BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

CINDY FREIBURGER, Claimant, vs. JOHN DEERE DUBUQUE WORKS OF DEERE & COMPANY, Employer, Self-Insured, Defendant.	:	File No: 5066626.01 ARBITRATION DECISION Head Note Nos: 1803.1, 2502, 4000.2

STATEMENT OF THE CASE

Claimant, Cindy Freiburger, filed a petition in arbitration seeking workers' compensation benefits from John Deere Dubuque Works of Deere & Company (Deere), self-insured employer. This matter was heard on November 24, 2020, with the final submission date of December 21, 2020.

The record in this case consists of Joint Exhibits 1-9, Claimant's Exhibits 1-7, Defendant's Exhibits A-I, and the testimony of claimant and Mark Ruden.

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 the injury resulted in a permanent disability.

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

3. Whether defendant is liable for a penalty under Iowa Code Section 86.13.

FINDINGS OF FACT

Claimant was 63 years old at the time of the hearing. Claimant graduated from high school. Claimant began with John Deere in 2011.

On April 1, 2015, claimant was working on the small crawler line at Deere. Claimant was using a hoist to lift a track frame. The frame moved and pinned claimant against a work table. Claimant said she dislocated her left ankle and broke her right leg. Claimant was taken by ambulance to Finley Hospital in Dubuque. (TR pp. 18-20)

On April 1, 2015, claimant treated with Stephen Pierotti, M.D., at Finley Hospital. Claimant was assessed as having a left ankle dislocation and a right distal tibia and fibula fracture. Claimant underwent surgery consisting of a closed reduction and casting of the dislocation, and an ORIF plating of the distal fibula. Claimant was in the hospital until April 4, 2015. (JE 1, p. 2; Ex. 1, p. 2)

Photos of claimant's leg in a cast and walking boot are found in Exhibit 4.

Claimant returned to Dr. Pierotti on May 13, 2015. Claimant was put in a walking boot on the left and right legs. Claimant began full weightbearing on both legs on June 10, 2015. (JE 1, pp. 2-3)

Claimant returned to Dr. Pierotti on August 25, 2015. Claimant had minimal leg pain. Claimant indicated pain in the legs with weather changes or prolonged standing. (JE 1, p. 3)

Claimant returned to Dr. Pierotti on February 24, 2016. Claimant was working six hours a day. Claimant was allowed to do work duty as tolerated. (JE 1, p. 5)

On July 13, 2016, claimant was evaluated by Christopher Palmer, M.D. Claimant had a long history of intermittent back problems. Claimant had progressive left-sided back pain following her return to work from her leg injuries. Claimant was assessed as having degenerative disc disease. (JE 8)

Claimant was evaluated by Timothy Miller, M.D., on August 17, 2016. Claimant had intermittent left leg pain. Claimant had a normal gait. Dr. Miller believed claimant's problems would resolve. (JE 2, pp. 1-2)

Claimant returned to Dr. Miller on November 23, 2016. Claimant had ". . . a feeling of impending doom, like something was wrong." She noted some clicking of her hip. Claimant had no clicking of the hip on exam. Gluteal trigger point injections were discussed as a potential future treatment option. (JE 2, pp. 4-5)

Claimant returned to Dr. Miller on January 26, 2017. Claimant still had symptoms of left gluteal pain. Claimant was given a gluteal trigger point injection. (JE 2, pp. 7-8)

On February 15, 2017, claimant returned to Dr, Miller. Dr. Miller did not perform further injections. Claimant was found to be at MMI for her gluteal symptoms. (JE 2, pp. 10-11)

On April 14, 2017, Dr. Pierotti indicated claimant had no permanent impairment to either the left or right leg. (JE 1, p. 7)

In a July 5, 2017 note, David Field, M.D., an orthopedic specialist, gave his opinions of claimant's condition following an independent medical evaluation (IME). Dr. Field opined that claimant had no permanent impairment on the left ankle, and a 5 percent permanent impairment to the left leg. (Ex. B)

On December 20, 2017, claimant was evaluated by Ludwig Gutmann, M.D., for occasional tingling in the feet and intermittent left buttock pain. Claimant's hip pain was found not related to her work injury. Claimant's sensory tingling in her feet and pain were found likely related to the injury. (JE 9)

On January 24, 2019, claimant was evaluated by Don Damsteegt, Ph.D. Claimant had chronic worrying about a future injury. Claimant was assessed as having a generalized anxiety disorder and symptoms of posttraumatic stress disorder (PTSD). (JE 3, pp. 5-6)

Claimant returned to Dr. Pierotti on February 15, 2019. Claimant indicated tenderness in the right lower extremity everywhere. Dr. Pierotti recommended against removal of the hardware in claimant's leg. (JE 1, p. 7)

In a March 13, 2019 report, Arnold Delbridge, M.D., gave his opinions of claimant's condition following an IME. Claimant complained of pain in the left buttock radiating to the knee. Claimant's right leg had some numbness immediately. Claimant complained of a burning sensation in the right leg. (Ex. 1, pp. 1-4)

Dr. Delbridge did not find claimant had any impairment to her spine as a result of her work injury. Dr. Delbridge found that claimant had a 7 percent permanent impairment to the left lower extremity. He believed claimant had a gait derangement and found claimant had a 7 percent permanent impairment to the body as a whole. (Ex. 1, pp. 5-6) Dr. Delbridge found claimant at maximal medical improvement (MMI) as of June 1, 2018. (JE 1, p. 6)

In an April 18, 2019 note, Dr. Damsteegt indicated claimant's tendency to worry was greatly aggravated by her April 2015 work injury. He noted he did not diagnose claimant with PTSD. (JE 3, pp. 9-10)

In a July 3, 2019 note, Laura Rank, LMHC, indicated she believed claimant had PTSD and that claimant's PTSD stemmed from her work injury. (JE 4, p. 16)

In a July 3, 2019 report, Teresa McClain, MA, CRC, gave her opinion of claimant's vocational opportunities. Claimant was working full time as a parts picker and forklift driver for Deere. Based on the IME report from Dr. Delbridge, Ms. McClain opined claimant had a 52.5 percent loss of access to skilled jobs and a 38.9 percent loss of access to unskilled jobs. (Ex. 7)

Claimant was evaluated by Mark Mittauer, M.D., on August 29, 2019. Claimant was assessed as having chronic PTSD and insomnia. (JE 4, pp. 23-25)

On September 24, 2019, claimant was evaluated by Philip Chen, M.D., at the University of Iowa Hospitals and Clinics. Claimant had numbness, tingling and a burning sensation in the right medial lower extremity. Claimant was assessed as having a right saphenous nerve injury. Claimant was told she could use a TENS unit for her leg pain. (JE 6)

Claimant returned to Dr. Miller on August 13, 2020, for pain in the right knee bursa. Claimant was assessed as having bursitis and given an injection in the right infrapatellar bursa. (JE 2, pp. 12-15)

In an October 24, 2020 letter, Ms. Rank indicated that the PTSD symptoms claimant had stemmed from her work injury. She opined claimant's condition was chronic. Ms. Rank opined that claimant should continue to receive outpatient services. (Ex. 2, p. 4)

At the time of hearing, claimant was still employed with Deere. In her job claimant receives parts, pulls work orders, takes parts to operators and mechanics, returns stock, and does some computer work. (TR p. 41) Claimant indicated she wants to return to assembly. She said her current job pays her less than her job in assembly. (TR pp. 41-43)

Mark Ruden testified that he has been claimant's supervisor at Deere for approximately one year. Mr. Ruden testified that claimant has never complained to him regarding a mental health issue. (TR p. 79)

CONCLUSION 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. 6.904(3).

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).

Nontraumatically caused mental injuries are compensable under Iowa Code section 85.3(1). Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995).

Under Dunlavey, mental injuries caused by work-related stress are compensable if, after demonstrating medical causation, the employee shows that the mental injury was caused by work place stress of greater magnitude than the day-to-day mental stresses experienced by other workers employed in the same or similar jobs, regardless of their employer. Id. at 857.

Both medical and legal causation must be resolved in claimant's favor before an injury arising out of and in the course of the employment can be established. To establish medical causation, the employee must show that the stresses and tensions arising from the work environment are a proximate cause of the employee's mental difficulties. If the medical causation issue is resolved in favor of the employee, legal causation is examined. Legal causation involves a determination of whether the work stresses and tensions the employee experienced, when viewed objectively and not as the employee perceived them, were of greater magnitude than the day-to-day mental stresses workers employed in the same or similar jobs experience routinely regardless of their employer.

The employee has the burden to establish the requisite legal causation. Evidence of stresses experienced by workers with similar jobs employed by a different employer is relevant; evidence of the stresses of other workers employed by the same employer in the same or similar jobs will usually be most persuasive and determinative on the issue. Id. at 858.

Claimant contends she has a 7 percent permanent impairment to the left and right leg and has an industrial disability due to an alleged PTSD mental health condition from the work injury. Defendant contends claimant's permanent disability is limited to a functional rating of 5 percent of the lower extremity.

Regarding claimant's mental health condition, in July 2019 Ms. Rank opined that claimant had PTSD symptoms stemming from her work injury. (JE 4, p. 16) In subsequent correspondence, Ms. Rank opined that claimant's mental health condition is chronic. (Ex. 2, p. 4)

Claimant was also evaluated by Dr. Mittauer. Dr. Mittauer opined that claimant had PTSD symptoms from her work accident. (JE 4, p. 26) Given this record, claimant has carried her burden of proof she sustained a mental health injury as a sequela from her injury to her lower extremities on April 1, 2015.

Claimant contends that the word "chronic" by Ms. Rank is essentially an opinion claimant's condition is a permanent impairment. (Claimant's Post-Hearing Brief, p. 11) Claimant does not cite any precedent, indicating that the term "chronic" equates to finding of permanent impairment. I am unaware of any agency precedence or case law finding that the term "chronic" is an equivalent to a finding of permanent impairment. No expert has opined that claimant's PTSD is a permanent impairment. No expert has given an opinion that claimant has a permanent impairment rating for her PTSD. No expert has given claimant permanent restrictions for her PTSD. Given this record, claimant has failed to carry her burden of proof that her mental health condition is a permanent disability. For this reason, claimant has failed to carry her burden of proof she has an injury to the body as a whole.

As claimant has failed to carry her burden of proof her injury is to be analyzed as an industrial disability, the next issue to be determined is if claimant sustained a permanent disability to two members caused by a single injury, and is analyzed under Iowa Code Section 85.34(2)(t), or if claimant's injury caused a permanent disability to a single lower extremity and is to be compensated under Iowa Code Section 85.35(2)(p).

Dr. Pierotti treated claimant for an extended period of time. He found claimant had no permanent impairment to either lower extremity. (JE 1, pp. 6-7) There is no analysis of how Dr. Pierotti reached this finding of no permanent impairment. Given this record, Dr. Pierotti's opinions regarding permanent impairment are found not convincing.

Dr. Field saw claimant once for an IME. He opined that claimant had a 5 percent permanent impairment to the lower extremity. (Ex. B, pp. 2-4)

Dr. Delbridge opined that claimant had a 7 percent permanent impairment to both lower extremities. This finding was based on a finding that claimant had a mild gait derangement. (Ex. 1) Dr. Delbridge's opinions regarding bilateral permanent impairment is problematic. Dr. Delbridge cites to the Guides, page 529, table 17-5, indicating a finding of 7 percent permanent impairment regarding claimant's gait. The Guides indicates that this rating is only appropriate for a gait derangement of a person who is dependent on an assistive device, or to those who have documented moderate to advanced arthritic changes of the hip, knee or ankle. Id. Claimant does not fit any of these criteria. Based on this issue, it is found Dr. Delbridge's opinion regarding permanent impairment is not convincing.

Dr. Field found that claimant had 5 percent permanent impairment to the lower extremity. Dr. Delbridge's rating of a bilateral permanent impairment is found not convincing. Dr. Pierotti's finding of no impairment is found not convincing. Based on this, it is found that Dr. Field's rating of 5 percent to claimant's lower extremity is most

convincing. Claimant is entitled to 11 weeks of permanent partial disability benefits (5 percent x 220 weeks).

The next issue to be determined is whether defendant is liable for a 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."

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 Custom 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, 594 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 that defendant is liable for a penalty based on Exhibit 5. A review of Exhibit 5 indicates that most of temporary total disability benefit payments were made within 10 days after the end of the week. (Ex. 5, pp, 5-6) The same is true for the temporary partial disability benefits paid. (Ex. 5, pp. 7-9) Given this record, a penalty for an alleged delay of payment of temporary benefits is not appropriate.

Regarding permanent partial disability benefits, the records indicate that Dr. Field issued his permanent impairment on July 5, 2017. Claimant was not issued a check until August 15, 2017. (Ex. 5, p. 1) The record suggests that defendant was aware of Dr. Field's rating at least by July 10, 2017. (Ex. B, pp. 2-4) Defendant did not issue a payment for the permanent disability rating until approximately one month later. Given this record, a penalty is appropriate. Defendant is liable for a penalty of $1042.03 (20 percent x 11 weeks x $473.65).

In their brief, defendant disputes that claimant is to be reimbursed for costs concerning the IME report by Dr. Delbridge. (Defendant Post-Hearing Brief, p. 19) Defendant did not raise costs as an issue in dispute in this matter. (TR pp. 5-7) As such, defendant has waived the issue of costs.

Assuming for argument's sake that defendant has not waived the issue of costs, claimant should still be reimbursed for Dr. Delbridge's IME under Iowa Code Section 85.39. Dr. Field issued a rating for claimant on July 5, 2017. Dr. Delbridge, the employee-retained expert, issued a rating for claimant's permanent impairment on March 13, 2019. Given the chronology of these reports, claimant would still be reimbursed for the cost of the IME under Iowa Code Section 85.39. See Des Moines Regional Transit Authority v. Young, 867 N.W.2d 839, 846-847.

ORDER

Therefore, it is ordered,

That defendant shall pay claimant eleven (11) weeks of permanent partial disability benefits at the rate of four hundred seventy-three and 65/100 dollars ($473.65) commencing on January 7, 2017.

Defendants shall pay accrued weekly benefits in a lump sum together with interest at the rate of ten percent for all weekly benefits payable and not paid when due which accrued before July 1, 2017, and all interest on past due weekly compensation benefits accruing on or after July 1, 2017, shall be payable at an annual rate equal to the one-year treasury constant maturity published by the federal reserve in the most recent H15 report settled as of the date of injury, plus two percent. See Gamble v. AG Leader Technology File No. 5054686 (App. Apr. 24, 2018)

That defendant shall be given credit for benefits previously paid.

That defendant shall pay a penalty of one thousand forty-two and 03/100 ($1042.03) for delay of payment of permanent partial disability benefits.

That defendant shall pay costs including the costs associated with Dr. Delbridge's IME.

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

Signed and filed this 15th day of July, 2021.

JAMES F. CHRISTENSON
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Thomas Wertz (via WCES)

Arthur Gilloon (via WCES)

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 filed via Workers' Compensation Electronic System (WCES) unless the filing party has been granted permission by the Division of Workers' Compensation to file documents in paper form. If such permission has been granted, the notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 150 Des Moines Street, Des Moines, Iowa 50309-1836. The notice of appeal must be received by the Division of Workers' Compensation 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 legal holiday.