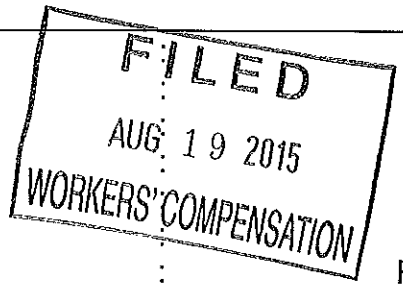
BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER



ELSA GONZALEZ,

Claimant,

vs.

BERRY PLASTICS CORPORATION d/b/a BERRY IOWA, LLC,

Employer,

and

FEDERAL INSURANCE COMPANY,

Insurance Carrier,
Defendants.

File No. 5042719

ARBITRATION

DECISION

Head Note Nos.: 1100; 1800

STATEMENT OF THE CASE

Claimant, Elsa Gonzalez, has filed petitions in arbitration and seeks worker's compensation benefits from, Berry Plastics Corporation d/b/a Berry Iowa, LLC, employer, and Federal Insurance Company, insurance carrier, defendants.

Deputy workers' compensation commissioner, Stan McElderry, heard this matter in Des Moines, Iowa.

ISSUES

The parties have submitted the following issues for determination:

1. Whether the injury arising out of and in the course of employment on November 2, 2011 was a cause of temporary disability (claimant seeks running award);

2. Whether the alleged injury caused any permanent disability, and if so, the extent;

3. Industrial versus scheduled member;

4. Gross earnings for rate calculation;

5. Medical Benefits; and

6. Independent Medical Examination (IME) under Iowa Code section 85.39;

7. Penalty; and

8. Costs.

FINDINGS OF FACT

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

The claimant was 51 years old at the time of hearing. The claimant was born in Guatemala, and has a limited (9th grade) education in Guatemala. She came to the United States in 1985. She is conversational, if not entirely fluent, in English.

The claimant began working for Berry Plastics in 2004 as a printing machine operator. On November 1, 2011, the claimant received her third written warning for quality issues within a 90-day period for her work at Berry. She knew that a third warning would mean a suspension and termination.

The claimant had a wellness screening appointment at Berry Plastics prior to her work shift on November 2, 2011. The defendants' characterize the blood draw as voluntary. That is not an entirely fair description. To get a reduced rate on her employer provided family health insurance plan she was required to undergo the wellness screening. The employer hoped to benefit with heathier more productive employees and reduced premiums on its portion of the health insurance plans. As part of the wellness screening a blood draw was taken from the claimant's right elbow region. The claimant reported pain and the needle than was removed.

The claimant last worked for Berry Plastics on November 4, 2011. On that date she was informed that she would be suspended on November 10, 2011 for the November 1, 2011 warning; and terminated if another quality issue occurred within 90 days. Claimant called on November 6 to report she would not be at work on November 7, 2011 due to illness. She called on November 7 to report she would not be in on November 8, 2013 due to illness. The claimant's claim in this case is that an injury to the right arm from the blood draw became a case of CRPS, a facial condition, and lit up a mental condition. Defendants contend that the arm injury was scheduled and temporary.

The medical opinions in this case are perhaps more varied than normal. The claimant had a laparoscopic cholecystectomy in 2002, and had an episode of seizure activity following. (Exhibit 1, pages 1-8) The seizure episode is significant. Claimant's mental health history pre-2011 is perhaps more important and is addressed below.

On November 7, 2011 claimant went to David Dennis, D.O., her family physician to report right arm pain. (Ex. 3, p. 3) Dr. Dennis referred claimant to Drs. Potthoff, Rattay, and Dr. Recinos. (Ex. 4) Rene Recinos, M.D., believed that some factors supported CRPS, but deferred to Erin R. Peterson, D.O. (Ex. 4) Dr. Recinos referred claimant to Dr. Peterson who referred her to Dr. Cross. Dr. Peterson thought CRPS was possible but did not diagnose it. (Ex. 5, pp. 46-47) Defendants then sent the claimant to Arnold Parenteau, M.D., in Ames. (Ex. 8) Dr. Parenteau sent the claimant to Amtul Sami, M.D., in Iowa City. (Ex. 1) Dr. Sami opined that the claimant did not have CRPS, and had multiple factors clouding an exact diagnosis. (Ex. 1) She recommended an MMPI which Sam Graham, Ph.D., reported could not be performed. (Ex. 9, p. 6) Michael Kitchell, M.D., saw the claimant at Mary Greely Medical Center. (Ex. 8) Dr. Kitchell while noting a previous diagnosis of CRPS could not so diagnose. He noted inconsistencies in examination and stated that the exam was consistent with "a functional or nonorganic problem, either conversion reaction or malingering." (Ex. 8) In a separate report he concluded that the claimant's condition was not related to the blood draw and was a physical manifestation of a psychosomatic disturbance. (Ex. 12, p. 3) He noted a significant childhood history of abuse, and the 2002 right side weakness incident where the neurologists thought that the claimant's symptoms were not warranted by the incident and believed the symptoms were augmented by claimant for unknown reasons. (Ex. 12, pgs. 3-4) A report by Dr. Kitchell on February 11, 2015 was of the same opinions. (Ex. 12, p. 8)

The claimant was sent to Robert Broghammer, M.D., in January of 2013. (Ex. 11) Dr. Broghammer found only one criteria for CRPS of 11 existed, joint stiffness. (Ex. 11, p. 7) Dr. Broghammer noted upper extremities were normal color, temperature, and had normal circulation. No evidence of nail changes, no evidence of soft tissue atrophy, skin was not overly dry or moist, and no edema was found. (Ex. 11, p. 7) Dr. Broghammer noted that some physicians had reported conversion reaction and malingering which he believe warranted exploration. He believed the problems were psychiatric with a component of functional overlay, but not a work injury. (Ex. 11, p. 8) Based on his report the claimant's claim was denied.

Pada Sandroni, M.D., a neurologist, examined the claimant in September of 2014 after the placement of a permanent spinal cord stimulator. He diagnosed CRPS, hemifacial spasm, and Horner syndrome. He thought the most likely explanation of the hemifacial spasm was CRPS because he could not see anything from the blood draw or on a MRI/MRA that could explain it. (Ex. 17, pp. 38-51)

The claimant saw Todd Ajax, M.D., on November 2, 2014. (Ex. 19) Dr. Ajax concluded that the claimant did not have a history or examination to support CRPS. He noted his examination demonstrated a large number of non-organic findings and though it might be the manifestation of conversion symptoms in a suspectible individual with malingering for financial gain. (Ex. 19, p. 4) Claimant saw Robin Sassman, M.D., on December 19, 2014. (Ex. 22) Dr. Sassman opined CRPS and Horner syndrome. She opined a 61 percent impairment. She also recommended no use of the right hand and to limit use of the left to 5 pounds. (Ex. 22, p. 17) However, Dr. Sassman allowed the

claimant to self-report several of the criteria for CRPS. (Ex. 21, p. 14) That is extremely damaging to Dr. Sassman's conclusions. The claimant did not develop CRPS as a result of the temporary physical injury to the right arm from the blood draw.

Michael Cullen, M.D., saw the claimant on February 16, 2015 and found that the claimant's situation was most consistent with a conversion disorder or somatoform disorder. (Ex. 21, pp. 12-22)

For post-injury mental health treatment Rogerio Ramos, M.D., saw the claimant. (Ex. 4) He noted that the claimant had no preexisting mental health problems and diagnosed major depressive disorder. (Ex. 4, p. 15) Problem is that the claimant has a lengthy pre-existing history of mental issues including child abuse and rape by an uncle and a group of soldiers/policemen. The rape produced a son still in Guatemala from where she is estranged. She was solicited by her godmother to be a prostitute and involved in illegal drugs. She reported emotional stress to her family physician in 2001. (Ex. 3, p. 1) She attended numerous counseling sessions with Carol Besch of Mercy Behavioral Center from 2004 through 2007. (Ex. 2) Despite this she told providers post-injury herein that she had no history of mental issues. Dr. Taylor evaluated the claimant on November 26, 2013. (Ex. 16) Michael Taylor, M.D., diagnosed major depressive order, recurrent, and opined that it was not caused or materially aggravated by the blood draw. (Ex. 16, p. 4) It is so found.

Claimant seeks payment for medical bills that are not related to the work injury, but to her underlying depressive disorder which predates the limited injury herein and was not materially aggravated by the blood draw injury. The claimant also seeks payment of a second IME, the one by Dan Rogers, Ph.D. (Ex. 20) Claimant also seeks a finding of gross weekly wages of $604.89 as opposed to $585.75. The difference is two bonuses which as paid based on the plants profitability and which are irregular.

REASONING AND 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. of App. P. 6.14(6).

The claimant has the burden of proving by of preponderance of the evidence that the alleged injury actually occurred and that it both arose out of and in the course of the employment. Ciha v. Quaker Oats Co., 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. Frye v. Smith-Doyle Contractors, 569 N.W.2d 154 (Iowa App. 1997); George A. Hormel & Co. v. Jordan, 569 N.W.2d 148 (Iowa 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. Cedar Rapids Community School v. Pease, 807 N.W.2d 839, 845 (Iowa 2011). 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). The finder of fact, must determine the credibility of the witnesses, weigh the evidence, and decide the facts at issue in a case. See Arndt v. City of LeClair, 728 N.W.2d 389, 394-95 (Iowa 2007). One factor the commissioner considers is whether an expert's opinion is based upon an incomplete medical history. Dunlavey v. Economy Fire & Cas. Co., 526 N.W.2d 845, 853 (Iowa 1995).

The claimant had a temporary injury to her right arm which had healed to the point before she missed work that she would not had to have missed work. Anything following was due to the diagnosed major depressive order, recurrent, that it was not caused or materially aggravated by the blood draw.

The next issue is temporary partial benefits.

An employee is entitled to appropriate temporary disability benefits during those periods in which the employee is temporarily, partially disabled. An employee is temporarily, partially disabled when the employee is not capable medically of returning to employment substantially similar to the employment in which the employee was engaged at the time of the injury, but is able to perform other work consistent with the employee's disability. Temporary partial benefits are not payable upon termination of temporary disability, healing period, or permanent partial disability simply because the employee is not able to secure work paying weekly earnings equal to the employee's weekly earnings at the time of the injury. Section 85.33(2).

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 claimant had a temporary injury to her right arm which had healed to the point before she missed work that she would not have had to miss work. Under those facts there is no entitlement to temporary benefits.

The claimant also seeks payment of 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-reopen October 16, 1975).

The claimant seeks payment of medical expenses. Those medical expenses were not the result of a compensable work injury. The defendants are not responsible for payment of those expenses.

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). 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 a second evaluation/examination by Dr. Rogers. The defendants paid for a first IME and the claimant is not entitled to second one.

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).

In Schadendorf v. Snap-on Tools Corp., 757 N.W.2d 330, 335 (Iowa 2008) the court held that the delay in paying the award did allow the imposition of a penalty after the defendant no longer had a reasonable excuse for non-payment. The court in Schadendorf affirmed an award of penalty when the defendants did not reasonable pay benefits after an award of benefits.

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 v. Snap-on Tools Corp., 555 N.W.2d 229, 238 (Iowa 1996).

No benefits are payable and thus there can be no penalty.

ORDER

THEREFORE IT IS ORDERED:

That the claimant take nothing.

Defendants shall receive credit for all benefits previously paid.

Costs are taxed to the claimant pursuant to 876 IAC 4.33.

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

Signed and filed this 19th day of August, 2015.

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.