BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

YVETTE KEYES-HEGG,	:	File No. 19700596.01
Claimant,	:	ARBITRATION DECISION
vs.	:	
CITY OF DAVENPORT,	:	
Employer, Self-Insured, Defendant.	:	Head Note Nos: 1402.40; 1802; 1803; 2501; 2502; 4000.2

STATEMENT OF THE CASE

Claimant, Yvette Keyes-Hegg, filed a petition in arbitration seeking workers' compensation benefits from the City of Davenport, self-insured employer. This matter was heard on January 11, 2021, with a final submission date of February 8, 2021. The record in this case consists of Joint Exhibits 1-3, Claimant's Exhibits 1-11, Defendant's Exhibits A-G, and the testimony of claimant and Chris Dibbern.

The parties filed a hearing report at the commencement of the arbitration hearing. On the hearing report, the parties entered into various stipulations. All of those stipulations were accepted and are hereby incorporated into this arbitration decision and no factual or legal issues relative to the parties' stipulations will be raised or discussed in this decision. The parties are now bound by their stipulations.

ISSUES

1. Whether the injury resulted in a temporary disability.

2. Whether the injury resulted in a permanent disability; and if so,

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

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

5. Whether claimant is due reimbursement for an independent medical evaluation (IME) under Iowa Code section 85.39.

6. Whether defendant is liable for penalty.

7. Costs.

In the hearing report, the parties disputed the issue of whether claimant sustained an injury arising out of and in the course of employment on February 27, 2019. It is clear from post-hearing briefs that defendant accepts claimant sustained an injury arising out of and in the course of employment, but dispute the injury resulted in a permanent disability. (See Defendant's Post-Hearing Brief, pages 8-9.) As the post-hearing briefs indicate the parties agree claimant sustained a work injury on February 27, 2019, the issue of whether claimant sustained an injury arising out of and in the course of employment is not addressed in this decision.

FINDINGS OF FACT

Claimant was 46 years old at the time of the hearing. Claimant has taken community college courses but has not graduated with a degree. (Defendant's Exhibit F, p. 50)

Claimant has worked as a housekeeper, custodian and bartender. Claimant has also done production line work with Oscar Mayer. (Claimant's Exhibit 6, pp. 26-27)

Claimant began her employment with the City of Davenport in September 2015 as a custodian. Claimant's job duties include, but are not limited to, cleaning municipal buildings, snow removal and lawn mowing. (Testimony p. 36)

Claimant's prior medical history is relevant. In 2009 claimant injured her right shoulder in a motor vehicle accident. (TR pp. 31-32) In 2010 claimant was tested for carpal tunnel syndrome and was found to have a mild to moderate severity on the right and mild on the left. (Joint Exhibit 1, p. 6) Claimant had lower back problems following a 2015 motor vehicle accident. (TR pp. 33-34)

On February 27, 2019, claimant was asked by her supervisor, Chris Dibbern, to salt slick spots in the city's downtown area and Public Works. Claimant said she went to the salt bins and found the salt was frozen.

Claimant and a co-worker, Jesse, tried to break up the salt using shovels. When the co-worker left to work downtown, claimant picked up salt bins, dropped and banged the bins to loosen up the salt. Claimant said breaking up the salt took about an hour. She said that each tote holding salt weighed approximately 75 pounds. When the salt was broken up, claimant shoveled salt into bins. (TR pp. 10-15)

Claimant said her right arm began to feel sore around 10:00 AM. She completed her workday at 2:30 PM. At approximately 6:00 PM, claimant and her daughter went to claimant's second job doing janitorial work.

Claimant said that on February 28, 2019, at approximately 1:30 AM, she woke up with stabbing pain in her neck and shoulder. Claimant went to work that morning and reported her injury.

On February 28, 2019, claimant was evaluated by Cheryl Benson, PA-C, for right shoulder pain. Claimant was assessed as having a soft tissue injury on the right upper extremity related to overuse and a sprain of the cervical spine. Claimant's injury was

found consistent with a history of a work-related injury. Claimant was given cold packs for use, medication and given work restrictions. (JE 1, pp. 7-9)

Claimant underwent physical therapy in March 2019 for her neck and shoulder injuries. (JE 2, pp. 105-114)

Claimant underwent a cervical MRI on March 22, 2019. It showed marked disc protrusions and extrusions at C4 through C6 causing compression of the spinal cord. (JE 1, pp. 20-21)

On March 25, 2019, claimant had an MR arthrogram of the right shoulder. It showed degenerative changes in the AC joint. (JE 1, p. 26)

Claimant was evaluated by Physician's Assistant Benson on March 26, 2019, for right shoulder pain. Claimant was again assessed as having a soft tissue injury to the right upper extremity, cervical sprain and cervical radiculopathy. Claimant's injury was found consistent with her description of a work injury. Claimant was referred to a pain clinic. (JE 1, pp. 29-31)

Claimant was evaluated by Todd Ridenour, M.D., on March 27, 2019. Claimant had right-sided neck pain and arm pain since breaking up and lifting salt. Surgery was discussed as a treatment option. (JE 1, pp. 34-38)

In an April 8, 2019 report, Peter Matos, D.O., gave his opinions of claimant's condition following a record review. Based on his review of claimant's medical records, Dr. Matos opined that it was more likely a substantial factor regarding claimant's disc herniation and neck pain was her smoking. He opined that the February 27, 2019, incident of breaking up salt and lifting and dropping totes was not a substantial contributing factor. (Ex. C, pp. 17-22)

On April 22, 2019, claimant underwent a C4 through C6 discectomy with an allograft fusion. Surgery was performed by Dr. Ridenour. (JE 1, pp. 39-40)

Claimant returned for follow-up appointments with Dr. Ridenour's office on May 28, 2019, June 25, 2019, and July 16, 2019. Records indicate claimant was progressing as expected. (JE 1, pp. 56-68)

On August 6, 2019, claimant was evaluated by Alyssa Uker, ARNP. Claimant had intermittent right posterior cervical pain and parascapular pain. (JE 1, p. 71)

On August 13, 2019, claimant was evaluated in the Pain and Spine Office by Rachel Huber, RN, to go over pre-procedure instructions for cervical trigger point injections by Dr. Meloy. (JE 1, pp. 79-90)

On August 28, 2019, claimant was given right cervical trigger point injections for pain by Nathan Meloy, D.O. (JE 1, p. 97) Claimant returned on September 26, 2019 to Dr. Meloy. At that appointment, she stated she had 80 percent reduction in her symptoms, and Dr. Meloy elected to not proceed with any more interventional procedures at that time. (JE 1, pp. 97-101)

In a July 21, 2020 report, Dr. Matos gave his opinions of claimant's condition following an IME. Claimant had occasional neck pain. Claimant has returned to work.

Dr. Matos opined that claimant sustained a temporary cervical soft tissue injury on February 27, 2019. He indicated that claimant's smoking and her prior car accidents were major contributing factors to her condition. (Ex. C, pp. 23-28)

In a July 31, 2020 report, Sunil Bansal, M.D., gave his opinions of claimant's condition following an IME. Claimant had an occasional locking sensation in the right shoulder. Claimant had difficulty looking down for an extended period of time. Claimant continued to work for the City of Davenport but had increased pain with waxing floors and cleaning carpets. (Ex. 3, p. 16)

Dr. Bansal opined that claimant's C4-C6 disc herniations in the cervical spine were caused by her February 27, 2019, work injury. He found claimant at maximum medical improvement (MMI) as of August 20, 2019. He opined that claimant had a 25 percent permanent impairment to the body as a whole. This was based on a finding that claimant fell into the DRE Category IV under the AMA Guides to the Evaluation of Permanent Impairment (Fifth Edition) regarding the cervical spine. He limited claimant to lifting no more than 50 pounds. (Ex. 3, pp, 17-21)

In a December 6, 2020 report, Dr. Matos indicated he reviewed Dr. Bansal's report. Dr. Matos indicated his opinions have not changed regarding causation. (Ex. C, p. 34)

At the time of hearing, claimant earned $20.35 an hour. Claimant testified she continued to work full time with the City of Davenport. She also continued to work part-time for Boston Window Cleaning Company. Claimant indicated the part-time job required her to supervise custodians and handle customer complaints. Claimant said she worked, on average, 80 hours per week with both jobs. (TR pp. 27-29)

Claimant testified she has smoked for approximately 20 years. She says she smokes approximately a pack of cigarettes a day. Claimant says she has tried to quit smoking. (TR p. 29)

CONCLUSION OF LAW

The first issue to be determined is whether claimant sustained a permanent disability as a result of her February 27, 2019, accident. Defendant contends claimant sustained a temporary soft tissue injury on February 27, 2019, but did not have a permanent disability from that injury. (Defendant's Post-Hearing Brief, p. 8) Claimant contends she has a permanent disability caused by the February 27, 2019, date of injury.

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).

As noted, there is little evidence in the record claimant had any problems with her neck or upper extremity prior to the work injury of February 27, 2019.

Following her work injury, claimant was evaluated by Physician's Assistant Benson on February 28, 2019. At that time, Physician's Assistant Benson indicated that claimant's subjective findings of cervical spine and upper extremity injury were consistent with a history of a work-related injury. (JE 1, p. 8) Physician's Assistant Benson reiterated that finding of causation in exams on March 6, 2019, March 13, 2019, and March 26, 2019. (JE 1, pp. 15, 31; JE 3, p. 117)

Claimant was evaluated by Dr. Bansal for an IME. Dr. Bansal opined that claimant's cervical condition was consistent with lifting and pulling totes of salt in and out of a truck as described by claimant. (Ex. 3, p. 18)

Dr. Matos initially only reviewed claimant's records and gave an opinion regarding causation. He later performed an IME on claimant. Dr. Matos opined that claimant had a temporary injury and her neck pain and cervical disc herniations were a result of natural aging, smoking and previous car accidents. (Ex. C, pp. 18, 26)

There are several problems with Dr. Matos' opinions regarding claimant's injury and cause of permanent impairment. As noted, Dr. Matos found, in part, that claimant's car accidents were a major contributing factor to the herniated discs and subsequent need for surgery. (Ex. C, p. 26)

There is no evidence in the record that claimant had any long-term complaints or problems with her neck or upper extremity following her 2009 or 2015 car accidents. Medical records from claimant's 2009 car accident indicate that claimant had no neck or back pain. (JE 1, p. 1)

Second, the record indicates that prior to the February 27, 2019, work injury, claimant had no symptoms of neck pain or pain in the upper extremity. Dr. Matos offers no rationale or explanation why claimant was symptom free before February 27, 2019, but after the February 27, 2019, injury, claimant had neck and radicular symptoms.

Consequently Dr. Matos' opinions regarding permanent impairment are found not convincing.

There is no evidence that claimant had any neck or upper extremity symptoms before the February 27, 2019, incident. Dr. Bansal opines that claimant's cervical problems and need for surgery were causally connected to her February 27, 2019, injury. Dr. Bansal opined that claimant had a permanent impairment from the February 27, 2019, injury. Dr. Bansal's opinions regarding causation are corroborated by the opinions of Physician's Assistant Benson. Dr. Matos' opinions regarding causation of permanent impairment are found not convincing. Given this record, claimant has carried her burden of proof that her February 27, 2019, injury resulted in a permanent disability.

The next issue to be determined is whether claimant's injury resulted in a temporary disability.

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).

Claimant underwent cervical surgery on April 22, 2019. Claimant was off work due to her cervical problems beginning April 12, 2019. Claimant was returned to work on August 20, 2019, without restrictions. (JE 1, p. 91; Ex. 6, p. 30; TR p. 21) Given this record, claimant is due healing period benefits from April 12, 2019, through August 20, 2019.

The next issue to be determined is the extent of claimant's entitlement to permanent partial disability benefits. The parties stipulated that claimant's entitlement to permanent partial disability benefits is limited to a finding of functional impairment under Iowa Code section 85.34(2)(v). (Claimant's Post-Hearing Brief, p. 14; Defendant's Post-Hearing Brief, p. 11) Dr. Bansal opined claimant had a 25 percent permanent impairment to the body as a whole caused by the February 27, 2019, work injury. (Ex. 3, p. 21) Claimant is due 125 weeks of permanent partial disability benefits (500 weeks x 25 percent).

The next issue to be determined is if there is a causal connection between the injury and the claimed medical expenses.

The employer shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance, and hospital services and supplies for all conditions compensable under the workers' compensation law. The employer shall also allow reasonable and necessary transportation expenses incurred for those services. The employer has the right to choose the provider of care, except

where the employer has denied liability for the injury. Section 85.27. Holbert v. Townsend Engineering Co., Thirty-second Biennial Report of the Industrial Commissioner 78 (Review-Reopening October 1975).

As noted, it is found that claimant's injury resulted in a permanent disability that required surgery and follow-up treatment. There is no evidence in the record that the treatment given to claimant for her cervical condition was not reasonable and necessary. There is no evidence in the record that the charges for the services were not fair and reasonable. Given this record, defendant is liable for payment of the claimant's medical expenses.

The next issue to be determined is if claimant is due reimbursement for an IME.

Section 85.39 permits an employee to be reimbursed for subsequent examination by a physician of the employee's choice where an employer-retained physician has previously evaluated "permanent disability" and the employee believes that the initial evaluation is too low. The section also permits reimbursement for reasonably necessary transportation expenses incurred and for any wage loss occasioned by the employee attending the subsequent examination.

Defendants are responsible only for reasonable fees associated with claimant's independent medical examination. Claimant has the burden of proving the reasonableness of the expenses incurred for the examination. See Schintgen v. Economy Fire & Casualty Co., File No. 855298 (App. April 26, 1991). Claimant need not ultimately prove the injury arose out of and in the course of employment to qualify for reimbursement under section 85.39. See Dodd v. Fleetguard, Inc., 759 N.W.2d 133, 140 (Iowa App. 2008).

Regarding the IME, the Iowa Supreme Court provided a literal interpretation of the plain language of Iowa Code section 85.39, stating that section 85.39 only allows the employee to obtain an independent medical evaluation at the employer's expense if dissatisfied with the evaluation arranged by the employer. Des Moines Area Reg'l Transit Auth. v. Young, 867 N.W.2d 839, 847 (Iowa 2015).

Under the Young decision, an employee can only obtain an IME at the employer's expense if an evaluation of permanent disability has been made by an employer-retained physician.

Iowa Code section 85.39 limits an injured worker to one IME. Larson Mfg. Co., Inc. v. Thorson, 763 N.W.2d 842 (Iowa 2009).

The Supreme Court in Young noted that in cases where Iowa Code section 85.39 is not triggered to allow for reimbursement of an independent medical examination (IME), a claimant can still be reimbursed at hearing the costs associated with the preparation of the written report as a cost under rule 876 IAC 4.33. Young at 846-847.

Dr. Matos gave his opinions on permanent impairment in a report dated July 21, 2020. Dr. Bansal gave his opinions regarding permanent impairment in a report dated November 10, 2020. Given this chronology, claimant has proven entitlement to reimbursement for the IME.

The next issue to be determined is whether defendant is liable for 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.
>
> (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, 594 N.W.2d 833, 840 (Iowa App. 1999). Schadendorf v. Snap-On Tools Corp., 757 N.W.2d 330, 338 (Iowa 2008).

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

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

Defendant denied claimant's claim for benefits based on Dr. Matos' record review. (Ex. C; Ex. 4) It was not unreasonable for defendant to deny benefits based upon Dr. Matos' report. Given this record, a penalty is not appropriate in this case.

ORDER

THEREFORE, IT IS ORDERED:

That defendant shall pay claimant healing period benefits at the rate of six hundred thirteen and 95/100 dollars ($613.95) per week commencing on April 12, 2019, through August 20, 2019.

That defendant shall pay claimant one hundred twenty-five (125) weeks of permanent partial disability benefits at a rate of six hundred thirteen and 95/100 dollars ($613.95) per week commencing on August 21, 2019.

Defendant 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.

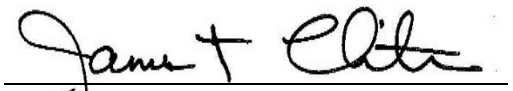
That defendant shall reimburse claimant for expenses associated with Dr. Bansal's IME.

That defendant shall pay claimant's medical costs.

That defendant shall pay costs.

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

Signed and filed this 19th day of August, 2021.



JAMES F. CHRISTENSON
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Andrew Bribriesco (via WCES)

Peter Thill (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.