BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

STEVEN J. BELL, JR.,

Claimant,

vs.

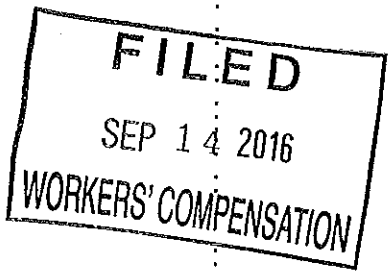
3E a/k/a ELECTRICAL & ENGINEERING CO.,

Employer,

and

TRAVELERS INDEMNITY,

Insurance Carrier,
Defendants.



File No. 5034021

REVIEW-REOPENING

DECISION

Head Note No.: 2403

STATEMENT OF THE CASE

Claimant filed a petition in review-reopening from an arbitration decision dated July 21, 2011, which awarded permanent partial disability benefits of 5 percent. That decision was affirmed on intra-agency appeal on October 15, 2012. The decision was largely affirmed by a Polk Court District Court order of July 9, 2013. The Iowa Court of Appeals affirmed on March 11, 2015. Further review was denied by the Iowa Supreme Court on May 4, 2015. Deputy workers' compensation commissioner, Stan McElderry, heard the review-opening in Des Moines, Iowa.

ISSUES

1. Whether there has been a substantial change in circumstances or condition from the time of the original arbitration and appeal decisions for a reassessment of the extent of the claimant's permanent partial disability, and if so, the extent of industrial disability;

2. Independent Medical Examination;

3. Costs;

4. Medical bills;

5. Alternate Medical Care;

6. Penalty.

FINDINGS OF FACT

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

The claimant was 48 years old at the time of the hearing. His educational background includes graduation from high school and coursework at DMACC from 1994 to 1997. His work history includes working as a plumber's apprentice, inside sales position at a marketing firm, telephone cable technician, and volunteer firefighter.

At the time of his injury on March 19, 2010, claimant was working a sales position with the defendant employer. This work was primarily sedentary as he sat at a desk taking orders. Prior to accepting the inside sales position in May of 2002, claimant worked counter sales for five and a half years. Claimant asserts that he has some difficulties performing his current job.

The claimant continues to work for 3E. He continues to work in sales and has taken on additional duties of working the sales counter in addition to inside sales. He is earning more than before the original arbitration decision, and is working more hours. (Exhibit E, page 8)

The claimant has had no additional restrictions or limitations on his physical activities imposed since the time of the original hearing. Since the original hearing, the claimant has had no significant treatment for the injury of March 19, 2010. The claimant was released to work without restrictions on November 2, 2011. (Ex. 3, p. 2) The claimant saw John D. Kuhnlein, D.O., for an independent medical evaluation on December 4, 2013 (January 20, 2014 report). (Ex. 3, p. 226) This was the second evaluation by Dr. Kuhnlein of the claimant. On February 16, 2016, the claimant was examined by Dr. Kuhnlein a third time. (Ex. 3, p. 268) Dr. Kuhnlein saw nothing to change his earlier opinions as the lumbar impairment was unchanged, other than that the left shoulder had actually improved. (Ex. 3, p. 274) As to cervical complaints there is no medical evidence to support any. Even Dr. Kuhnlein could, or would, not connect any cervical complaints to work. (Ex. 3, p. 278) There has not been a significant change economically or physically to justify a review reopening.

Claimant also seeks wages for time missed for medical appointments pursuant to Iowa Code section 85.27. However the claimant presented no proof of any wage loss or lost time. He also asserts they were ordered in the original decision. The claimant seeks reimbursement for Dr. Kuhnlein IME's from December 4, 2013 ($2,525.00) and February 16, 2016 ($1,542.50). The claimant also seeks another order for expenses he claims remain unpaid from the original decision. He also seeks medical expenses in an attachment to the hearing report that he claims are unpaid ($8.04) or were paid by the claimant ($36.97) which are the defendants' responsibility. The claimant also seeks payment of healing period from January 12-30, 2012. An attachment to the hearing

report shows two amounts due of $593.69 ($1,127.78) and one of $423.90 with $1,476.85 of that paid ($76.29 unpaid plus interest). Defendants stipulated that the period of January 12-30, 2012 was a healing period.

The claimant's weekly benefit rate was established by the prior arbitration decision at $593.69 per week.

REASONING AND CONCLUSIONS OF LAW

The issue is whether claimant is entitled to additional permanent disability benefits via a claim for review-reopening.

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. 6.14(6).

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).

In a proceeding to reopen an award for payments or agreement for settlement as provided by section 86.13, inquiry shall be into whether or not the condition of the employee warrants an end to, diminishment of, or increase of compensation so awarded or agreed upon. Iowa Code section 86.14(2).

The Iowa Supreme Court has held that a claimant does not need to prove that the change in the condition was not contemplated at the time of the original decision(s). Kohlhaas v. Hog Slat, Inc., 777 N.W.2d 387 (Iowa 2009).

The claimant has not had a substantial change of economic condition as evidenced by his continued employment with the same employer following this work injury. Also it was not established that he had substantial change in physical impairment or disability for better or worse.

Iowa Code section 85.39 examination.

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). Defendants' liability for claimant's injury need not ultimately be established before defendants are obligated to reimburse claimant for an independent medical examination.

The claimant chose to get evaluations/examinations to establish whether the injuries arose out of and in the course of employment, and whether they caused permanent impairment or disability. The claimant seeks reimbursement for Dr. Kuhnlein IME's from December 3, 2013 ($2,525.00) and February 16, 2016 ($1,542.50). Claimant is allowed reimbursement by statute for only one examination which here shall be the earlier and more expensive IME of $2,525.00.

Alternate medical care.

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).

> [T]he 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 therefor, allow and order other care.

By challenging the employer's choice of treatment – and seeking alternate care – claimant assumes the burden of proving the authorized care is unreasonable. See Iowa R. App. P. 14(f)(5); Long v. Roberts Dairy Co., 528 N.W.2d 122 (Iowa 1995). Determining what care is reasonable under the statute is a question of fact. Id. The employer's obligation turns on the question of reasonable necessity, not desirability. Id.; Harned v. Farmland Foods, Inc., 331 N.W.2d 98 (Iowa 1983). In Pirelli-Armstrong Tire Co., 562 N.W.2d at 433, the court approvingly quoted Bowles v. Los Lunas Schools, 109 N.M. 100, 781 P.2d 1178 (App. 1989):

> [T]he words "reasonable" and "adequate" appear to describe the same standard.
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> [The New Mexico rule] requires the employer to provide a certain standard of care and excuses the employer from any obligation to provide other services only if that standard is met. We construe the terms "reasonable" and "adequate" as describing care that is both appropriate to the injury and sufficient to bring the worker to maximum recovery.

The commissioner is justified in ordering alternate care when employer-authorized care has not been effective and evidence shows that such care is "inferior or less extensive" care than other available care requested by the employee. Long, 528 N.W.2d at 124; Pirelli-Armstrong Tire Co., 562 N.W.2d at 437.

Claimant seeks an order of alternate medical care for the neck (cervical conditions) which even Dr. Kuhnlein's IME's do not causally connect to the work injury. The request must be denied.

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).

It appears that $8.04 in medical is unpaid and $36.97 was paid by the claimant for work injury related bills (Attachment to hearing report). Defendants shall pay/reimburse as appropriate. Lost wages were not proved, and were ordered as part of the first decision. Claimant also wants $10.96 in mileage that is claimed as owed from the first decision. If so, the remedy is to collect a judgment through the judicial process, not a second order from this agency on that ordered previously.

Penalty

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).

There does not appear to be unreasonable delay or unreasonable underpayment here. It is not even at this point totally clear exactly what claimant thinks was unpaid or underpaid, and why that is the case. The record does not support a penalty.

ORDER

THEREFORE IT IS ORDERED:

That the defendants shall pay/reimburse the two thousand five hundred twenty-five and no/100 dollars ($2,525.00) IME fee of Dr. Kuhnlein.

The defendants shall pay seventy-six and 29/100 dollars ($76.29) in unpaid healing period for January 12-30, 2012.

That the defendants shall pay costs including the one hundred and no/100 dollars ($100.00) filing fee and costs of service pursuant to 876 IAC 4.33.

Defendants shall receive credit for benefits previously paid.

Defendants shall file subsequent reports of injury as required by the agency.

Signed and filed this 14th day of September, 2016.

STAN MCELDERRY
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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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.