BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

SHANE SCHOENBERGER, Claimant, vs. ZEPHYR ALUMINUM PRODUCTS, Employer, and ACUITY, Insurance Carrier, Defendants.	File No. 1642927.02 ARBITRATION DECISION Head Note Nos: 1803.1, 4000.2

STATEMENT OF THE CASE

Claimant, Shane Schoenberger, filed a petition in arbitration seeking workers' compensation benefits from Zephyr Aluminum Products (Zephyr), employer, and Acuity, insurer, both as defendants. This matter was heard on December 14, 2020, with a final submission date of January 11, 2021.

The record in this case consists of Joint Exhibits 1-7, Claimant's Exhibits 1-6, Defendants' Exhibits A-K, and the testimony of claimant, Randy Till and Bruce Zimmerman.

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

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

3. Whether Iowa code sections 85.34(2)(n), 85.34(2)(v) and 85.34(2)(x) violate the Iowa Constitution.

FINDINGS OF FACT

Claimant was 57 years old at the time of hearing. Claimant graduated from high school. Claimant has had training in welding and was a union journeyman carpenter. (Ex. 2, p. 24)

Claimant began with Zephyr in June 2007 as a carpenter. Claimant's duties with Zephyr involved tearing out and installing new windows.

Claimant testified that on September 18, 2017, he and a co-worker were moving a large bay window. Claimant said as the window was being removed, the weight shifted and claimant took the bulk of the weight. Claimant said he felt a pop in his left shoulder. (TR p. 13)

On September 18, 2017, claimant was evaluated by Emily Armstrong, PA-C, for left shoulder pain. Claimant was assessed as having a possible left shoulder rotator cuff strain. Claimant was treated with medication and given restrictions. (JE 1, pp. 1-2)

Claimant returned to Ms. Armstrong on September 28, 2017, with continued complaints of shoulder pain. Claimant was recommended to have an MRI and prescribed physical therapy. (JE 1, pp. 3-4)

An MRI done on November 3, 2017, showed a SLAP tear and tendinopathy of the supraspinatus and infraspinatus tendons. (JE 1, pp. 5-6)

Claimant was evaluated by Judson Ott, M.D., an orthopedic surgeon on November 3, 2017 Claimant was given a subacromial injection in the left shoulder. (JE 1, pp. 7-8)

Claimant returned to Dr. Ott on December 8, 2017. Claimant's injection did not resolve his shoulder pain. Surgery was discussed and chosen as a treatment option. (JE 1, pp. 9-10)

On January 25, 2018, Dr. Ott performed surgery on claimant consisting of a biceps tenotomy and a mini-open rotator cuff repair. (JE 3, pp. 34-36)

On June 8, 2018, claimant returned to Dr. Ott with complaints of anterior and lateral left shoulder pain with activity. (JE 1, pp. 18-19) Because claimant had continuing shoulder pain, Dr. Ott recommended a second MRI. (JE 1, pp. 23-24)

A second MRI done on July 24, 2018, showed some rotator cuff tendinopathy, but no evidence of a recurrent tear or labral pathology. Dr. Ott noted claimant's second MRI looked ". . . about as good as we could expect postop rotator cuff repair to look."

(JE 1, p. 25) Claimant was returned to work full duty. Claimant was found to have satisfactory strength and range of motion. (JE 1, pp. 25-26)

Claimant returned to Dr. Ott on September 12, 2018. Claimant had improved, but still had some achiness in his shoulder. Claimant indicated problems with ladder climbing. Dr. Ott recommended claimant not climb ladders. Dr. Ott offered claimant a second opinion, but claimant declined. Claimant was found to be at maximum medical improvement (MMI) as of September 12, 2018, and referred for permanent impairment rating. (JE 1, pp. 27-29)

In a November 5, 2018 report, David Field, M.D., gave his opinions of claimant's condition following an independent medical evaluation (IME). Dr. Field found that claimant had a 15 percent permanent impairment of the upper extremity, converting to a 9 percent permanent impairment to the body as a whole. (JE 5, pp. 40-42)

In a September 3, 2019 report, John Kuhnlein, D.O., gave his opinions of claimant's condition following an IME. Claimant had constant left shoulder pain and constant biceps muscle pain. Claimant had numbness in his triceps area. Claimant had some tingling from the elbow through the left hand into the ring and small finger. (Ex. 1, p. 8) Claimant indicated problems with working at or above chest level, gripping and grasping, and problems with use of power tools. (Ex. 1, p. 9)

Dr. Kuhnlein opined:

> In this case, with the labral tear on the glenoid, or torso side of the glenohumeral joint, with the full-thickness tear of the supraspinatus, with the supraspinatus muscle belly being proximal to the glenohumeral joint and without repair of this muscle's tendon, the arm would not be as functional, the biceps tenotomy, and the surgical scars on the torso side of the body, I believe that this is a whole person injury.

(Ex. 1, p. 18)

Dr. Kuhnlein found claimant reached MMI on September 12, 2018. He opined claimant had a 19 percent permanent impairment to the left upper extremity, converting to an 11 percent permanent impairment to the body as a whole. Dr. Kuhnlein restricted claimant to no lifting greater than 30 pounds, and that claimant should not work at or above shoulder level. (Ex. 1, pp. 18-19)

On October 21, 2019, claimant underwent EMG/NCS testing on the left upper extremity. Testing showed an ulnar neuropathy at the left elbow. (JE 7, pp. 47-49) Claimant did not request further medical care after EMG tests. (Ex. K, depo p. 36)

In an August 25, 2020 report, James Nepola, M.D., gave his opinions of claimant's condition following an IME. Dr. Nepola opined that claimant's tingling and

numbness on the ulnar nerve were a sequela to the October 18, 2017 work injury and subsequent surgery. (Ex. B, p. 9)

Dr. Nepola opined claimant's injury was to the shoulder and not the body as a whole. Dr. Nepola opined that based upon medical and anatomic criteria and rationale, claimant's injury, resulting in impairment to his rotator cuff tendon and associated connective tissues, were solely related to his shoulder, as a part of the upper extremity and not the body as a whole. (Ex. B, p. 16)

Claimant testified he is a member of the Carpenter's Union and is paid wages pursuant to a union contract. (TR pp. 33-34, 57-58) Claimant said that there are different wage scales for different cities where claimant works. (TR p. 34) Claimant testified he usually earns a higher wage when not working in Dubuque. (TR p. 34)

At the time of injury, claimant was generally earning $22.71 per hour. At the time of hearing, claimant was earning $23.86 per hour. (TR pp. 33, 57)

The record indicates claimant's rate evaluation involved different hourly rates and overtime hours. (Ex. I, pp. 47-48)

Claimant testified in November 2017, he spoke to Ms. Schuchardt with defendant insurer. He said he did not recall talking to Ms. Schuchardt regarding the number of dependents. He says he was unsure if his wife talked to Ms. Schuchardt approximately one year later regarding the number of dependents. (TR pp. 42-43)

According to e-mails in the record, in November 2018 claimant's wife wrote e-mails to Ms. Schuchardt indicating that in November 2017 claimant had three dependent children. Ms. Schuchardt wrote claimant's wife indicating that in November 2017 claimant indicated he only had two dependent children. (Ex. G, pp. 38-39)

In January 2019 claimant's attorney's office contacted Ms. Schuchardt regarding underpayment issues. Underpayments and interest payments were made on November 14, 2018, January 30, 2019, February 19, 2020, and March 3, 2020. (Ex. 4, pp, 31-33, 35, 37-42) At the time of hearing, claimant was continuing to work as a journeyman carpenter at Zephyr. (TR p. 39) Since being released to full duty after the shoulder injury, claimant has done all the work required of him at Zephyr. (TR p. 30)

Randy Till testified he is claimant's supervisor at Zephyr. In that capacity he is familiar with claimant, his work at Zephyr, and his work injury. (Tr. pp. 31, 50) Mr. Till testified claimant has been performing his full work duties since his return from his injury. He testified claimant has never indicated he is unable to do his job since returning to work at full duty. Mr. Till testified that since his return to work, claimant has occasionally reported left shoulder pain. (Tr. pp. 51-52)

CONCLUSION OF LAW

The first issue to be determined is 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).

One of the main issues in this case is if claimant's injury extends to the body as a whole, and is compensated as an industrial disability under Iowa Code section 85.34(2)(v), or if the injury is limited to the shoulder and is compensated as a functional loss under Iowa Code section 85.34(2)(n).

Two experts have opined whether claimant's rotator cuff extends to the body as a whole. Dr. Kuhnlein evaluated claimant once for an IME. Dr. Kuhnlein opined he believed claimant's rotator cuff tear was a whole person injury. (Ex. 1, p. 18)

Dr. Nepola evaluated claimant once for an IME. Dr. Nepola opined claimant's rotator cuff injury was solely related to his shoulder as a part of the upper extremity and was not a body as a whole injury. (Ex. B, p. 16)

In 2017 the Iowa Legislature amended Iowa Code section 85.34. Before the 2017 changes, shoulder injuries were considered proximal to the arm and compensated as a body as a whole injury, under Iowa Code section 85.34(2)(u). Prior to the 2017

changes to Iowa Code section 85.34, a shoulder injury was compensated as an unscheduled injury, and based on industrial disability. See Alm v. Morris Barick Cattle Co., 240 Iowa 1174, 38 N.W.2d 161(1949).

One of the changes made to Iowa Code section 85.34 in 2017, dealt with the shoulder. Through the change, the legislature added the shoulder to the list of scheduled members. Iowa Code section 85.34(2)(n) states: "[f]or the loss of a shoulder, weekly compensation during four hundred weeks." Iowa Code section 85.34(2)(n)(2018). This amendment went into effect on July 1, 2018. It should be noted the legislature did not define the term "shoulder."

The Iowa Supreme Court has said that this agency does not have the authority to interpret worker's compensation statutes. See Ramirez-Trujillo v. Quality Egg, LLC, 878 N.W.2d 759, 770 (Iowa 2016). However, the agency is the front-line in interpreting recently amended statutes. The Iowa Workers' Compensation Commissioner has issued several decisions regarding the amended Iowa Code section 85.34(2)(n) which provide agency precedent for the shoulder amendment. See Deng v. Farmland Foods, Inc., File No. 5061883 (App. September 29, 2020); Chavez v. MS Technology, LLC, File No. 5066270 (App. September 30, 2020); Smidt v. JKB Restaurants, LC, File No. 5067766 (App. December 11, 2020).

The commissioner determined that under Iowa Code section 85.34(n), the "shoulder" is not limited to the glenohumeral joint. The commissioner also determined that the muscles that make up the rotator cuff are considered part of the "shoulder." Deng v. Farmland Foods, Inc., File No. 5061883 (App. September. 29, 2020).

In Deng, the Commissioner determined the muscles that make up the rotator cuff are included within the definition of "shoulder" under section 85.34(2)(n). In Chavez, the Commissioner determined both the labrum and the acromion are likewise included in the definition.

Claimant's left shoulder injury was to his rotator cuff, supraspinatus tendon and biceps long head tendon. The commissioner's appeals decision in Deng, Chavez, and Smidt, have all held that these conditions are parts of the shoulder covered by Iowa Code section 85.34(2)(n). As a result, claimant's left shoulder injury is a scheduled shoulder injury and is limited to the functional impairment, as per Iowa Code section 85.34(2)(n).

Two experts have given impairment ratings regarding claimant's left shoulder. Dr. Field found that claimant had a 15 percent permanent impairment to the left upper extremity. (JE 5, p. 42). Dr. Kuhnlein opined that claimant had a 19 percent permanent impairment to the left upper extremity. (Ex. 1, p. 19)

Dr. Kuhnlein's opinion regarding permanent impairment is more detailed than that of Dr. Field. I am able to follow Dr. Kuhnlein's analysis using the AMA Guides to

the Evaluation of Permanent Impairment, fifth edition. Given the above, claimant is found to have a 19 percent permanent impairment to the left shoulder. Claimant is entitled to 76 weeks of permanent partial disability benefits (19 percent x 400 weeks).

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.
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> Christensen, 554 N.W.2d at 260.

The supreme court has stated:

> (1) If the employer has a reason for the delay and conveys that reason to the employee contemporaneously with the beginning of the delay, no penalty will be imposed if the reason is of such character that a reasonable fact-finder could conclude that it is a "reasonable or probable cause or excuse" under Iowa Code section 86.13. In that case, we will defer to the decision of the commissioner. See Christensen, 554 N.W.2d at 260 (substantial evidence found to support commissioner's finding of legitimate reason for delay pending receipt of medical report); Robbennolt, 555 N.W.2d at 236.
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> (2) If no reason is given for the delay or if the "reason" is not one that a reasonable fact-finder could accept, we will hold that no such cause or excuse exists and remand to the commissioner for the sole purpose of assessing penalties under section 86.13. See Christensen, 554 N.W.2d at 261.
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> (3) Reasonable causes or excuses include (a) a delay for the employer to investigate the claim, Christensen, 554 N.W.2d at 260; Kiesecker v. Webster City 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, 593 N.W.2d 833, 840 (Iowa App. 1999). Schadendorf v. Snap-On Tools Corp., 757 N.W.2d 330, 338 (Iowa 2008).

When an employee's claim for benefits is fairly debatable based on a good faith dispute over the employee's factual or legal entitlement to benefits, an award of penalty benefits is not appropriate under the statute. Whether the issue was fairly debatable turns on whether there was a disputed factual dispute that, if

resolved in favor of the employer, would have supported the employer's denial of compensability. Gilbert v. USF Holland, Inc., 637 N.W.2d 194 (Iowa 2001).

Claimant makes two arguments why defendants are liable for penalty. The record indicates that claimant was found to be at MMI by Dr. Ott on September 12, 2018. Claimant was seen by Dr. Field for an impairment rating on October 25, 2018. The period of September 12, 2018, to October 25, 2018, is approximately six weeks. Claimant contends defendants are liable for penalty because six weeks passed between the time the claimant was found to be at MMI to the time he was rated. There is no evidence in the record that defendants delayed claimant receiving a rating once he was found to be at MMI. The period of time between the time claimant was found to be at MMI and the time the claimant was rated is approximately six weeks. Given this record, a penalty is not appropriate on this ground.

Second, the claimant contends a penalty is appropriate as defendants recalculated claimant's weekly benefits incorrectly on several occasions (Claimant's Post-Hearing Brief, p. 10). The record indicates claimant told the defendant insurer he had two dependent children. Claimant's wife contacted the insurer one year later indicating that claimant actually had three dependents. (Ex. G, pp. 38-39) The record indicates that claimant had multiple hourly rates and overtime issues. The record indicates that defendants attempted to promptly issue checks for underpayments and interest once a proper rate was determined. (Ex. 4, pp. 31-43; Ex. I, pp. 47-48) Given this record, a penalty is not appropriate as to these grounds.

The final issue to be determined is whether Iowa Code sections 85.34(2)(n), 85.34(2)(v) and 85.34(2)(x) violate the Iowa Constitution.

The Iowa Supreme Court has ruled that agencies cannot decide issues of statutory validity or the constitutional validity of a statute. Salsbury Laboratories v. Iowa Dept. of Environmental Quality, 276 N.W.2d 830, 836 (Iowa 1979). Based on this precedent, this agency cannot rule on the claim that the statutory provisions of Iowa Code section 85.34(2)(x) is unconstitutional and legally invalid.

ORDER

THEREFORE IT IS ORDERED:

That defendants shall pay claimant seventy-six (76) weeks of permanent partial disability benefits at a rate of eight hundred ninety-five and 58/100 dollars ($895.58) a week commencing on September 12, 2018.

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 receive a credit for benefits previously paid.

That defendants shall pay costs.

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

Signed and filed this 21st day of June, 2021.

JAMES F. CHRISTENSON
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Thomas Wertz (via WCES)

Stephanie Marett (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.