BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

CAROL GONZALES, Claimant, vs. QUAKER OATS COMPANY, Employer, and INDEMNITY INSURANCE COMPANY OF NORTH AMERICA, Insurance Carrier, Defendants.	File No. 5061890 A R B I T R A T I O N D E C I S I O N Head Note No.: 1101

STATEMENT OF THE CASE

The claimant, Carol Gonzales, filed a petition for arbitration and seeks workers' compensation benefits from Quaker Oats Company, employer, and Indemnity Insurance Company of North America, insurance carrier. The claimant was represented by Anthony Olson. The defendants were represented by Tim Wegman.

The matter came on for hearing on May 29, 2019, before Deputy Workers' Compensation Commissioner Joe Walsh in Cedar Rapids, Iowa. The record in the case consists of Joint Exhibits 1 through 10; Claimant's Exhibits 1 through 5 and Defense Exhibits A, B and D. The claimant testified under oath at hearing. Vicki Newgard served as the court reporter. The matter was fully submitted on June 17, 2019, after helpful briefing by the parties. The parties presented an orderly, succinct record and both parties were well-represented.

ISSUES

The parties submitted the following issues for determination:

1. Whether the claimant sustained an injury which arose out of and in the course of her employment on March 28, 2018. Specifically, the defendants have asserted the "going and coming" defense.

2. Claimant contends the defendants are responsible for healing period benefits from March 28, 2018, through August 27, 2018. The defendants deny this primarily based on their denial of injury itself.

3. Whether the claimant has suffered any permanent functional disability.

4. Whether the defendants are responsible for medical expenses set forth in Claimant's Exhibit 5.

5. Whether the defendants are responsible for independent medical examination (IME) expenses under section 85.39, set forth in Joint Exhibit 10.

6. Whether the defendants are required to pay penalty under section 86.13.

STIPULATIONS

Through the hearing report, the parties stipulated to the following:

1. The parties had an employer-employee relationship at the time of the alleged injury.

2. Claimant was off work between March 28, 2018, and August 27, 2018.

3. The commencement date for any permanent disability benefits, if any are owed, is August 28, 2018. The claimant's disability, if any, is confined to the right leg.

4. The weekly rate of compensation is $1,002.42 per week.

5. Defendants are entitled to a credit under section 85.38(2) in the amount of $16,207.01.

6. Affirmative defenses have been waived, with the exception of the "coming and going" defense.

FINDINGS OF FACT

Claimant, Carol Gonzales, was 62 years old as of the date of hearing. She is a long-term employee of Quaker Oats who resides in Cedar Rapids, Iowa. Ms. Gonzales testified live and under oath at hearing. I find her to be a highly credible witness. Her testimony was professional, straightforward and direct. She testified consistently with all other portions of the record. There was certainly nothing about her demeanor which caused the undersigned any concern about her truthfulness. In fact, the opposite is true.

The facts are not really disputed in this case. Ms. Gonzales is a long-term employee of Quaker Oats. She has an associate's degree. She also serves as a Union

Steward for the Retail, Wholesale and Department Store Union Local 110 (RWDSU Local 110). RWDSU Local 110 has a collective bargaining agreement (CBA) with Quaker Oats which governs labor-management relations. The only portion of the CBA which is relevant to these proceedings is contained in Claimant's Exhibit 4:

> Union Security
>
> The success of the new work system is dependent upon sustaining a strong independent Union. To ensure this the RWDSU and Quaker Oats Company have agreed to the following:
>
> - The Company will provide eight (8) hours of Union education on paid company time (on site) for all Quaker Cedar employees. The RWDSU will develop and deliver this training.
>
> - The Company agrees to provide sixteen (16) hours paid release time (off-site) for all Local 110 RWDSU stewards to provide training/roles in the new work system. This training shall be provided annually.

(Claimant's Exhibit 4) The agreement itself specifies the training is to be delivered offsite. As a Union steward, Ms. Gonzales was familiar with this training. She testified the training is mandatory and an employee could be disciplined for failure to attend. (*See also*, Cl. Ex. 3) She testified that the steward's training covers a variety of topics, including the CBA (including the grievance process), company policies and Union history. The training essentially teaches stewards how to effectively represent Union members. Ms. Gonzales testified the Company often participates in the training as well. In the text of the Union Security provision of the CBA it is evident that it is intended to benefit both the Union and the Company in maintaining peaceful labor-management relations.

On March 13, 2018, RWDSU 1st Vice President Bob Dixon sent an email to a number of individuals scheduling training in 2018. The subject line was "Steward's Training 2018." (Cl. Ex. 1)

> We will be conducting Stewards Training March 26th through the 29th. I have attached a workbook with multiple sheets which have the days employees will be attending the training. Please get these people on the schedule and if there are any issues, please let us know so we can make arrangements.

(Cl. Ex. 1) An attachment listed "Carol Gonzales" from Sanitation for the March 28-29 training. (Cl. Ex. 2)

The facts regarding the injury itself are not in dispute. Ms. Gonzales testified that she was scheduled to attend the steward's training on March 28, 2019, at 7:00 a.m. She testified that she left her home and drove in her personal vehicle to the Union Hall

in order to be there on time. The Union Hall parking lot was full so she drove across the street to another parking lot. This parking lot was not maintained by either the Company or the Union. She exited her vehicle and crossed the street. While crossing the street, she slipped and fell on some ice. She fell to her knees and felt a snap in her right ankle. Her ankle was broken. There is no dispute that the claimant was to be paid for this training at the Union Hall once she arrived. A couple driving by stopped to help Ms. Gonzales. She was transported to St. Luke's Hospital. (Joint Exhibit 1) Initially, some back pain was noted, but ultimately the injury was confined to her right leg. An incident report was prepared a few days later and the injury is well-documented. (Defendants' Exhibit A)

Subsequently, Ms. Gonzales received medical treatment through Physician's Clinic of Iowa (PCI). She was diagnosed with a lateral malleolus fracture and placed in a boot. (Jt. Ex. 2, p. 1) She underwent a normal course of medical treatment for this type of injury and was ultimately returned to work without any medical restrictions on August 27, 2018. (Jt. Ex. 2, p. 20) While she was off work, she was paid disability benefits. (Def. Ex. C) The parties have stipulated that Ms. Gonzales was off work from the date of her injury through August 27, 2018. They have further stipulated that the disability payments amounted to $16,207.00. She incurred medical expenses through her group health insurance from several providers. (Jt. Exs. 6 through 9) Two physicians provided impairment ratings. Claimant's chosen IME physician, Farid Manshadi, M.D., opined that claimant suffered a 9 percent right leg impairment on March 25, 2019. (Cl. Ex. 4, p. 3) Fred Pilcher, M.D., her treating physician at PCI assigned a 7 percent right leg impairment on May 17, 2019. (Jt. Ex. 5)

The employer timely investigated the claim and sent a letter to Ms. Gonzales, through her counsel on April 16, 2018. The claim was denied. "We do content [sic] that this is a 'going and coming exclusion.' Based upon the foregoing, we respectfully deny your client's claim as being work related." (Def. Ex. D)

Having reviewed the entire record and listened to the sworn testimony of the claimant live, I find that Ms. Gonzales was injured while traveling to a mandatory training for her employer pursuant to a CBA between her employer and Union. I find that Ms. Gonzales was not merely commuting to her place of work. Rather, she was assigned to attend an off-site training as a result of the CBA. In other words, she was assigned to attend a special training through an agreement between her employer and Union. During this special errand, she sustained an injury which arose out of and in the course of her employment. I find that her claim was, however, fairly debatable and the employer timely investigated and denied the claim.

CONCLUSIONS OF LAW

The fighting question submitted is whether the claimant was in the course of her employment when she was injured on March 28, 2018. The claimant contends she was. The defendants deny this, alleging that the "going and coming" exclusion applies.

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.

A personal injury contemplated by the workers' compensation law means an injury, the impairment of health or a disease resulting from an injury which comes about, not through the natural building up and tearing down of the human body, but because of trauma. The injury must be something that acts extraneously to the natural processes of nature and thereby impairs the health, interrupts or otherwise destroys or damages a part or all of the body. Although many injuries have a traumatic onset, there is no requirement for a special incident or an unusual occurrence. Injuries which result from cumulative trauma are compensable. Increased disability from a prior injury, even if brought about by further work, does not constitute a new injury, however. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); Ellingson v. Fleetguard, Inc., 599 N.W.2d 440 (Iowa 1999); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995); McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985). An occupational disease covered by chapter 85A is specifically excluded from the definition of personal injury. Iowa Code section 85.61(4) (b); Iowa Code section 85A.8; Iowa Code section 85A.14.

The fighting issue in this case is whether the claimant's slip and fall accident on March 28, 2018, occurred in the course of her employment. For the reasons set forth below, I find that Ms. Gonzales was, in fact, in the course of her employment.

The Iowa Supreme Court has held that

> [a]n injury occurs in the course of the employment when it is within the period of employment at a place where the employee reasonably may be in performing his duties, and while he is fulfilling those duties or engaged in doing something incidental thereto. An injury in the course of employment embraces all injuries received while employed in furthering the employer's business and injuries received on the employer's premises, provided that the employee's presence must ordinarily be required at the place of the injury, or if not so required, employee's departure from the usual place of employment must not amount to an abandonment of

> employment or be an act wholly foreign to his usual work. An employee does not cease to be in the course of his employment merely because he is not engaged in doing some specifically prescribed task, if, in the course of his employment he does some act which he deems necessary for the benefit of his employer.

Quaker Oats v. Ciha, 552 N.W.2d 143, 150 (Iowa 1996) [internal citations omitted].

Absent "special circumstances, injuries occurring off the employer's premises while the employee is on the way to or from work are not compensable." 2800 Corp. v. Fernandez, 528 N.W.2d 124, 129 (1995). One exception to the going and coming rule is the special errand exception. This exception applies "when an employee makes a special trip in response to a request, agreement or instructions to go from his home to the plant to do something for the employer's benefit. In that case it is clear the entire trip would be his master's business and by all authorities would be held to be in the course of employment." Pribyl v. Standard Elec. Co., 246 Iowa 333, 339, 67 N.W.2d 438, 443 (1954). This exception has been applied to an employee who is pursuing Union activities under a CBA. Caterpillar Tractor Co. v. Shook, 313 N.W.2d 503, 507 (Iowa 1981).

In Shook, the claimant was an elected Union Representative who served as chairman of the grievance committee. Id. at 505. He was paid for his time conducting Union activities; some of his time under the contract was paid by the Union; some by the employer. Id. Mr. Shook was injured in a motorcycle accident traveling from the Union Hall to a negotiations meeting with the employer. At the time of his injury, he was being paid by the employer. Id. The Iowa Supreme Court held that Mr. Shook, while performing his duties for the Union, was in the course of his employment because "[h]is travel was incidental to his duties. The time, place and activity were work-connected." Id. at 507. The Shook decision did not invoke the special errand rule specifically because his travel was directly incidental to his work duties.[1]

[1] Employees whose travel is incidental to work are widely considered to be in the course of their employment for the entire course of a work trip while engaging in acts of everyday life. The going and coming rule usually does not apply to traveling employees because they are in the course of their employment until they return home. Heissler v. Strange Bros. Hide Co., 212 Iowa 848, 237 N.W. 343 (1931) (traveling salesman injured in auto accident returning home from sales trip was in the course of his employment); Walker v. Speeder Mach. Corp., 213 Iowa 1134, 240 N.W. 725 (1932) (traveling salesman killed by automobile while walking to dinner on business trip was in the course of his employment). A review of international law reveals that some courts have taken this basic rule to an extreme. *See* CA Paris, 6, 12 17-05-2019, n 16/08787, Confirmation, *described in* The New York Times, "A French Worker Died After Sex on a Business Trip. His Company is Liable", Palko Karasz, September 12, 2019 https://www.nytimes.com/2019/09/12/world/europe/france-sex-work-accident.html (engineer who suffered heart attack while having sexual intercourse with a stranger on a business trip deemed to be an act of everyday life).

While this case is distinguishable from Shook in that Ms. Gonzales was not being paid by Quaker at the time of the injury, I find it falls squarely within the special errand rule because her travel was to a different location negotiated specifically between her employer and her Union.

In this case, claimant's trip was undertaken pursuant to a CBA between the employer and the Union. The CBA provided for mandatory Union Steward training. This provision of the agreement is in the record. The purpose is to aid the success of "the new work system" by ensuring a strong independent Union. This provision is a binding agreement and undoubtedly provides a substantial benefit to the employer. Ms. Gonzales was required to attend this training and could be disciplined for failing to attend under the CBA and work rules. I find that the claimant's activities of driving from her home to training to a negotiated offsite location on March 28, 2018, constitutes a special errand on behalf of the employer which placed her in the course of her employment. Alternatively, I would also find that claimant was within the sphere of protection.

Having found that the claimant suffered an injury which arose out of and in the course of her employment, the remaining questions involve what benefits she is entitled to.

Section 85.34(1) provides that healing period benefits are payable to an injured worker who has suffered permanent partial disability until (1) the worker has returned to work; (2) the worker is medically capable of returning to substantially similar employment; or (3) the worker has achieved maximum medical recovery. The healing period can be considered the period during which there is a reasonable expectation of improvement of the disabling condition. See Armstrong Tire & Rubber Co. v. Kubli, 312 N.W.2d 60 (Iowa App. 1981). Healing period benefits can be interrupted or intermittent. Teel v. McCord, 394 N.W.2d 405 (Iowa 1986).

Under the Iowa Workers' Compensation Act, permanent partial disability is compensated either for a loss or loss of use of a scheduled member under Iowa Code section 85.34(2)(a)-(t) or for loss of earning capacity under section 85.34(2)(u). The extent of scheduled member disability benefits to which an injured worker is entitled is determined by using the functional method. Functional disability is "limited to the loss of the physiological capacity of the body or body part." Mortimer v. Fruehauf Corp., 502 N.W.2d 12, 15 (Iowa 1993); Sherman v. Pella Corp., 576 N.W.2d 312 (Iowa 1998). The fact finder must consider both medical and lay evidence relating to the extent of the functional loss in determining permanent disability resulting from an injury to a scheduled member. Terwilliger v. Snap-On Tools Corp., 529 N.W.2d 267, 272-273 (Iowa 1995); Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417, 420 (Iowa 1994).

The claimant is entitled to healing period benefits from the date of her injury through her date of maximum medical improvement, August 27, 2018. The employer is entitled to a credit for disability payments made during that time under its group plan. The claimant has also suffered a permanent partial disability of her right leg under Iowa

Code section 85.34(2)(p) (2019). I find that Dr. Manshadi has provided the most reliable rating of impairment under The AMA Guides, 5th ed. His report better explains the basis for his rating. Therefore, the claimant is found to have suffered a 9 percent functional disability of her leg. I conclude this entitles her to 19.8 weeks of permanent partial disability benefits commencing on August 28, 2018.

The next issue is 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).

The defendants are responsible for the medical expenses set forth in Claimant's Exhibit 5.

The final issue is 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).

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).

While I have found in claimant's favor, I find that the issue of whether this injury arose out of and in the course her employment was fairly debatable. There are facts in this case which distinguish it from the Shook case such that reasonable minds could differ regarding the application of the law to the facts. The defendants processed and denied the claim in a timely fashion and communicated the basis for the denial in a timely fashion. The claim for penalty is denied.

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).

The claimant is not entitled to an IME under section 85.39 because she obtained her examination before the employer had obtained a rating. A portion of Dr. Manshadi's report is awarded as a cost.

ORDER

THEREFORE, IT IS ORDERED:

All benefits shall be paid at the rate of one thousand two and 42/100 dollars ($1,002.42) per week.

Defendants shall pay healing period benefits from the date of injury through August 27, 2018.

Defendants shall pay the claimant nineteen point eight (19.8) weeks of permanent partial disability benefits commencing August 28, 2018.

Defendants shall pay accrued weekly benefits in a lump sum.

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

Defendants are entitled to a credit for disability benefits paid under the group plan in the amount of sixteen thousand two hundred seven and 01/100 dollars ($16,207.01).

Defendants are responsible for medical expenses as set forth in Claimant's Exhibit 5.

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

Costs are taxed to defendants in the amount of one thousand one hundred fifty and 00/100 dollars ($1,150.00).

Signed and filed this 13th day of March, 2020.

JOSEPH L. WALSH
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Timothy Wegman (via WCES)
Anthony Olson (via WCES)
Bob Rush (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.