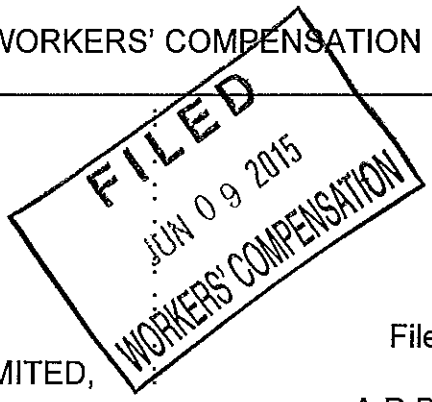
BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER



SHIRLEY M. RENS,

Claimant,

vs.

VILLAGE NORTHWEST UNLIMITED,

Employer,

and

UNITED HEARTLAND,

Insurance Carrier,
Defendants.

File No. 5033410

A R B I T R A T I O N

D E C I S I O N

Head Note No.: 1803

STATEMENT OF THE CASE

Claimant, Shirley Rens, has filed a petition in arbitration and seeks workers' compensation benefits from Village Northwest Unlimited, employer, and United Heartland, insurance carrier, defendants.

Deputy Workers' Compensation Commissioner, Stan McElderry, heard this matter in Sioux City, Iowa.

ISSUES

The parties have submitted the following issues for determination:

1. Whether the injury arising out of and in the course of employment on December 11, 2009 is the cause of permanent disability, and if so, the extent;

2. Temporary benefits;

3. Medical benefits;

4. Independent medical evaluation (IME);

5. Alternate medical care;

6. Penalty; and

7. Costs.

FINDINGS OF FACT

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

The claimant was 73 years old at the time of hearing. She is a high school graduate, but was a poor student and finished 45th out of 48 in her graduating class. Her GPA was 1.39 in high school. She has no additional education post-high school. She has no knowledge of computer usage and has never owned a computer.

Her work history other than the employer herein is relatively brief. She worked in grocery stores as a checker and stocker and then as a switchboard operator for Northwestern Bell Telephone from 1960-1965. She was then out of the work world to raise a family until returning to work in 1979 at "The Village," the employer herein as a home health aide. She worked that position until 1989 when she went to work at Metro Home Health as a CNA. She worked at Metro on and off until 1996. She returned to The Village for 1991-2, and worked part of 1993. She returned full time to The Village (hereinafter referred to as employer) in 1996 where she worked until 2009. She also worked part time at Cheers Home Health in Sioux Center, Iowa 25-30 hours per week in CNA-type duties for about ten years while working for the Village.

The claimant worked only a few days between November 29, 2009 and December 11, 2009 having just returned to work with some difficulty following a lengthy absence due to a total left hip replacement. This was her second hip replacement surgery, as the right was replaced in 2008. She also had a total right knee replacement in 2005. (Exhibit J, pages 60, 63) The claimant also had received chiropractic care for her back just prior to the fall herein. (Ex. C, p. 24, Ex. CC, et al.)

On December 9, 2009 the claimant suffered an injury arising out of and in the course of her employment when she fell down a flight of basement stairs carrying laundry for a brain damaged resident. She suffered multiple fractures to her face, a right shoulder injury, left hip and pelvis, and a back injury as a result of the fall. A series of four injections were administered to the lumbar spine at L3-5 from February 15, 2010 through April 12, 2010. (Ex. 8, pp. 1-6) On May 21, 2010 surgery was recommended. Care was delayed, and the surgery was not performed until March 11, 2011. (Ex. 8, pp. 9-13) When performed, the surgery was an L3-5 fusion with cages. Id. The claimant recovered relatively well from the surgery. The claimant underwent a functional capacity evaluation (FCE) on February 15 and 21, 2012. (Ex.2, pp. 22-35) The FCE was considered valid and suggested frequent lifting-carry of up to 8.5 pounds, 6 pounds frequently to shoulder. (Ex. 2, p. 22) No lifting on a constant basis was recommended. Quentin J. Durward, M.D. on February 29, 2012 adopted the FCE restrictions and

provided an MMI date of February 21, 2012. He also opined a 20 percent BAW impairment. (Ex. 7, p. 22)

There is also a question of the claimant's mental functioning post-injury. Clayton J. Toddy, Psy.D., saw the claimant on February 26, 2010. (Ex. 9) Dr. Toddy concluded that the claimant had anxiety disorder NOS with post-concussion syndrome, mild moderate cognitive decline. (Ex. 9) He suggested cognitive rehabilitation and advanced attention process training. (Ex. 9, pp. 9-10) The recommendations were not acted on. Following the injury herein the claimant's cognitive function continued to decline at an increased rate. Dr. Durward recommended that Dr. Toddy provide the rating in regards to the head injury. The defendants instead refused to authorize any more treatment or evaluation for the head injury. (Ex. B, pp. 17-18) The claimant did have mild cognitive decline prior to the injury. (Ex. K, p. 77) But after the injury, as recognized by Dr. Toddy, the claimant's condition had been materially aggravated. (Ex. 11, pp. 17-18) Dr. Toddy assigned a 15 percent body as a whole rating on this basis. (Ex. 11, p. 21)

Robert Jones, Ph.D., saw the claimant on December 16, 2011. (Ex. A) Dr. Jones concluded that the claimant suffered no permanent mental deficits as a result of the fall herein. (Ex. A, p. 5) He believed that the claimant's problems were all due to borderline to low average functioning prior to the injury combined with pre-existing dementia. (Ex. A) Although the claimant was borderline to low average functioning prior to the injury combined with pre-existing dementia, the opinions of Dr. Toddy that the accident materially aggravated her mental deficits is accepted.

Claimant had an IME with John D. Kuhnlein, D.O., on February 7, 2013. Dr. Kuhnlein opined a 20 percent impairment from the back, 5 percent for the facial fractures, and 3 percent for the right shoulder. (Ex. 12, pp. 40-43) He was specifically directed to exclude the head injury from his rating.

The claimant saw Rick Ostrander, a vocational expert, and Mr. Ostrander issued a report on October 8, 2013. (Ex. 14) Mr. Ostrander also testified at hearing. Mr. Ostrander opined that the FCE physical restrictions would result in a 73 percent reduction in labor market access and that she would be unlikely to be hirable. (Ex. 14, p. 10; Transcript) He also included that with the claimant's mental restrictions, as outlined by Dr. Toddy, that the claimant is most certainly unemployable. It is so found.

The claimant's reasonably large long-term employer at the date of injury did not return her to work. Her physical restrictions alone prevent claimant from returning to any relevant post-employment. Her mental condition would also prevent employment. Combined physical and mental is even clearer. Her physical ability to work was borderline pre-injury as well. The injury finished what industrial capacity was left. Given the claimant's pain, claimant's medical impairment, training, permanent restrictions, as well as all other factors of industrial disability, the claimant has suffered a total loss of earnings capacity.

On the date of injury, based on the claimant's gross earnings, married status, and entitlement to two exemptions, her weekly benefit rate is $299.43. The claimant also seeks payment of medical expenses as set forth in Exhibit 15. Those expenses are from the Sheldon Hospital, Dr. Allen S. Jones, Sheldon Family Clinic, and for prescriptions. Those expenses were reasonable and necessary for treatment of the work injuries.

The claimant seeks continuing medical care as recommended by the doctors herein, including that mental care recommended by Dr. Toddy. The claimant also seeks payment of Dr. Kuhnlein's IME fee of $5,020.00. (Ex. 16, p. 16) Defendants have paid $2,700.00 of that bill.

Claimant seeks a penalty of $13.35 for underpayment of $26.69 on a December 19, 2012 check that was made up on December 27, 2012. (Ex. 23, pp. 1-2) Claimant also seeks a penalty of $125.87 for a check of $503.64 that was for two weeks making the first weeks payment slightly late. (Ex. 23, p. 3) Claimant seeks costs of Dr. Toddy's report ($1,855.00), Rick Ostrander's vocational report ($1,491.50), filing fee ($100.00), and service costs ($29.28).

REASONING AND CONCLUSIONS OF LAW

Permanent 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. Frye v. Smith-Doyle Contractors, 569 N.W.2d 154 (Iowa App. 1997); George A. Hormel & Co. v. Jordan, 569 N.W.2d 148 (Iowa 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).

The burden of showing that disability is attributable to a preexisting condition is placed upon the defendant. Where evidence to establish a proper apportionment is absent, the defendant is responsible for the entire disability that exists. Bearce, 465 N.W.2d at 536-37; Sumner, 353 N.W.2d at 410-11.

The claimant has permanent restrictions following the work injury herein. She has met her burden of establishing that she suffered permanent impairment or disability as a result of that injury.

Extent of Permanent disability.

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.2d 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.

While a claimant is not entitled to compensation for the results of a preexisting injury or disease, its mere existence at the time of a subsequent injury is not a defense. Rose v. John Deere Ottumwa Works, 247 Iowa 900, 76 N.W.2d 756 (1956). If the claimant had a preexisting condition or disability that is materially aggravated, accelerated, worsened or lighted up so that it results in disability, claimant is entitled to recover. Nicks v. Davenport Produce Co., 254 Iowa 130, 115 N.W.2d 812 (1962); Yeager v. Firestone Tire & Rubber Co., 253 Iowa 369, 112 N.W.2d 299 (1961). 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).

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 29, 1987); Eastman v. Westway Trading Corp., II Iowa Industrial Commissioner Report 134 (App. May 19, 1982).

Based on the finding that the claimant has suffered a 100 percent loss of earnings capacity, she has sustained a 100 percent permanent total industrial disability. Since permanent total benefits began as of the injury date the issue of temporary benefits is moot.

MEDICAL

As claimant is seeking relief in this case, claimant bears the burden of proof to show by a preponderance of the evidence that the offered medical treatment is not reasonably suited to treat the injury without undue inconvenience to the employee. See Lawyer and Higgs, Iowa Workers' Compensation --Law & Practice, (3rd Ed), Section 15-4, pp. 188-189 and cases cited therein.

Under Iowa law, the employer is required to provide care to an injured employee and is permitted to choose the care. Pirelli-Armstrong Tire Co. v. Reynolds, 562 N.W.2d 433 (Iowa 1997). Iowa Code section 85.27 provides, in relevant part: For purposes of this section, this employer is obliged to furnish reasonable services and supplies to treat an injured employee, and has the right to choose the care. The treatment must be offered promptly and be reasonably suited to treat the injury without undue inconvenience to the employee. If the employee has reason to be dissatisfied with the care offered, the employee should communicate the basis of such dissatisfaction to the employer, in writing if requested, following which the employer and the employee may agree to alternate care reasonably suited to treat the injury. If the employer and employee cannot agree on such alternate care, the commissioner may, upon application and reasonable proofs of the necessity therefore, allow and order other care.

The question of reasonable care is a question of fact. An application for alternate medical care is not granted simply because the employee is dissatisfied with the care the employer has chosen. Mere dissatisfaction with the care is not sufficient grounds to grant an application for alternate medical care. The employee has the burden of proving that the care chosen by the employer is unreasonable. Unreasonableness can be established by showing that the care was not offered promptly, was not reasonably

suited to treat the injury, or that the care was unduly inconvenient for the claimant. West Side Transport v. Cordell, 601 N.W.2d 691 (Iowa 1999); Long v. Roberts Dairy Company, 528 N.W.2d 122 (Iowa 1955). Unreasonableness can be established by showing that the care authorized by the employer has not been effective and is "inferior or less extensive" than other available care requested by the employee. Pirelli-Armstrong, at 437.

An employer's statutory right is to select the providers of care, and the employer may consider cost and other pertinent factors when exercising its choice. Long, at 124.

The claimant has requested care for her physical and brain/mental injuries. Since the necessary care for the treatment of these is not being provided without it being ordered, it is so ordered. Defendants shall immediately at their expense authorize and pay for the requested care.

IME

Iowa Code section 85.39 provides, in part:

> If an evaluation of permanent disability has been made by a physician retained by the employer and the employee believes this evaluation to be too low, the employee shall, upon application to the commissioner and upon delivery of a copy of the application to the employer and its insurance carrier, be reimbursed by the employer the reasonable fee for a subsequent examination by a physician of the employee's own choice, and reasonably necessary transportation expenses incurred for the examination. The physician chosen by the employee has the right to confer with and obtain from the employer-retained physician sufficient history of the injury to make a proper examination.

An evaluation was made by a physician retained by the employer, and the claimant was thus entitled to an independent medical evaluation. She chose that evaluation to be performed by Dr. Kuhnlein. Although the fee is higher than average, it was reasonable given the complexity of the injuries herein. The $5,020.00 IME fee of Dr. Kuhnlein is to be reimbursed by the defendants.

Costs.

The petition fee of $100.00 and service of same for $29.28 are taxed to the defendants. The fighting issue is Dr. Toddy's report ($1,855.00) and Rick Ostrander's vocational report ($1,491.50). Ostrander's report is taxed at the more reasonable (based on the non-boiler plate portions) fee of $750.00. Dr. Toddy's $1,855.00 fee is reasonable and is taxed.

The last issue is penalty.

Iowa Code section 86.13(4) provides:

a. If a denial, a delay in payment, or a termination of benefits occurs without reasonable or probable cause or excuse known to the employer or insurance carrier at the time of the denial, delay in payment, or termination of benefits, the workers' compensation commissioner shall award benefits in addition to those benefits payable under this chapter, or chapter 85, 85A, or 85B, up to fifty percent of the amount of benefits that were denied, delayed, or terminated without reasonable or probable cause or excuse.

b. The workers' compensation commissioner shall award benefits under this subsection if the commissioner finds both of the following facts:

(1) The employee has demonstrated a denial, delay in payment, or termination in benefits.

(2) The employer has failed to prove a reasonable or probable cause or excuse for the denial, delay in payment, or termination of benefits.

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).

Defendants paid a small amount of benefits some few days late. There is not enough in this record to justify a penalty in those circumstances.

ORDER

Therefore it is ordered:

That the defendants pay the claimant permanent total disability commencing December 11, 2009 at the weekly rate of two-hundred ninety-nine and 43/100 dollars ($299.43).

Accrued benefits shall be paid in lump sum together with interest pursuant to Iowa Code section 85.30 with subsequent reports of injury pursuant to rule 876 IAC 3.1.

Defendants shall pay/reimburse claimant's medical expenses as detailed above.

Defendants shall pay/reimburse as appropriate the portion of Dr. Kuhnlein's bill that defendants have not paid.

Defendants shall receive credit for all benefits previously paid.

Costs are taxed to the defendants pursuant to 876 IAC 4.33, as detailed above.

Accrued benefits shall be paid in lump sum together with interest pursuant to Iowa Code section 85.30 with subsequent reports of injury pursuant to rule 876 IAC 3.1.

Signed and filed this 9th day of June, 2015.

STAN MCELDERRY
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

Copies To:

Dennis J. Mahr
Attorney at Law
520 Nebraska St., Ste. 334 – Box B8
Sioux City, IA 51101-1307
mahrlaw@cableone.net

David L. Jenkins
Attorney at Law
801 Grand Ave., Ste. 3700
Des Moines, IA 50309
Jenkins.david@bradshawlaw.com

SRM/sam

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.