BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

MIKEL ROTTER, Claimant, vs. WHIRLPOOL CORPORATION, Employer, Self-Insured, Defendants.		File No. 5043967 ARBITRATION DECISION Head Note No.: 1803

STATEMENT OF THE CASE

Claimant, Mikel Rotter, has filed a petition in arbitration and seeks workers' compensation benefits from Whirlpool Corporation, self-insured, defendant.

This matter is heard by Deputy Workers' Compensation Commissioner Ron Pohlman on September 3, 2014 in Des Moines, Iowa. The case was fully submitted on October 10, 2014.

The record consists of claimant's exhibits 1 through 17 and defendant's exhibits A through Q, as well as the testimony of claimant.

Claimant objected to exhibit E, pages 41 through 46 as having been submitted untimely. The documents are reports from treating physicians that are offered in rebuttal. The documents in question are a letter from defense counsel to Daniel Fabiano, M.D., dated July 18, 2014 and signed by Dr. Fabiano dated July 20, 2014 in which Dr. Fabiano indicates that the statements set out in the letter from defense counsel are agreed with. Pages 45 and 46 are a similar document from defense counsel to Scott Ekroth, M.D., signed by Dr. Ekroth indicating his agreement to the opinions set out in the letter dated August 22, 2014. Pages 43 and 44 is a report prepared by Dr. Fabiano and signed August 9, 2013. The report from Dr. Fabiano from 2013 was served on claimant August 7, 2014. The medical report from Dr. Ekroth was served on claimant on July 21, 2014. Claimant argues that these documents must be excluded as they were not served timely and they relate to causation and thus are prejudicial to the claimant. Claimant sites Trade Professionals, Inc. v. Shriver, 661 N.W.2d 119, 122 (Iowa 2003), where the Court stated:

> "Schoenfeld should not be read so broadly as to require admission of evidence received after the cutoff date on the basis the employer merely knew of the existence of the reporting doctor."

Claimant argues that even if the record were held open for additional time to obtain rebuttal evidence to these reports that would create a substantial time burden on the claimant whose claim had been denied and require an unwarranted expense to produce additional evidence. In summary, claimant states plainly, there is no real excuse for not timely providing medical opinions. Exclusion is the proper remedy. Defendants note that the document that is found at pages 43 and 44, the report of Dr. Fabiano from 2013 was served upon claimant's counsel on March 17, 2014, and thus was provided timely. With respect to the other opinions of Dr. Fabiano and Dr. Ekroth, defense argues that claimant had been advised that the employer was relying upon the opinion of those physicians and answers to interrogatories and in records that were served by the claimant upon the employer in March 2014.

The undersigned agrees with the principals outlined by the claimant in claimant's argument in his brief. However, the record shows that in this case, these documents do not present new information unknown to the claimant so as to require that they be excluded. Therefore, these exhibits are admitted.

ISSUES

The parties submitted the following issues for determination:

1. Whether the claimant sustained an injury on May 13, 2013, which arose out of and in the course of his employment;

2. Whether the injury was the cause of any disability;

3. Whether the claimant is entitled to healing period benefits from August 1, 2013 through June 18, 2014;

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

5. Whether the claimant is entitled to payment of medical expenses pursuant to Iowa Code section 85.27; and

6. Whether the claimant is entitled to payment of penalties pursuant to Iowa Code section 86.16 for an unreasonable denial of the claim.

FINDINGS OF FACT

The undersigned having considered all of the testimony and evidence in the record finds:

The claimant at the time of the hearing was 52 years old. He has an 11th grade education. His employment history consists of 30 years of employment at Whirlpool Corporation. On the date of injury, in this case, the claimant was a second class inspector.

On May 13, 2013, the claimant slipped on some oil on the floor and felt severe pain in the front of his knee.

On June 18, 2013, the claimant underwent an MRI of his right knee, which revealed:

1. Medial femoral condyle bone marrow edema/contusion. Infrapatellar fat pad edema.

2. Partial PCL tear with marked stretching.

3. Low-grade MCL sprain.

4. Biceps femoris and medial gastroenemius strains.

(Exhibit 5, page 2)

Patrick Hartley, M.D., confirmed on June 27, 2013 that the claimant's MRI revealed conditions that were clinically consistent with the claimant's reported mechanism of injury. See Exhibit 4, page 6. However, defendants indicated at that time that an investigation had been conducted which indicated that there was no oil of any kind on the floor near the area where claimant slipped. Defendants later admitted that oil was found on the floor near the area where claimant slipped and fell. This admission only occurred after multiple motions to compel and requests for clarification from the claimant.

The claimant began treating with Sunny Kim, M.D., October 24, 2013. Dr. Kim assessed the claimant with a traumatic right knee patella tendonosis and enthesopathy. On December 27, 2013, Dr. Kim referred the claimant to a foot and ankle specialist, Dr. Ekroth and kept the claimant off work until February 1, 2014 because the claimant was in too much pain with weight bearing activities. See Exhibit 1, page 7. Dr. Kim performed surgery on November 18, 2013 after claimant failed conservative treatments for his right knee.

On February 24, 2014, the claimant underwent a three-phase bone scan, which revealed, "1. The altered distribution of activity on the blood flow and blood pool sequences could support a clinical diagnosis of late stage RSD involving the right lower extremity." (Ex. 8, p. 3)

On March 3, 2014, Dr. Kim opined the claimant had complex regional pain syndrome in the right foot and ankle. He kept the claimant off of work for another three months in an attempt to get this problem under control. By April 21, 2014, Dr. Kim noted claimant still had complex regional pain syndrome from the right ankle and foot but it was improved. Dr. Kim had treated this condition with nerve blocks and medication. Dr. Kim opines that this condition is related to the claimant's work injury. On May 5, 2014, Dr. Kim opined claimant had a 19 percent permanent impairment of the whole body as a result of the complex regional pain syndrome.

In response to a letter from claimant's counsel dated July 24, 2014, Dr. Kim indicated that he had been contacted by an attorney representative of the defendant by phone on July 23, 2014 and that the attorney representative had presented arguments or issues suggesting a different outcome regarding his opinions and conclusions but these suggestions did not change Dr. Kim's opinion. On February 14, 2014, Shahin Bagheri, M.D., opined that the claimant's symptoms and history are highly suggestive of complex regional pain syndrome.

The claimant has not worked from August 1, 2013 through the time of the hearing. Dr. Kim placed the claimant at maximum medical improvement (MMI) on June 19, 2014. Dr. Kim has given the claimant restrictions of sit down work only, light duty, sedentary in nature.

On July 20, 2014, Dr. Daniel Fabiano, M.D., opined that an MRI taken of the claimant's left knee in 2011 revealed similar findings to those present on the 2013 MRI taken of the claimant's right knee. See Exhibit E, page 42. However, Dr. Bagheri, who also reviewed those MRI's, disagreed. Dr. Ekroth agreed with a letter from defense counsel dated August 21, 2014 that the May 13, 2013 injury was not a significant or substantially contributing factor to the claimant's right ankle and foot problems at the time he evaluated the claimant. Further, he opines claimant does not require any restrictions.

The claimant is currently receiving Social Security disability on the basis of his complex regional pain syndrome condition. Currently, he experiences a great deal of pain, which is mostly a steady pain, but sometimes is a stabbing pain from his knee down to his foot. The pain increases with activities. The claimant has difficulty standing for more than 15 to 20 minutes and has difficulty climbing stairs or walking.

REASONING AND CONCLUSIONS OF LAW

The first issue in this case is whether the claimant sustained an injury that arose out of and in the course of employment on May 13, 2013.

The party who would suffer loss if an issue were not established has the burden of proving that issue by a preponderance of the evidence. Iowa R. App. P. 6.14(6).

The claimant has the burden of proving by a preponderance of the evidence that the alleged injury actually occurred and that it both arose out of and in the course of the employment. Quaker Oats Co. v. Ciha, 552 N.W.2d 143 (Iowa 1996); Miedema v. Dial Corp., 551 N.W.2d 309 (Iowa 1996). The words "arising out of" referred to the cause or source of the injury. The words "in the course of" refer to the time, place, and circumstances of the injury. 2800 Corp. v. Fernandez, 528 N.W.2d 124 (Iowa 1995). An injury arises out of the employment when a causal relationship exists between the injury and the employment. Miedema, 551 N.W.2d 309. The injury must be a rational consequence of a hazard connected with the employment and not merely incidental to the employment. Koehler Electric v. Wills, 608 N.W.2d 1 (Iowa 2000); Miedema, 551

N.W.2d 309. An injury occurs "in the course of" employment when it happens within a period of employment at a place where the employee reasonably may be when performing employment duties and while the employee is fulfilling those duties or doing an activity incidental to them. Ciha, 552 N.W.2d 143.

The defendants denied this claim on the basis that the alleged mechanism of injury, oil on the floor, was not present. Later, the defendants admitted that. The claimant's account of that injury is consistent with the condition his treating physicians found in his knee after the injury. The claimant has established that he sustained an injury arising out of and in the course of his employment on May 13, 2013.

The next issue is whether the injury was the cause of any disability.

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).

Greater weight is given to the opinions of Dr. Kim and Dr. Bagheri with respect to the claimant's disability and its relationship to the work injury. Dr. Kim indicated in his treating notes that the claimant had developed a complex regional pain syndrome which was supported by the three phase bone scan. It is not clear what Dr. Ekroth or Dr. Fabiano relied upon in issuing their opinions. In fact, it appears that their opinions may well have been simply an acceptance of something defendant's counsel had provided them.

The next issue is the extent of claimant's entitlement to permanent disability and the nature of that disability.

An injury to a scheduled member may, because of after effects or compensatory change, result in permanent impairment of the body as a whole. Such impairment may in turn be the basis for a rating of industrial disability. It is the anatomical situs of the permanent injury or impairment which determines whether the schedules in section 85.34(2)(a) - (t) are applied. Lauhoff Grain v. McIntosh, 395 N.W.2d 834 (Iowa 1986); Blacksmith v. All-American, Inc., 290 N.W.2d 348 (Iowa 1980); Dailey v. Pooley Lumber Co., 233 Iowa 758, 10 N.W.2d 569 (1943). Soukup v. Shores Co., 222 Iowa 272, 268 N.W. 598 (1936).

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.

Total disability does not mean a state of absolute helplessness. Permanent total disability occurs where the injury wholly disables the employee from performing work that the employee's experience, training, education, intelligence, and physical capacities would otherwise permit the employee to perform. See McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Diederich v. Tri-City R. Co., 219 Iowa 587, 258 N.W. 899 (1935).

A finding that claimant could perform some work despite claimant's physical and educational limitations does not foreclose a finding of permanent total disability, however. See Chamberlin v. Ralston Purina, File No. 661698 (App. October 1987); Eastman v. Westway Trading Corp., II Iowa Industrial Commissioner Report 134 (App. May 1982).

The initial injury in this case was to a scheduled member, the claimant's right leg, but as a result of that injury, the claimant has developed complex regional pain syndrome which is an injury to the body as a whole. As a result, the claimant's disability must be determined industrially.

The greater weight of evidence in this case indicates that the claimant is unable to work as a result of his injury and the subsequent regional pain syndrome. The claimant is 52 years old and did not graduate high school. His whole work history is working for Whirlpool and he can no longer perform the jobs that he has previously performed there as a result of his work restrictions, which limit him to light duty, sedentary work. There is no evidence that would suggest the claimant would be capable of performing any work that is consistent with those restrictions. The likelihood of the claimant obtaining sedentary employment with his limited education and experience given his restrictions and physical limitations is remote and not expected. The claimant is permanently and totally disabled. Benefits shall commence on August 1, 2013.

The next issue is whether the claimant is entitled to payment of medical expenses pursuant to Iowa Code section 85.27.

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).

The next issue in this case is whether the claimant had sustained an injury that arose out of and in the course of his employment and whether the condition that required medical treatment for that injury was connected to that injury. The claimant has prevailed in both of those issues so he is entitled to payment of his medical expenses and reimbursement of those expenses he has personally paid. Furthermore, he is entitled to treatment for his ongoing problems as a result of that injury. The record shows that Dr. Kim has indicated a willingness to continue to provide such care and the defendants are ordered to provide and pay for the care with Dr. Kim including any recommendations or referrals he may make.

The next issue is whether the claimant is entitled to penalties pursuant to 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 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).

There is no evidence in this record to explain how the defendant first related that no oil was found in its investigation and then later related that oil was found on the floor. Furthermore, the record suggests that the basis of the denial was wholly without merit. The medical causation defense that the defendants later offered appears to be based upon a faulty history of that incident. The claimant is entitled to penalty in the range of 50 percent of all benefits due as a result of this decision.

Finally, the claimant asked that he be awarded costs for the motion to compel. The order of August 21, 2014 specifically indicated that those costs would be a part of this proceeding and the claimant is entitled to those costs.

ORDER

THEREFORE, IT IS ORDERED:

Defendant shall pay claimant permanent total disability benefits commencing August 1, 2013 at the weekly rate of four hundred sixty-nine and 30/100 dollars ($469.30).

Accrued benefits shall be paid in a lump sum together with interest pursuant to Iowa Code section 85.30, with subsequent reports of injury filed as directed by this agency.

Defendant shall pay claimant's medical expenses and reimburse him for those expenses he has personally paid pursuant to Iowa Code section 85.27.

Defendant shall pay a penalty of fifty (50) percent of all benefits due under this decision pursuant to Iowa Code section 86.13.

Defendant shall reimburse claimant for the costs of obtaining the motion to compel in the amount of four hundred sixty-two and no/100 dollars ($462.00).

Costs of this action in the amount of five hundred ninety-three and 96/100 dollars ($593.96) are taxed to defendant pursuant to rule 876 IAC 4.33.

Signed and filed this 18th day of March, 2015.

RON POHLMAN
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.