BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

KARLA PERDOMO, Claimant, vs. OMAR TABORA, Employer, and UNKNOWN, Insurance Carrier, Defendant.	:	File No. 22700882.01 ARBITRATION DECISION Headnote: 1803

STATEMENT OF THE CASE

Karla Perdomo, claimant, filed a petition in arbitration against Omar Tabora, as the employer, on September 2, 2022. Claimant served her Petition on Defendant via certified mail on September 16, 2022.

To date, the employer has not filed an appearance or an answer in these proceedings. On October 11, 2022, claimant mailed a Notice of Intent to File Written Application for Default to defendant. On November 21, 2022, claimant filed a motion for default against the employer. On December 16, 2022, the undersigned entered a ruling on the motion for default. Default was entered against the employer and the evidentiary record was closed to further activity by the employer.

A default hearing was originally scheduled for January 27, 2023; however, a continuance was granted as claimant preferred to appear after reaching maximum medical improvement. As such, the default hearing was continued to May 25, 2023. Claimant appeared personally and through her counsel of record.

Pursuant to the December 16, 2022, ruling, claimant submitted medical records as written evidence in advance of the default hearing. Those medical records were submitted via WCES and were accepted into the evidentiary record of this default proceeding. Claimant submitted 82 pages of medical records. Claimant also testified on her own behalf. No other evidence was received on the date of hearing. The evidentiary record closed at the conclusion of the hearing.

ISSUES

1. The extent of claimant's entitlement to temporary disability, or healing period, benefits;

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

3. Claimant's Rate of Compensation;

4. Claimant's entitlement to past medical expenses contained in Exhibit 3 and Exhibit 4;

5. Whether penalty benefits should be imposed against defendant for unreasonable delay or denial of weekly benefits through the date of hearing; and

6. Whether claimant's costs should be assessed against defendant.

FINDINGS OF FACT

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

Karla Perdomo, claimant, is a 45-year-old individual. (See Exhibit 1, page 3) On May 7, 2022, Ms. Perdomo was working as a laborer for Omar Tabora. According to Ms. Perdomo, her job involved construction work. (Claimant's Testimony) She was paid $450.00 per week. (Claimant's Testimony)

On the date of injury, Ms. Perdomo was working on the fourth rung of a ladder when she slipped and fell to the wood floor below her. (Claimant's Testimony; see Ex. 1, p. 3) Claimant landed on her right side and hit her head. (Claimant's Testimony) Claimant experienced nausea and dizziness. (Claimant's Testimony)

Mr. Tabora was at the jobsite when the fall occurred. After checking in on claimant's status, Mr. Tabora arranged for his wife to take claimant to the emergency room. However, instead of taking claimant to the emergency room, Mr. Tabora's wife drove claimant to her brother's house. From there, claimant's sister drove her to the emergency room for treatment. (Claimant's Testimony)

Ms. Perdomo arrived at Mercy Medical Center where she was evaluated by Christopher Kearse, ARNP. (Ex. 1, p. 3) Claimant described the injury and relayed that she had a brief loss of consciousness and dizziness following the fall. (Ex. 1, p. 4) She reported pain in her face, right upper extremity, and right ribs. (Id.) A CT scan of claimant's head revealed no evidence of acute intracranial hemorrhage, and no cerebral edema resulting in mass effect or shift of midline. (See Ex. 1, p. 5) An x-ray of the right wrist revealed a comminuted minimally displaced fracture of the distal radius entering the radiocarpal and radial ulnar joints. (See Ex. 1, p. 5) X-rays of the right elbow and ribcage were unremarkable. (See Ex. 1, p. 5) Mr. Kearse diagnosed claimant with a

right distal radius fracture, head injury, and rib contusion. (Ex. 1, p. 6) Mr. Kearse placed claimant's wrist in a splint, provided her with an arm sling for comfort, and prescribed pain medication. (Id.) Claimant was instructed to contact Iowa Ortho to schedule a follow-up appointment. (Id.)

Claimant underwent an open reduction and internal fixation on May 10, 2022. (See Ex. 2, pp. 42-43)

Claimant presented to Broadlawns Medical Center for a follow-up appointment on June 1, 2022. (Ex. 2, p. 43) She was reportedly doing well and denied experiencing any paresthesia. (Ex. 2, p. 44)

Claimant participated in her first and only occupational therapy evaluation on August 4, 2022. (Ex. 2, p. 56) On examination, claimant demonstrated decreased range of motion in her right wrist. (Ex. 2, p. 58) She also demonstrated somewhat decreased grip and pinch strength. (Id.) She denied experiencing pain in her right upper extremity. (Id.) Claimant was provided a home exercise program and instructed to follow-up with occupational therapy if she did not feel she was improving. (Id.)

When claimant did not call to schedule any additional visits, occupational therapy discharged her from care on January 4, 2023. (Ex. 2, p. 56)

An x-ray, dated, March 17, 2023, showed fracture healing progression to completion with no displacement of hardware. (Ex. 2, p. 61) At the time, claimant was able to make a composite fist, flex and extend all of her fingers, and there was no tenderness around the right wrist. (Id.)

In a letter, dated April 3, 2023, Sreedhar Somisetty, M.D. opined that the May 10, 2022, incident either caused or substantially contributed to the development of the right wrist distal radius fracture.[1] (Ex. 2, p. 63) Dr. Somisetty further provided that the treatment claimant received, and the charges for said treatment, was reasonable and necessary. (Id.) Dr. Somisetty then addressed claimant's permanent impairment. (Ex. 2, p. 61) Utilizing Table 15-1 on page 385 in the American Medical Association Guides to the Evaluation of Permanent Impairment, Sixth Edition, Dr. Somisetty assigned six percent upper extremity impairment attributable to the loss of range of motion in claimant's right wrist. (Id.)

Dr. Somisetty's medical causation and impairment rating are unrebutted opinions. They are accepted as accurate. I find that claimant has proven she sustained an injury to her right upper extremity as a result of the May 7, 2022, work incident which arose out of and in the course of her employment with Omar Tabora. I further find claimant sustained a permanent injury to the right upper extremity. Claimant testified she experiences ongoing pain, loss of range of motion, and loss of grip strength in the right wrist. All of these symptoms are credible and accepted.

[1] It appears Dr. Somisetty committed a scrivener's error when he provided May 10, 2022 as the date of injury.

Ms. Perdomo seeks an award of healing period benefits from May 7, 2022, to August 4, 2022. Ms. Perdomo did not return to work for the defendant following the May 7, 2022, work injury. Ms. Perdomo was discharged from occupational therapy on January 4, 2023; however, it does not appear as though Ms. Perdomo presented for any medical treatment for the right wrist between August 4, 2022, and January 4, 2023. (Ex. 2, p. 56) Dr. Somisetty opined that claimant had reached maximum medical improvement (MMI) in his April 3, 2023, letter; however, he did not provide the date of MMI. (Ex. 2, p. 61)

While no physician expressly provided August 4, 2022, as claimant's date of MMI, it appears claimant is asserting she had no reasonable expectation of improvement following her initial occupational therapy appointment on August 4, 2022. I find her assertion reasonable. Therefore, I find claimant has proven entitlement to healing period benefits for the time period between May 7, 2022, and August 4, 2022.

Claimant is married and entitled to two exemptions. Claimant testified she earned $450.00 per week. Claimant's testimony is unrebutted. I accept claimant's testimony and find claimant's average weekly wage is $450.00.

As a result of the injuries sustained while employed by Omar Tabora, Ms. Perdomo has incurred medical expenses. The medical expenses contained in Exhibits 3 and 4, appear to be related to treatment of claimant's right upper extremity. I find that all of the medical care and expenses were reasonable and necessary.

Ms. Perdomo seeks an award of penalty benefits. She testified the defendant paid for a portion of her surgery; however, she has not received any disability benefits from defendant. I find defendant has not demonstrated payment of any weekly benefits to date. Claimant has established a delay in benefits. Defendant offers no excuse, explanation, or basis for the delay or denial of benefits. Defendant's delay or denial of benefits is found to be unreasonable.

CONCLUSIONS OF LAW

Claimant asserts she sustained an injury to her right wrist on May 7, 2022.

A personal injury contemplated by the workers' compensation law means an injury, the impairment of health or a disease resulting from an injury which comes about, not through the natural building up and tearing down of the human body, but because of trauma. The injury must be something that acts extraneously to the natural processes of nature and thereby impairs the health, interrupts or otherwise destroys or damages a part or all of the body. Although many injuries have a traumatic onset, there is no requirement for a special incident or an unusual occurrence. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); Ellingson v. Fleetguard, Inc., 599 N.W.2d 440 (Iowa 1999); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995); McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985).

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 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 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).

Defendant is in default. All activity has been cut off for defendant. Claimant testified to a work injury on May 7, 2022. Claimant's testimony is in line with the medical records in evidence. I accept claimant's testimony. Therefore, it is concluded claimant has established an injury arose out of and in the course of her employment with defendant on May 7, 2022.

Having found that her injury is work-related, and having concluded that the injury is compensable, I must consider claimant's claim for healing period benefits. On the hearing report, claimant asserts entitlement to healing period benefits between May 7, 2022, and August 4, 2022.

Section 85.34(1) provides that healing period benefits are payable to an injured worker who has suffered permanent partial disability until (1) the worker has returned to work; (2) the worker is medically capable of returning to substantially similar employment; or (3) the worker has achieved maximum medical recovery. The healing period can be considered the period during which there is a reasonable expectation of improvement of the disabling condition. See Armstrong Tire & Rubber Co. v. Kubli, 312 N.W.2d 60 (Iowa App. 1981). Healing period benefits can be interrupted or intermittent. Teel v. McCord, 394 N.W.2d 405 (Iowa 1986).

In this case, I found Ms. Perdomo reached MMI on August 4, 2022. Therefore, she is entitled to healing period benefits between May 7, 2022, and August 4, 2022. Iowa Code section 85.34(1).

Ms. Perdomo asserts entitlement to permanent disability benefits. Having accepted Dr. Somisetty's opinions and having found that claimant has reached MMI, I conclude that it is appropriate to determine and award permanent disability benefits.

The Iowa Workers' Compensation Act contains a schedule of body parts. See Iowa Code §§ 85.34(2). Compensation for work injuries to body parts listed in the schedule are limited to functional disability over a number of weeks set by the statute. See Gilleland v. Armstrong Rubber Co., 524 N.W.2d 404, 407 (Iowa 1994); see also Mortimer v. Fruehauf Corp., 502 N.W.2d 12, 15 (Iowa 1993).

In 2017, the legislature enacted a bill that made multiple changes to the statutory framework governing workers' compensation in Iowa. See 2017 Iowa Acts ch. 23. Before the 2017 amendments, the agency could use all evidence in the administrative record, as well as agency expertise, when determining the permanent disability of an injured worker. See, e.g., Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417, 421 (Iowa 1994). Under agency rules before the 2017 amendments, the Guides were considered a "useful tool in evaluating disability." Seaman v. City of Des Moines, File Nos. 5053418, 5057973, 5057974 (App. Oct. 11, 2019) (quoting Bisenius v. Mercy Med. Ctr., File No. 5036055 (App. Apr. 1, 2013)). However, in cases involving injuries on or after July 1, 2017, the Guides are now more than a tool; they are the sole means by which impairment may be determined. Iowa Code § 85.34(2)(x).

Iowa Code section 85.34(2)(x) provides, in part:

> In all cases of permanent partial disability described in paragraphs "a" through "u", or paragraph "v" when determining functional disability and not loss of earning capacity, the extent of loss or percentage of permanent impairment shall be determined solely by utilizing the guides to the evaluation of permanent impairment, published by the American medical association, as adopted by the workers' compensation commissioner by rule pursuant to chapter 17A.

The Division of Workers' Compensation has adopted the AMA Guides 5th Edition for evaluating disability. 876 IAC 2.4.

Dr. Somisetty's impairment assessment utilized the Sixth Edition of the Guides. It cannot be said that this was a typographical error, as Dr. Somisetty clearly crossed out the word, "Fifth" and wrote "Sixth" alongside his initials to note the change on the report. (Ex. 2, p. 63) Therefore, while claimant carried her burden of proving her injury is a cause of permanent disability, I am unable to determine the extent of her entitlement to permanent partial disability benefits. Iowa Code § 85.34(2)(x).

Claimant asserts that she is entitled to a compensation rate of $320.57 per week. I agree with this assertion.

The weekly benefit amount payable to an employee shall be based upon 80 percent of the employee's weekly spendable earnings, but shall not exceed an amount, rounded to the nearest dollar, equal to 66-2/3 percent of the statewide average weekly wage paid employees as determined by the Department of Workforce Development. Iowa Code section 85.37.

The weekly benefit amount is determined under the above Code section by referring to the Iowa Workers' Compensation Manual in effect on the applicable injury date. Having found claimant was married, entitled to two exemptions, had a gross average weekly wage of $450.00, and using the Iowa Workers' Compensation Manual with effective dates of July 1, 2021 through June 30, 2022, I determine that the applicable weekly rate is $320.57.

Ms. Perdomo seeks an award for past 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).

Having concluded that claimant has proven a compensable work injury, I further conclude that defendant is responsible for providing claimant's medical care, including payment of past medical expenses. Iowa Code section 85.27.

Having found the medical expenses contained in Exhibits 3 and 4 are causally related to claimant's work injuries, and that those medical expenses were reasonable and necessary, I conclude defendant should be ordered to reimburse claimant for any out-of-pocket expenses, reimburse any third-party payor that has paid medical expenses on behalf of claimant, and should be ordered to pay claimant or the medical providers for any outstanding medical expenses.

Ms. Perdomo asserts a claim for penalty benefits on the hearing report.

If weekly compensation benefits are not fully paid when due, section 86.13 requires that additional benefits be awarded unless the employer shows reasonable cause or excuse for the delay or denial. Robbennolt v. Snap-on Tools Corp., 555 N.W.2d 229 (Iowa 1996).

Delay attributable to the time required to perform a reasonable investigation is not unreasonable. Kiesecker v. Webster City Custom Meats, Inc., 528 N.W.2d 109 (Iowa 1995).

It also is not unreasonable to deny a claim when a good faith issue of law or fact makes the employer's liability fairly debatable. An issue of law is fairly debatable if viable arguments exist in favor of each party. Covia v. Robinson, 507 N.W.2d 411 (Iowa 1993). An issue of fact is fairly debatable if substantial evidence exists which would support a finding favorable to the employer. Gilbert v. USF Holland, Inc., 637 N.W.2d 194 (Iowa 2001).

An employer's bare assertion that a claim is fairly debatable is insufficient to avoid imposition of a penalty. The employer must assert facts upon which the commissioner could reasonably find that the claim was "fairly debatable." Meyers v. Holiday Express Corp., 557 N.W.2d 502 (Iowa 1996).

If the employer fails to show reasonable cause or excuse for the delay or denial, the commissioner shall impose a penalty in an amount up to 50 percent of the amount unreasonably delayed or denied. Christensen v. Snap-on Tools Corp., 554 N.W.2d 254 (Iowa 1996). The factors to be considered in determining the amount of the penalty include the length of the delay, the number of delays, the information available to the employer and the employer's past record of penalties. Robbennolt, 555 N.W.2d at 238.

In this case, claimant has established that a delay in benefits has occurred. Defendant offers no evidence that it has paid claimant any weekly benefits. Defendant offers no evidence to establish that the basis for its delay or denial of weekly benefits was based upon any type of investigation, that the basis was reasonable, or that the basis was conveyed to claimant. Iowa Code section 86.13(4). Defendant has failed to establish its delay or denial is reasonable in any manner.

I conclude that claimant is entitled to an award of penalty benefits. Having introduced no justification for its delay or denial of benefits, I conclude that a penalty award of $1,900.00 is justified and warranted under the circumstances of this case. Iowa Code section 86.13(4).

Finally, claimant seeks assessment of her costs. Assessment of costs is a discretionary function of the agency. Iowa Code section 86.40. In this instance, defendant failed to appear for any of the proceedings. Claimant was forced to file a petition with this agency and incur costs related to this case to establish liability. I conclude that it is proper to assess claimant's costs to the extent permitted.

Claimant seeks the cost of her filing fee ($103.00). This cost is reasonable and is assessed pursuant to 876 IAC 4.33(7).

ORDER

THEREFORE, IT IS ORDERED:

Defendant shall pay claimant healing period benefits from May 7, 2022, through August 4, 2022, at the weekly rate of three hundred twenty and 57/100 dollars ($320.57).

Defendant shall pay all accrued benefits in lump sum with interest pursuant to Iowa Code section 85.30.

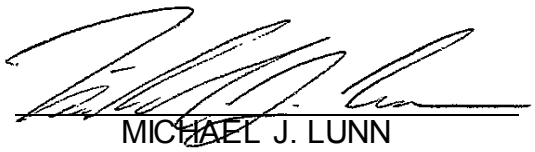
Defendant shall reimburse claimant for all out-of-pocket medical expenses, reimburse any third-party payor for past medical expenses paid on behalf of claimant, and satisfy any outstanding past medical expenses by either paying those funds directly to claimant or to the medical providers, but in all events shall hold claimant harmless for the past medical expenses and mileage as directed in the above decision.

Defendant shall pay penalty benefits in the amount of one thousand nine hundred and 00/100 dollars ($1,900.00) for benefits delayed or denied before the May 25, 2023, default hearing.

Defendant shall reimburse claimant's costs totaling one hundred three and 00/100 dollars ($103.00).

Defendant shall file subsequent reports of injury (SROI) as required by this agency pursuant to rules 876 IAC 3.1(2) and 876 IAC 11.7.

Signed and filed this 22nd day of August, 2023.



MICHAEL J. LUNN
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served as follows:

Nathaniel Boulton (via WCES)

Omar Tabora (via regular and certified mail)
1641 Buchanan St
Des Moines, IA 50316

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.