Ms. Schrot opined that if claimant stopped working at Serta, she would have a very limiting chance of finding other employment. (Ex. 2)

At the time of hearing, claimant was still employed with Serta. Claimant worked in a job called "inlets." In that position, claimant sews a border ribbon on a mattress pad and puts handles on mattresses. Claimant testified this position meets her restrictions and is less physically demanding than her job in "sort and match." Claimant said the "inlets" position allows her to sit and stand as needed. She testified that Serta accommodates her in her position. She said that she intends to stay in employment with Serta.

Claimant testified she takes ibuprofen and hydrocodone for pain. At the time of hearing, claimant had an appointment with Dr. Afzal to discuss an ablation procedure to help with pain.

Claimant testified that because of her lower back condition she no longer bowls, plays volleyball or bikes.

Claimant testified that when she began with Serta in 2013, she was earning $11.00 an hour. She said at the time of hearing she makes over $16.00 an hour. Claimant testified she works approximately eight to nine hours a day.

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 Rule of Appellate Procedure 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 63 years old at the time of hearing. She graduated from high school. Claimant has worked installing chips on boards for computers. She worked as a sheet metal fabricator. Claimant has also worked as a debt collector.

Three experts have opined regarding claimant's permanent impairment. Dr. Beck performed both surgeries on claimant. He opined that claimant had a 12 percent permanent impairment to the body as a whole. (Jt. Ex. 5, p. 25) Dr. Mooney found that claimant had a 25 percent permanent impairment to the body as a whole. (Jt. Ex. 7, pp. 1-4) While Dr. Mooney does refer to the Guides at page 384, regarding his rating, neither expert supplies much rationale or analysis as to how they arrived at the figures for claimant's permanent impairment. Dr. Kuhnlein found that claimant had a 23 percent permanent impairment to the body as a whole. (Ex. 1, p. 10) I am able to understand and follow Dr. Kuhnlein's rationale for reaching this figure and his analysis of claimant's abilities and impairments are more detailed than those of Drs. Mooney and Beck. Based on this, it is found that claimant has a 23 percent permanent impairment to the body as a whole.

An FCE found that claimant was limited to lifting up to 40 pounds occasionally from 9 inches to waist level. (Jt. Ex. 7, pp. 5-14)

Claimant has had two back surgeries, including a fusion at the L3-4 levels. She has been assessed as having a "failed back syndrome." (Jt. Ex. 9, pp. 1-4)

Claimant has returned to work at Serta and works full time. She was moved into a job that meets her restrictions. Claimant testified Serta has accommodated her limitations. Claimant testified that when she began with Serta she earned $11.00 an hour. At the time of hearing, claimant was earning over $16.00 an hour. The unrebutted opinion of a vocational expert is that if claimant was let go from her job with Serta, she would have an extremely difficult time finding employment anywhere else. When all relevant factors are considered, it is found that claimant has a 40 percent loss of earning capacity or industrial disability. Claimant is entitled to 200 weeks of permanent partial disability benefits.

The next issue to be determined is if defendants are liable for penalty under Iowa Code section 86.13.

In Christensen v. Snap-on Tools Corp., 554 N.W.2d 254 (Iowa 1996), and Robbennolt v. Snap-on Tools Corp., 555 N.W.2d 229 (Iowa 1996), the supreme court said:

> Based on the plain language of section 86.13, we hold an employee is entitled to penalty benefits if there has been a delay in payment unless the employer proves a reasonable cause or excuse. A reasonable cause or excuse exists if either (1) the delay was necessary for the insurer to investigate the claim or (2) the employer had a reasonable basis to contest the employee's entitlement to benefits. A "reasonable basis" for denial of the claim exists if the claim is "fairly debatable."
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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.

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

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

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

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

The record indicates that defendants did voluntarily pay claimant permanent partial disability benefits from July 21, 2014 through January 11, 2015. (Ex. D, pp. 7-14; Ex. 5, p. 11) This is equal approximately to a 5 percent permanent impairment rating. On May 20, 2015, Dr. Beck found that claimant had a 12 percent permanent impairment. Defendants did not pay the full rating for Dr. Beck until March 2, 2016. At that time, defendants paid claimant a lump sum of $10,195.10. Claimant was not given any explanation why defendants did not pay the rating for Dr. Beck for approximately 41 weeks. No explanation was given to claimant why defendants delayed, for approximately 9 months, the payment of the additional 7 percent of permanent partial disability benefits based on Dr. Beck's rating. Based on this, a penalty is appropriate. Five thousand ($5,000.00) dollars is approximately 50 percent of $10,195.10. Defendants are liable for penalty of $5,000.00 for failure to timely pay Dr. Beck's rating.

Claimant also suggests that defendants should be penalized for failure to pay industrial disability in excess of the 12 percent rating from Dr. Beck. As noted, claimant still works full time at Serta. Claimant testified she began working at Serta at $11.00. At the time of hearing, claimant earned over $16.00 an hour. While it is found that claimant has a 40 percent loss of earning capacity, given the record detailed above, it is not unreasonable for defendants to pay claimant's permanent partial disability benefits based solely on the permanent impairment rating given by Dr. Beck.

ORDER

THEREFORE, IT IS ORDERED:

That defendants shall pay claimant two hundred (200) weeks of permanent partial disability benefits at the rate of two hundred ninety-one and 46/100 dollars ($291.46) per week commencing on July 21, 2014.

That defendants shall pay accrued weekly benefits in a 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 as detailed above.

That defendants shall pay a penalty of five thousand and 00/100 dollars ($5,000.00) for the delay in the payment of permanent partial disability benefits based on Dr. Beck's rating.

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

Signed and filed this 15th day of September, 2017.

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.