BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

SHELLEY HYATT, Claimant, vs. HULCHER SERVICES, INC., Employer, and AMERICAN HOME ASSURANCE, Insurance Carrier, Defendants.	File No. 5028768 A R B I T R A T I O N D E C I S I O N Head Note Nos.: 1802; 1803; 1806; 2206; 4000

STATEMENT OF THE CASE

Shelley Hyatt, claimant, filed a petition in arbitration seeking workers' compensation benefits from Hulcher Services, Inc., employer, and its insurer, American Home Assurance, as a result of an injury he allegedly sustained on December 15, 2008, that allegedly arose out of and in the course of his employment. The case was heard on September 9, 2010, in Des Moines, Iowa and considered fully submitted on September 30, 2010, upon the filing of the post hearing briefs.

The evidence in this case consists of testimony of the claimant, Shelley Hyatt; claimant's exhibits 1-16 and defendants' exhibits A through FF.

ISSUES

1. Whether the claimant is entitled to healing period benefits;

2. The extent of any industrial disability;

3. The date upon which permanent partial disability benefits should begin;

4. Whether penalty benefits are appropriate.

FINDINGS OF FACT

The parties have stipulated that claimant sustained an injury arising out of and in the course of his employment on December 15, 2008. Although the parties do not agree on the extent of the claimant's permanent partial disability, they do agree that the

claimant's permanent partial disability is an industrial disability. The parties disagree as to the starting date of any permanent partial disability benefits. The claimant sets the start date at January 31, 2010 and defendants set the start date at May 28, 2009.

The parties stipulated that the claimant has been off work and may be entitled to some healing period benefits.

As of the date of the hearing, claimant has been paid 89 weeks of compensation at the rate of $711.50 per week for a period of December 26, 2008 to September 10, 2010. Defendants would be entitled to a credit for any permanent partial disability benefits paid to claimant.

The parties also stipulated that the claimant's gross earnings at the time of his injury was $1,209.00 per week and the claimant was single with three exemptions. His weekly benefit rate is $711.50.

Claimant was 39 years old at the time of the hearing. He has a 9th grade education with a GED acquired in 2004 or 2005. His primary means of employment has been labor related. Claimant worked as a tuck-pointer, an electrician, pressure-washer of trucks and homes, construction worker, and operator of heavy machinery. (Exhibit 16, page 4) At some point, claimant obtained a CDL. His CDL was valid and without restrictions through May of 2010. (Ex. BB-3) His CDL was not renewed in 2010 as he failed his DOT physical.

Claimant began working for Hulcher Services, Inc., on or about March 8, 2006. As an employee of defendant, claimant would assist in the cleanup of train wrecks. It was heavy duty work. Claimant was training as an Apprentice Operator (AO1) but when he wasn't operating the machinery, he worked as a laborer. He would carry heavy hooks, crawl under wreckage, move metal, get the trains back on the rails and other heavy labor work. This work entailed very long hours and part of the crew would nap while the other parts of the crew worked so that there was constant activity at the crash site.

On December 15, 2008, claimant was driving a semi tractor trailer hauling a flatbed truck that was experiencing some kind of mechanical failure causing the semi tractor to move slowly. Claimant was leaning up against the steering wheel and the vehicle was traveling approximately 25 miles per hour when another semi tractor trailer drove into the rear of claimant's vehicle. There were pictures of the semi tractor trailer that drove into the rear of claimant's vehicle but there were none of the claimant's cab. (Ex. 15) I found the omission curious.

Claimant was thrown back from the steering wheel and hit the back of the cab with his whole body. He was taken via ambulance to the hospital due to back pain. (Ex. 7-1) Two days later, he was seen by Terrance O. Kurtz, M.D., with Concentra. (Ex. 4-9) Examination showed claimant had decreased range of motion, stiff neck, tenderness on the left side of the neck and spasms in the trapezius region. (Ex. 4-9)

Physical therapy was ordered and prescriptions for Ibuprofen were supplied. Claimant was returned to work with a ten pound lifting restriction on December 17, 2008. (Ex. 4-10) Claimant worked about an hour but left when he was told that there was no work that would accommodate his restrictions.

Claimant continued to complain of ongoing low back and neck pain to Dr. Kurtz. (Ex. 4-11) He displayed decreased range of motion, range of motion with pain and tenderness. (Ex. 4-14) He participated in physical therapy and was returned to work with restrictions. He was not to lift over 10 pounds and was not allowed to push or pull anything over 10 pounds. (Ex. 4-15) On December 31, 2008, claimant underwent an MRI which showed a small to moderate sized central disc protrusion at the L5-S1 which resulted in mild compression of the left S1 nerve root and effacement of the right S1 nerve root. (Ex. 6-4) The C spine MRI showed multilevel degenerative disc disease with central disc bulging. (Ex. 6-6) At his January 2, 2009, visit, claimant was declared medically unable to work and his care was transferred to an orthopedic surgeon. (Ex. 4-17)

He initially consulted with Lynn Nelson, M.D., on January 29, 2009, who found myofascial neck, mid back and low back pain. (Ex. 9-2) Dr. Nelson did not find, however, any neurologic impingement that would explain claimant's whole body pain. (Ex. 9-3) Dr. Nelson had apparently performed a medical examination in 2007 which noted "quite widespread pain/paresthesia" at that time. (Ex. 9-3) During the May 15, 2007, examination, claimant reported that he had work related back injuries in the past. (Ex. U-93)

In 1997, claimant treated with Donna Bahls, M.D., for low back pain which was similar in symptomatology to the symptoms claimant alleges arises out of the December 15, 2008, injury. (Ex. N) Claimant was treated for over a year by Dr. Bahls with medication, epidurals, and a TENS unit. (Ex. N) Claimant did not find much relief. (Ex. N-52) At one point, claimant stated that "none of the medications has been helpful" so Dr. Bahls did not provide new prescriptions. (Ex. N-57) Vioxx and Celebrex were prescribed in 1999 for continuing back pain, but claimant again found that these did not offer him any relief. (Ex. N-61) The only way claimant received relief from his pain, during the late 90s, was from periods of no work. (Ex. N-61)

Dr. Nelson did review the MRI films in 2009 and his opinion remained unchanged based on Dr. Nelson's impression that the claimant's complaints did not match up with the clinical findings of the MRI dated December 31, 2008. (Ex. 9-4)

Claimant returned to Concentra who referred him out to yet another orthopedic surgeon. (Ex. 4-18) Claimant remained off work due to his work injury. Claimant was then seen by Thomas A. Carlstrom, M.D., on April 27, 2009. (Ex. X-104) Dr. Carlstrom's opinion was claimant was suffering myofascial pain as a result of the work related injury but that there was no serious abnormality in his spine. (Ex. X-106) Dr. Carlstrom opined that claimant should continue with "conservative therapy and probably will need to be pushed some to return to work." (Ex. X-106)

On May 27, 2009, claimant underwent a medical examination and consultation with William Boulden, D.O. Dr. Boulden was concerned with claimant's pain problem. (Ex. 10-4) Dr. Boulden found nothing surgically wrong with the lumbar or cervical spine. Claimant brought up the issue regarding pain in his thoracic back.

The MRI of the thoracic spine taken on August 13, 2010, was essentially negative. (Ex. 6-8) Dr. Boulden recommended a rehabilitation program to get claimant back to work. (Ex. 6-8, 10-8)

Claimant was seen by Matthew Biggerstaff, D.O., for pain management. (Ex. 12) Dr. Biggerstaff provided medications and two injections. Dr. Biggerstaff found the motor vehicle collision to have aggravated a pre existing degenerative condition that had been only mildly responsive to treatment. (Ex. 12-12) At hearing, claimant complained of constant neck pain, pressure on the back of the spine, back pain, and pain in one leg. He suffers from depression. Claimant attempted to return to work at Hulcher but lasted only one day.

Claimant testified that he would like to go to school to obtain education in working on electronics and small appliances. These positions do not require significant strength or labor to perform the tasks of the job.

In regards to claimant's past work history, he experienced a significant period of unemployment following his 1997 injury up to around 2005 when he began working for Rowat Cut Stone & Marble Co. in 2005. His primary source of employment appeared to be his own business utilizing his Hy-Tech Washing Pressure machine. According to medical records, he would work a few days a week. (Ex. N-63) He was also in dispute over ownership with his wife which prevented him from working. (Ex. N-67)

The claimant had a very flat aspect during the hearing. He did not look at the undersigned or even his own attorney when questioned. He primarily leaned on his hand and stared out the window. At times, he seemed disinterested in the proceeding and during cross examination appeared hostile. Claimant had similar disinterested episodes reported in the medical records. In an emergency room visit for abdominal pain, Dr. Joel Ryon reported that claimant "does seem withdrawn and uninterested in participating in the interview. He is reading a pamphlet while I am talking with him. He rolls over and falls asleep as soon as I leave." (Ex. R-82) Dr. Boulden reported that claimant looked as if he were going to fall asleep during his examination. (Ex. 10-6) Claimant had difficulty staying alert during his physical therapy appointments. (Ex. FF-125) He made statements to the therapist that he was intoxicated the night before and that was why he didn't get much sleep. (Ex. FF-127) Another time, claimant told therapist that it was only when he was really drunk that he felt pain relief. (Ex. FF-125)

Dr. Boulden was very concerned about prescribing narcotics for claimant. Claimant did call Dr. Carlstrom's office wanting a refill on his hydrocodone. (Ex. X-107)

Daniel J. Maguire, M.D., was retained to provide opinions regarding claimant's work related injuries. (Ex. 13) Like Dr. Boulden, Dr. Maguire could find nothing clinically wrong with the claimant but felt, again like Dr. Boulden, that claimant could not work in his current condition. (Ex. 13-3) Dr. Maguire opined that claimant suffers from chronic pain and assigned a 3 percent impairment to the body as a whole. (Ex. 13-7)

Claimant's past medical history is also significant for a work related injury to his left ankle which left him with permanent work restrictions to avoid repetitive climbing and the possibility of wearing an ankle splint.

Claimant had also been diagnosed with fibromyalgia by William C. Koenig, Jr., M.D., in 1998 and assigned a 5 percent whole body impairment as a result of "mild degenerative disk disease of the lumbosacral spine" and fibromyalgia. (Ex. M-42) He had longstanding back pain that "never resolved during" treatment with Donna Bahls, M.D. (Ex. N-60) Claimant complained of thoracic, cervical spine, low back pain radiating into the legs in 1997, 1999, 2000, and 2001. (Ex. M and N) Claimant had complaints of depression and back pain in 2005. (Ex. R-81) He had a diagnosis of "major depressive disorder" on February 2, 2004. (Ex. S-83) In a visit with Dr. Susan M. Kennedy, claimant explained that he had a long history of depression, as did his family. (Ex. S-84)

Claimant did not provide answers consistent with his medical records. He did not recall having been assigned any work restrictions from his work related injury in 2007. He did not remember being treated for depression prior to his work related injury in 2009.

Claimant remains off work at the direction of his doctors.

CONCLUSIONS OF LAW

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 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" referred 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).

This is a nature and extent case. There is no dispute that claimant suffered a work related injury on December, 15, 2008, when the vehicle he was driving was struck in the rear.

The issue of permanency caused by a work related injury is largely an expert driven one, supported by lay testimony consistent with the expert's opinions. There is no disagreement that claimant's condition is not one that is objectively measured. His tests are normal. He has a long history of back pain, both low and mid back, as well as a past depressive history.

What also appears uncontradicted is that claimant is suffering a chronic pain syndrome that appears to have been aggravated by his work related injury.

Claimant has not exhibited a motivation to get better, however. He easily quits physical therapy, refusing to carry out even a few weeks to see if it would be palliative. (Ex. 10-8) Despite drug therapy not working in the past, according to claimant's reports to the medical doctors, claimant continued to ask for narcotics.

There is no dispute that claimant has work restrictions from Dr. Kurtz. The work restrictions have not been revoked nor are there any contrary opinions. Dr. Nelson opined that claimant required no work restrictions back in 2006 but made no similar claims to the December 2008 injury. (Ex. 9-3) Dr. Nelson refused to opine as to whether claimant reached maximum medical improvement. (Ex. 9-4)

It is also true that no doctor has returned claimant to work. Dr. Boulden recommended a rehabilitation program to assist claimant in returning to work and Dr. Biggerstaff opined that claimant could not labor in his current condition.

The work restrictions claimant is under currently are much more restrictive than the work restrictions placed on claimant in 1998. (Ex. M-42) The current work restrictions do not allow for claimant to continue to perform skilled labor positions.

The Iowa court has adopted the full-responsibility rule. Under that rule, where there are successive work-related injuries, the employer liable for the current injury also is liable for the preexisting disability caused by any earlier work-related injury if the former disability when combined with the disability caused by the later injury produces a

greater overall industrial disability. Venegas v. IBP, Inc., 638 N.W.2d 699 (Iowa 2002); Second Injury Fund of Iowa v. Nelson, 544 N.W.2d 258, 265 (Iowa 1995); Celotex Corp. v. Auten, 541 N.W.2d 252, 254 (Iowa 1995). The full-responsibility rule does not apply in cases of successive, scheduled member injuries, however. Floyd v. Quaker Oats, 646 N.W.2d 105 (Iowa 2002).

Apportionment of disability between a preexisting condition and an injury is proper only when some ascertainable portion of the ultimate industrial disability existed independently before an employment-related aggravation of disability occurred. Bearce v. FMC Corp., 465 N.W.2d 531 (Iowa 1991); Varied Enterprises, Inc. v. Sumner, 353 N.W.2d 407 (Iowa 1984). Hence, where employment is maintained and earnings are not reduced on account of a preexisting condition, that condition may not have produced any apportionable loss of earning capacity. Bearce, 465 N.W.2d at 531. Likewise, to be apportionable, the preexisting disability must not be the result of another injury with the same employer for which compensation was not paid. Tussing v. George A. Hormel & Co., 461 N.W.2d 450 (Iowa 1990).

The burden of showing that disability is attributable to a preexisting condition is placed upon the defendant. Where evidence to establish a proper apportionment is absent, the defendant is responsible for the entire disability that exists. Bearce, 465 N.W.2d at 536-537; Sumner, 353 N.W.2d at 410-411.

Under the full responsibility rule, defendants are liable for the full extent of industrial disability caused by the current work injury even if the industrial disability is greater due to a prior work related injury. Further, it is defendants' responsibility to show apportionment between previous work related injuries and the current one.

Despite the claimant's less than stellar testimony, the undisputed medical evidence paints a picture of an employee who is unable to work manual labor positions and suffers from serious depression. Claimant carries the burden to prove that extent of any disability caused by a work related injury. In this case, claimant has carried his burden that he has strict work restrictions and no doctor has returned him to work despite the fact that the doctors may not have had the full extent of information about prior injuries.

Claimant is not motivated to find new employment. Despite his testimony that he would like to attend classes to learn a new trade, he has not done so. Nor has he looked for any work in the interim. He has not sought additional health care that might enable him to return to work and he appears somewhat resistant to medical help such as drug therapy or physical therapy.

When all relevant factors are considered, claimant has suffered a 70 percent industrial disability/loss of earning capacity due to his December 15, 2008, injury. This conclusion entitles claimant to 350 weeks of permanent partial disability benefits.

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. 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). Neither maintenance medical care nor an employee's continuing to have pain or other symptoms necessarily prolongs the healing period.

The next issue is when claimant reached maximum medical improvement. On June 25, 2009, Dr. Boulden reviewed the last of the diagnostic tests of claimant to rule out any spinal injury that would necessitate injury. From that point on, it is clear from the records that any care claimant received was primarily palliative rather than recovery. The maximum medical improvement date is set on June 25, 2009, as ongoing symptoms or pain cannot prolong the healing period.

The next issue to be resolved is whether claimant is entitled to an additional award of healing period benefits.

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, Iowa App. 312 N.W.2d 60 (1981). Healing period benefits can be interrupted or intermittent. Teel v. McCord, 394 N.W.2d 405 (Iowa 1986).

Claimant was returned to work on December 17, 2008, and worked one hour when he was informed that there was no work suitable for his work restrictions. Claimant has not worked since.

Claimant is entitled to healing period benefits from the date of his injury of December 15, 2008, up to June 25, 2009.

Claimant then asks for penalty benefits for the non payment of ten days of healing period benefits. Penalty benefits were not pled nor was it an issue on the hearing report or one presented to the deputy during hearing when the hearing report was discussed. A presiding deputy can raise a penalty claim sua sponte, but must grant a rehearing if the issue had not already been pled. Where a statute imposes a duty for the Division of Workers' Compensation to act in some specific manner that action should occur even if it requires a separate hearing to be scheduled and held at a

later date so that parties may avoid unfair surprise and present additional evidence. Bacon v. Fort Dodge Animal Health, Inc., File No. 5009919 (App. February 23, 2007) (allowing for consideration of a claim for credit under Iowa Code section 85.38(2) although not specifically pled)

In this case, however, penalty benefits are not assessed and no rehearing on the issue of penalty benefits is necessary.

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.
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> (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 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).

Claimant was returned to work by the healthcare provider with restrictions. The non payment of benefits was for a period of ten days. Employer has the right to investigate a claim to determine whether there is a reasonable basis to contest a claim. Ten days is not an unreasonable period of time to investigate a claim. Penalty benefits are not awarded.

ORDER

THEREFORE, it is ordered:

That defendants are to pay unto claimant three hundred and fifty (350) weeks of permanent partial disability benefits at the rate of seven hundred eleven and 50/100 dollars ($711.50) per week from June 25, 2009.

That defendants shall pay healing period benefits from December 15, 2008, to June 25, 2009.

That defendants shall pay accrued weekly benefits in a lump sum.

That defendants shall pay interest on unpaid weekly benefits awarded herein as set forth in Iowa Code section 85.30.

That defendants are to be given credit for benefits previously paid.

That defendants shall file subsequent reports of injury as required by this agency pursuant to rule 876 IAC 3.1(2).

That defendants shall pay the costs of this matter pursuant to rule 876 IAC 4.33.

Signed and filed this ___13th___ day of December, 2010.

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JENNIFER S. GERRISH-LAMPE
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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