BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

MATTHEW MARKEZICH, Claimant, vs. FINISH LINE, INC., Employer, and SAFETY NATIONAL CASUALTY CO., Insurance Carrier, Defendants.	File No. 21010618.01 ARBITRATION DECISION Headnotes: 1402.30, 1802, 1803, 2501, 4000.2

STATEMENT OF THE CASE

Claimant, Matthew Markezich, filed a petition in arbitration seeking workers' compensation benefits from The Finish Line, Inc., employer, and AIU Insurance Company, insurer, both as defendants. This matter was heard on February 28, 2023, with a final submission date of March 21, 2023.

The records in this case consists of Joint Exhibits 1-2, Claimant's Exhibits 1-4, Defendants' Exhibits A-C, and the testimony of claimant.

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 that arose out of and in the course of employment.

2. Whether the injury is a cause of a temporary disability.

3. Whether the injury is a cause of a permanent disability; and if so,

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

5. Whether there is a causal connection between the injury and the claimed medical expenses.

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

FINDINGS OF FACT

Claimant testified he worked as an assistant store manager and a stockroom supervisor for defendant-employer. He said defendant-employer sells sports shoes and sporting goods apparel. (Joint Exhibit 2, deposition pages 8-9)

Claimant testified he spent the majority of his time at work loading and unloading boxes in the stockroom. Claimant said he could move from 100 to 200 boxes a day in the stockroom. He said the boxes could weigh up to 40 pounds.

Claimant testified in deposition that he was carrying shoes to the men's hallway area. He said he put the shoes on the bottom shelf. He said he was in a "catcher's" position, to shelve boxes. He said when he stood up, his right knee popped out at a 45-degree angle. (JE 2, depo pp. 12-13) Claimant said he sat down for about 10 minutes after the pop. He said he reported the injury to his store manager. (JE 2, depo pp. 14-15)

On June 23, 2021, claimant was evaluated by Claudia Corwin, M.D., at the University of Iowa Hospitals and Clinics (UIHC) for right knee pain. Claimant indicated he got up from a crouching position at work and heard his knee pop. Claimant indicated his knee was weak and unstable. Dr. Corwin found claimant's knee injury was work related. (JE 1, p. 4) Claimant was told to use a knee brace and ice his right knee intermittently. (JE 1, p. 4)

Claimant saw Dr. Corwin in follow up on July 12, 2021. An MRI showed a full-thickness tear of the lateral meniscus. Claimant was told to wear a brace and avoid ladders and steps. (JE 1, pp. 5-7)

Claimant was evaluated by Kyle Duchman, M.D., on August 5, 2021. Claimant was seen for a work-related knee injury. Claimant was assessed as having a right knee lateral meniscal tear following a work-related injury. Surgery was discussed and chosen as a treatment option. (JE 1, pp. 8-11)

On September 7, 2021, claimant underwent a right knee arthroscopy with a partial lateral meniscectomy. (JE 1, pp. 15-17)

Claimant returned to Dr. Duchman on February 7, 2022, in follow up. Claimant was going to physical therapy. Claimant had started to run. Claimant wanted to be able to return to work and sports. Claimant was released without restrictions. (JE 1, pp. 22-23)

In a December 9, 2022 report, Jacqueline Stoken, D.O., gave her opinions of claimant's condition following an independent medical evaluation (IME). Claimant had

bent down to put away shoes. When he stood up, he felt his knee pop. (Claimant's Exhibit 1, page 1)

Dr. Stoken assessed claimant as having a right knee lateral meniscus tear following a right injury with a right knee partial lateral meniscectomy. (Ex. 1, p. 5) Using the AMA Guides to the Evaluation of Permanent Impairment (Fifth Edition), Dr. Stoken found claimant had a 2 percent lower extremity impairment, converting to a 1 percent permanent impairment to the body as a whole. She found claimant at maximum medical improvement (MMI) as of February 7, 2022. Claimant was told to avoid walking on uneven ground. He was also told to avoid kneeling, bending and crawling. Dr. Stoken opined that claimant may need future pain management. (Ex. 1, pp. 5-6)

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. 6.904(3).

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" refer 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 Elec. 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).

There is no dispute that claimant was in the course of employment with defendant-employer when the injury occurred. Defendants contend the activity that claimant engaged in when the injury was produced, did not "arise out of" his employment with defendant-employer. (Defendants' Post-Hearing Brief, pp. 2-4)

In support of this position, defendants cite to the case of Green v. Compass Group, File No. 5059233 (App. August 6, 2020) (affirmed by ruling on judicial review, February 5, 2021).

In Green, claimant worked as a dishwasher. Claimant was obese, had diabetes and had a cavus deformity in his foot. (Arbitration Decision page 4) Claimant bent over to pick a fork up that had fallen and fractured a metatarsal in his foot.

The arbitration decision found that claimant had an injury that arose out and in the course of employment. On appeal, the commissioner reversed the finding, and found that claimant's injury did not "arise out of his employment." The commissioner noted, "based on claimant's descriptions of the incident, there was nothing about the nature of claimant's employment that exposed him to the risk of an injury to his foot." The commissioner also found that claimant's injury occurred "coincidentally" while at work. Green, File No. 5059237 (App. August 6, 2020, page 4)

The facts in this case differ from those in Green. This is not a case where claimant had a congenital issue that contributed to his knee injury. The record indicates claimant could lift and move up to 200 boxes during the course of a day. The record indicates that the boxes claimant lifted could weigh up to 40 pounds. The record indicates that claimant routinely carried boxes at work, and squatted to store shoes and other items on shelves.

In Green, at least one expert found that claimant's injury was not caused by his employment. In this case, every expert has opined that claimant's injury was caused by his job. (JE 1, p. 4, pp. 8-11; Ex. 1, p. 1) No expert opined that claimant's injury was not work related. Given this record, it is found that the decision in Green has no precedential value to this case.

The record indicates claimant carried boxes weighing up to 40 pounds. Claimant had to lift and squat in his job. Claimant could move up to 200 boxes during the course of a day. Every expert opinion in this case indicates that claimant's knee injury was caused by his work with the defendant-employer. Given this record, it is found that claimant has carried his burden of proof that his injury arose out of and in the course of employment.

The next issue to be determined is the extent of claimant's entitlement to temporary disability benefits.

Healing period compensation describes temporary workers' compensation weekly benefits that precede an allowance of permanent partial disability benefits. Ellingson v. Fleetguard, Inc., 599 N.W.2d 440 (Iowa 1999). Section 85.34(1) provides that healing period benefits are payable to an injured worker who has suffered permanent partial disability until the first to occur of three events. These are: (1) the worker has returned to work; (2) the worker medically is capable of returning to substantially similar employment; or (3) the worker has achieved maximum medical recovery. Maximum medical recovery is achieved when healing is complete and the extent of permanent disability can be determined. Armstrong Tire & Rubber Co. v. Kubli, Iowa App., 312 N.W.2d 60 (Iowa 1981). Neither maintenance medical care nor an employee's continuing to have pain or other symptoms necessarily prolongs the healing period.

The parties stipulated in the hearing report that if the defendants were found liable in this case, the claimant was due temporary benefits from July 13, 2021, through February 7, 2022. Claimant has carried his burden of proof his injury arose out of and in the course of employment. Claimant is due healing period benefits from July 13, 2021, through February 7, 2022.

The next issue to be determined is whether claimant's injury resulted in a permanent disability. The record indicates claimant underwent surgery for his knee injury. Dr. Stoken opined that claimant's injury resulted in a permanent disability. There is no opinion contradicting the findings of Dr. Stoken. Given this record, claimant has carried his burden of proof his knee injury resulted in a permanent disability.

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

Under the Iowa Workers' Compensation Act, permanent partial disability is compensated either for a loss or loss of use of a scheduled member under Iowa Code section 85.34(2)(a)-(t) or for loss of earning capacity under section 85.34(2)(u). The extent of scheduled member disability benefits to which an injured worker is entitled is determined by using the functional method. Functional disability is "limited to the loss of the physiological capacity of the body or body part." Mortimer v. Fruehauf Corp., 502 N.W.2d 12, 15 (Iowa 1993); Sherman v. Pella Corp., 576 N.W.2d 312 (Iowa 1998). The fact finder must consider both medical and lay evidence relating to the extent of the functional loss in determining permanent disability resulting from an injury to a scheduled member. Terwilliger v. Snap-On Tools Corp., 529 N.W.2d 267, 272-273 (Iowa 1995); Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417, 420 (Iowa 1994).

Dr. Stoken found that claimant had 2 percent permanent impairment to the lower extremity due to his work-related injury. There is no opinion contrary to this finding. Claimant is due 4.4 weeks of permanent partial disability benefits for his June 16, 2021, work injury (220 weeks x 2 percent).

The next issue is whether there is causal connection between the injury and the claimed medical expenses.

The employer shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance, and hospital services and supplies for all conditions compensable under the workers' compensation law. The employer shall also allow reasonable and necessary transportation expenses incurred for those services. The employer has the right to choose the provider of care, except where the employer has denied liability for the injury. Section 85.27. Holbert v. Townsend Engineering Co., Thirty-second Biennial Report of the Industrial Commissioner 78 (Review-Reopening October 1975).

There is no evidence that the outstanding medical bills are not causally connected to claimant's work injury. There is also no evidence that the charges regarding the outstanding medical bills are not found reasonable. There is no evidence that the treatment claimant received for the outstanding medical charges was not reasonable and necessary. For these reasons, claimant has proven defendants are liable for the outstanding medical bills.

The next issue to be determined is whether defendants are 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.

(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 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 consistently testified his injury to his knee occurred while he was in a squatting position while putting shoes on a shelf at work. Drs. Corwin, Duchman, and Stoken have all opined that claimant's injury was work related. There is no expert who has opined that claimant's injury is not work related. The only rationale offered by defendants for denying the claim was that the activity of rising from a squatting position "does not arise out of and in the course of employment." (Defendants' Exhibits B and C) Defendants offered no statute rule, caselaw or agency precedent to support that denial. Given this record, a 50 percent penalty is appropriate.

The period of time between July 13, 2021, through February 7, 2022, is approximately 29 weeks. Claimant's rate is $221.15 per week. Defendants are liable for a penalty of $3,206.68 for failure to pay claimant healing period benefits (29 weeks x $221.15 x 50 percent).

Claimant is due 4.4 weeks of permanent partial disability benefits for his work-related injury. Defendants are liable for a penalty of $442.30 for failure to pay claimant any permanent partial disability benefits (4 weeks x $221.15 x 50 percent).

ORDER

THEREFORE IT IS ORDERED:

That defendants shall pay claimant healing period benefits from July 13, 2021, through February 7, 2022, at the rate of two hundred twenty-one and 15/100 dollars ($221.15) per week.

That defendants shall pay claimant 4.4 weeks of permanent partial disability benefits commencing on February 8, 2022, at the rate of two hundred twenty-one and 15/100 dollars ($221.15) per week.

That defendants shall pay accrued weekly benefits in a lump sum together with interest 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.

That defendants shall be given credit for benefits previously paid.

That defendants shall pay claimant's medical expenses.

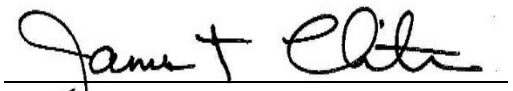
That defendants shall pay claimant three thousand two hundred six and 68/100 dollars ($3,206.68) in penalty for failure to pay healing period benefits.

That defendants shall pay claimant four hundred forty-two and 30/100 dollars ($442.30) for failure to pay claimant permanent partial disability benefits.

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 18th day of July, 2023.



JAMES F. CHRISTENSON
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Jason Neifert (via WCES)

Abigail Wenninghoff (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.