BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

KAREN M. FOSTER, Claimant, vs. EAST PENN MANUFACTURING CO., INC., Employer, and SEDGWICK/SENTINEL INSURANCE CO., LTD, Insurance Carrier, Defendants.	File No. 1592106.01 A R B I T R A T I O N D E C I S I O N Head Notes: 1402.40, 1802, 1804, 2907

STATEMENT OF THE CASE

Claimant Karen Foster filed a petition in arbitration seeking workers' compensation benefits from defendants East Penn Manufacturing Company, employer, and Sedgwick/Sentinel Insurance Company, LTD., insurer. The hearing occurred before the undersigned on September 4, 2020, via CourtCall video conference.

The parties filed a hearing report at the commencement of the arbitration hearing. In 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.

The evidentiary record consists of: Joint Exhibits 1 through 9 and Defendants' Exhibits A through J. Joint Exhibit 6 and Defendants' Exhibit E were accepted at the time of the hearing but filed after the hearing. Claimant testified on her own behalf. The evidentiary record was closed at the end of the hearing, and the case was considered fully submitted upon receipt of the parties' briefs on October 24, 2020.

ISSUES

The parties submitted the following disputed issues for resolution:

1. Whether claimant is entitled to additional healing period benefits.

2. The extent of claimant's industrial disability.

3. The commencement date for claimant's permanent partial disability (PPD) benefits.

4. Whether claimant is entitled to penalty benefits.

5. Costs.

FINDINGS OF FACT

Claimant sustained a stipulated work-related injury to her right shoulder on July 30, 2013, when she was loading batteries onto pallets. (Hearing Transcript, pp. 28-29)

In the months leading up to claimant's work-related injury, claimant was recovering from an assault that occurred in December of 2012 and left her with a compression fracture in her neck. (Tr., p. 27) After a course of conservative treatment, claimant reported she was improving and wanted to return to work. (Joint Exhibit 1, p. 22) As a result, she presented for a "return to employment physical examination" at defendant-employer's request on May 24, 2013. (JE 1, p. 25) Claimant passed the physical and was released to return to work with no restrictions. (JE 1, p. 28) This is consistent with claimant's testimony that in July of 2013, just prior to her right shoulder injury, she was working her normal job and shift with defendant-employer. (Tr., pp. 48-49) Claimant does not contend any of her neck complaints are related to her work-related injury with defendants. (See Tr., p. 63)

The day after her work-related right shoulder injury, defendants referred claimant to a physician's assistant at Wayne County Hospital. Claimant was diagnosed with a right shoulder sprain/strain and given work restrictions for two weeks. (JE 4, p. 5) Defendant-employer was able to accommodate claimant's restrictions. (Tr., p. 30) Claimant then returned to the physician's assistant two weeks later and reported improving symptoms. (JE 4, p. 6) In light of this improvement, claimant was instructed to return to work without restrictions. (JE 4, p. 8)

Unfortunately, claimant's symptoms worsened upon her return to regular work, and claimant's restrictions were renewed for an additional two weeks on August 21, 2020. (Tr., pp. 31-32; JE 4, pp. 9-11)

Claimant testified defendants were able to accommodate these restrictions but she continued to have symptoms. (Tr., pp. 32-33) Per claimant's testimony, she then returned to a different physician's assistant who transferred her care to her primary care provider, Deborah Wardlow, ARNP. (Tr., pp. 32-33)

Claimant testified Ms. Wardlow restricted her from returning to work due to her right shoulder and referred her to an orthopedic surgeon. (Tr., p. 34) However, when claimant was seen by Ms. Wardlow on August 26, 2020, the visit was related to

depression and includes no mention of claimant's right shoulder injury or any work restrictions. (JE 4, pp. 36-39)

At claimant's next visit with Ms. Wardlow on September 16, 2013, claimant complained of severe neck pain. (JE 4, p. 16) An injection was performed. (JE 4, p. 18) Again, there was no mention of claimant's right shoulder injury or any work restrictions.

Notably, per her brief, claimant is seeking temporary disability benefits starting on September 13, 2013 or September 14, 2014. (Claimant's Brief, p. 3). However, there is no medical record in evidence for an appointment on either of these dates. Furthermore, the restrictions that were put in place by the physician's assistant on August 21, 2013 were set to expire in two weeks, or on September 4, 2013. There are no medical records in evidence indicating any provider extended these restrictions.

While claimant testified Mr. Wardlow restricted her from returning to work due to her right shoulder, there are several issues with this testimony. First, it is not until the record from claimant's January 24, 2014 appointment with Ms. Wardlow that claimant's right shoulder is clearly discussed. The note states, "She has been off of work for several months due to a neck and shoulder injury. . . . I previously had told Karen that she could go back to work with a 10 lb. weight lifting restriction. Her current job requires her to lift 50 lb. or more." (JE 4, p. 46) (emphasis added) This statement from Ms. Wardlow directly contradicts claimant's testimony that Ms. Wardlow restricted her from working.

It does appear that defendants began paying claimant short-term disability benefits as of September 14, 2013. (Def. Ex. E; see Tr., p. 38) However, there is insufficient evidence in the record to discern whether this short-term disability was due to claimant's work-related right shoulder condition, her unrelated neck condition, or something else entirely. (See Def. Ex. G (noting in letter to defendant-insurer that claimant's doctor indicated she was unwilling to release her to work without restrictions "for my neck")).

I therefore find claimant provided insufficient evidence that she was unable to work due to her work-related right shoulder condition as of September 13 or 14, 2013.

Claimant returned to Ms. Wardlow again on September 30, 2013 seeking an epidural steroid injection (ESI) for her neck. (JE 4, p. 19) That injection was performed on October 8, 2013. (JE 4, p. 22) Once again, the record is devoid of a discussion regarding claimant's right shoulder injury or any work restrictions.

Claimant reported to Ms. Wardlow on October 14, 2013 that she "recently had an epidural injection in her right shoulder and she would like to have another one and needs a referral." (JE 4, p. 24) Notably, claimant's ESI was to her neck—not her shoulder.

On November 21, 2013, claimant was referred by Ms. Wardlow to neurosurgery "to see if she needs a cervical fusion." (JE 4, p. 40) Ms. Wardlow's note from this

appointment references “left shoulder pain,” which claimant disputes, but regardless, there is no discussion about any work restrictions. (JE 4, pp. 40-42)

Claimant testified she was terminated by defendant-employer on November 26, 2014. (Hrg. Tr., p. 43) There is no evidence in the record explaining why claimant was terminated. Presumably, claimant was terminated after she exhausted her leave. Regardless, however, between September 14, 2013 through claimant’s termination, there are no medical records in evidence that contain restrictions relating to claimant’s right shoulder. Thus, as of claimant’s termination, I find insufficient evidence that claimant was unable to work due to her right shoulder condition.

After claimant was terminated, claimant returned to Ms. Wardlow with ongoing neck pain. (JE 4, p. 43) She received a refill of her pain medication, but there is no mention of claimant’s right shoulder injury or any work restrictions. (JE 4, pp. 43-45)

As mentioned, at claimant’s January 24, 2014 appointment with Ms. Wardlow, Ms. Wardlow indicated she previously told claimant “she could go back to work with a 10 lb. weight lifting restriction.” (JE 4, p. 46) Again, however, it is not clear whether the 10-pound restriction is for claimant’s neck or right shoulder, nor is it clear that Ms. Wardlow was extending that restriction. Thus, through January 24, 2014, I find insufficient evidence that claimant was unable to work due to her right shoulder condition.

Ms. Wardlow recommended an MRI, which was completed on February 22, 2014. (JE 5, pp. 38-39) After the MRI, claimant was referred to William Jacobson, M.D.

At her initial appointment with Dr. Jacobson on April 18, 2014, Dr. Jacobson noted claimant’s complaints of “right shoulder pain” and “unrelated cervical neck issues.” (JE 6, p. 1) He performed an injection and gave her work restrictions, though it is not clear from Dr. Jacobson’s note what specific restrictions were assigned. (JE 6, p. 3) It appears from a subsequent record, however, that Dr. Jacobson recommended lifting restrictions of 5 to 10 pounds. (Defendants’ Ex. F, p. 5) (“I agree with Dr. Jacobson that she should be lifting only 5-10 pounds with both hands at the waist level.”)

Claimant’s job required lifting and pushing/pulling batteries that weighed 50 pounds. Thus, I find April 18, 2014 was the first point at which claimant was not working (or being accommodated at work) and was medically incapable of returning to employment substantially similar to her job with defendant-employer due to her work-related right shoulder condition.

When the injection performed by Dr. Jacobson did not improve claimant’s symptoms, Dr. Jacobson recommended surgery. (JE 6, pp. 4-5)

Before defendants would authorize surgery, they sent claimant to an independent medical examination (IME) with Mark Kirkland, D.O., on September 24, 2014. (Def. Ex. F) Dr. Kirkland opined that claimant’s right shoulder conditions were work related. (Def. Ex. F, p. 5) Dr. Kirkland also opined that claimant “should not be doing any work at

shoulder level or above" and "should be lifting only 5-10 pounds with both hands at the waist level." (Def. Ex. F, p. 5) He agreed with Dr. Jacobson's recommendation for surgery. (Def. Ex. F, p. 5)

Apparently, in response to Dr. Kirkland's letter, defendants began issuing temporary disability benefits in December 2014 for the period starting September 24, 2014. (Def. Ex. C, p. 5) Temporary benefits were paid through July 28, 2015. (Def. Ex. C, pp. 1, 3-5)

Dr. Jacobson eventually performed right shoulder surgery on January 5, 2015. (JE 7) After the surgery, claimant remained on restrictions through July 22, 2015, when Dr. Jacobson recommended a functional capacity evaluation (FCE). (JE 6, pp. 14-15) This FCE was completed on August 24, 2015; it was deemed valid and put claimant in the "light demand vocation." (JE 6, p. 18)

In a letter dated September 25, 2015, Dr. Jacobson indicated he placed claimant at maximum medical improvement (MMI) as of September 9, 2015. (JE 6, p. 29) He recommended permanent restrictions based on the FCE and assigned a 4 percent whole person impairment. (JE 6, p. 29)

Based on Dr. Jacobson's letter, which is unrefuted by any other expert in the record, I find claimant reached MMI for her right shoulder condition as of September 9, 2015. I also find claimant required work restrictions as set forth in the FCE and sustained a 4 percent whole person impairment due to her work-related right shoulder injury.

Based on the restrictions assigned by Dr. Jacobson and the FCE, I find claimant was incapable of returning to work substantially similar to her job with defendant-employer until she reached MMI on September 9, 2015.

It does not appear that claimant returned to Dr. Jacobson after she was released from his care in September of 2015. (See Tr., pp. 71-72)

At some point in the fall of 2015, claimant attempted to work as a checker for Hy-Vee, but she had to quit after a month or so because the pushing and pulling motions of the job caused too much pain. (Tr., p. 48) Claimant was not working at the time of the hearing.

I find claimant's work restrictions would preclude her from returning to her regular job with defendant-employer. These restrictions would also preclude claimant from returning to many of her past jobs, including managing a Dollar General (unloading merchandise off trucks, stocking), cement work, and factory work (assembling office cubicles). (Tr., pp. 22-23)

Claimant began receiving Social Security Disability (SSD) benefits in November of 2017, though I acknowledge that claimant's disability determination was based on several factors beyond her right shoulder, including hearing loss, her neck condition, COPD, bipolar depression, and anxiety. (Tr., p. 50)

Claimant, who was 59 years old at the time of the hearing and whose education was limited to high school, lives in a rural part of Iowa. (Tr., p. 22)

While claimant no doubt has limitations beyond her right shoulder, most notably her cervical condition, she was working performing her job without restrictions just before her right shoulder injury in July of 2013. Per Dr. Jacobson's unrefuted opinion, claimant now has restrictions that place her in light physical demand level, and these restrictions would preclude her from returning to much of her past work. Considering all the appropriate factors, I find claimant sustained a 65 percent loss of earning capacity as a result of her work injury.

CONCLUSIONS OF LAW

I turn first to claimant's claim for temporary disability benefits. 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).

Healing period compensation describes temporary workers' compensation weekly benefits that precede an allowance of permanent partial disability benefits. Ellingson v. Fleetguard, Inc., 599 N.W.2d 440 (Iowa 1999). Section 85.34(1) provides that healing period benefits are payable to an injured worker who has suffered permanent partial disability until the first to occur of three events. These are: (1) the worker has returned to work; (2) the worker medically is capable of returning to substantially similar employment; or (3) the worker has achieved maximum medical recovery. Evenson v. Winnebago Industries, Inc., 881 N.W.2d 360 (Iowa 2016). Maximum medical recovery is achieved when healing is complete and the extent of permanent disability can be determined. Armstrong Tire & Rubber Co. v. Kubli, Iowa App., 312 N.W.2d 60 (Iowa 1981).

As mentioned, claimant in her brief asserts she is entitled to temporary disability benefits starting on September 13, 2013 or September 14, 2014. (Claimant's Brief, p. 3). However, for the reasons set forth in my fact findings, I found there was insufficient evidence that claimant had any restrictions relating to her right shoulder as of September 13 or September 14, 2014. In fact, there is insufficient evidence that claimant had any such restrictions relating to her shoulder until her initial appointment with Dr. Jacobson on April 18, 2014.

I found the restrictions implemented by Dr. Jacobson would have made her incapable of returning to work with defendant-employer or performing a job substantially similar to her job with defendant-employer. Claimant had been terminated by this point and was not working. She also had not yet reached MMI. Thus, I conclude claimant satisfied her burden to prove she is entitled to healing period benefits starting on April 18, 2014.

I found claimant remained incapable of returning to substantially similar employment through the date of MMI, which was September 9, 2015. Having found claimant achieved MMI on September 9, 2015 and did not return to work and was not capable of performing substantially similar work before this date, I conclude the date of MMI is the first factor in Iowa Code section 85.34(1) to occur. I therefore conclude claimant's healing period terminated on September 9, 2015. Thus, claimant proved her entitlement to healing period benefits from April 18, 2014 through September 9, 2015.

Defendants eventually issued temporary benefits for the period of September 24, 2014 through July 28, 2015. (Def. Ex. C, p. 1) Per the parties' stipulations in the hearing report, defendants are entitled to a credit for these benefits.

These payments, however, were not issued until December 17, 2014. Claimant is seeking penalty benefits for this late payment of benefits.

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 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.

Defendants argue claimant failed to distinguish whether her restrictions were for her work-related shoulder condition or her unrelated neck condition. Through the date of her initial appointment with Dr. Jacobson, I agree. Dr. Jacobson, however, was very clearly treating claimant only for her right shoulder condition, and he was an authorized treating physician. Thus, as of April 18, 2014, when Dr. Jacobson first assigned restrictions, I find defendants’ liability for temporary benefits was no longer fairly debatable.

This period—from April 18, 2014 through December 17, 2014 (when defendants first issued benefits)—represents a delay of nearly 35 weeks of benefits. At the stipulated rate of $373.63, this amounts to roughly $13,000.00 in delayed benefits.

Notably, defendants also failed to timely initiate payment of benefits even after Dr. Kirkland’s IME was performed. The appointment occurred on September 24, 2014, yet defendants did not issue benefits for an additional three months. Given these delays, I find a penalty in the amount of $6,500 (or roughly 50 percent of the delayed benefits) is appropriate.

The final issue to address is the extent of claimant’s industrial disability and her entitlement to PPD benefits. Having concluded claimant’s entitlement to healing period benefits terminated on September 9, 2015, I likewise conclude claimant’s entitlement to PPD benefits commenced on September 10, 2015. See Iowa Code section 85.34(1); Evenson, 881 N.W.2d at 372.

The parties stipulated claimant sustained an industrial disability. Industrial disability was defined in Diederich v. Tri-City R. Co., 219 Iowa 587, 258 N.W. 899 (1935) as follows: "It is therefore plain that the Legislature intended the term 'disability' to mean 'industrial disability' or loss of earning capacity and not a mere 'functional disability' to be computed in 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. Iowa Code § 85.34.

As discussed, I found claimant sustained a 4 percent whole body impairment as a result of her work-related right shoulder condition. I also found claimant's work-related right shoulder injury resulted in permanent restrictions as set forth in claimant's FCE. Again, Dr. Jacobson adopted these restrictions, and Dr. Jacobson's opinions were unrefuted in the record. These restrictions place claimant in the light vocational demand category.

Significantly, I found such restrictions would preclude claimant from returning to her job with defendant-employer and much of her past employment. Relying on these facts and after considering all the appropriate industrial disability factors, I found claimant sustained a 65 percent loss of earning capacity. I therefore conclude claimant sustained a 65 percent industrial disability, which entitles her to 325 weeks of PPD benefits.

Claimant also seeks an assessment of the $100.00 filing fee. Assessment of costs is a discretionary function of this agency. Iowa Code § 86.40. Costs are to be assessed at the discretion of the deputy commissioner or workers' compensation commissioner hearing the case. 876 IAC 4.33. I conclude defendants must reimburse claimant for her filing fee pursuant to 876 IAC 4.33(7).

ORDER

THEREFORE, IT IS ORDERED:

Defendants shall pay claimant temporary benefits from April 18, 2014 through September 9, 2015.

Defendants shall pay claimant three hundred twenty-five (325) weeks of PPD benefits commencing on September 10, 2015.

All weekly benefits shall be paid at the stipulated rate of four hundred fifty-eight and 14/100 dollars ($458.14) per week.

Defendants shall pay accrued weekly benefits in a lump sum together with interest at the rate of ten percent for all weekly benefits payable and not paid when due which accrued before July 1, 2017, and all interest on past due weekly compensation benefits accruing on or after July 1, 2017, shall be payable 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. See Gamble v. AG Leader Technology, File No. 5054686 (App. Apr. 24, 2018).

Defendants shall be entitled to the stipulated credits against this award.

Pursuant to rule 876 IAC 4.33, defendants shall reimburse claimant's costs for her filing fee in the amount of one hundred and 00/100 dollars ($100.00).

Defendants 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 24th day of November, 2020.

STEPHANIE J. COPLEY
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served as follows:

Diana Rolands (via WCES)

Tiernan Siems (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.