O'hern,Sheila-5037298d

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

	:	
SHEILA O'HERN,	:	
	:	
Claimant,	:	
	:	
vs.	:	
	:	File Nos. 5037298/5037898
MERCY MEDICAL CENTER d/b/a	:	
BISHOP DRUMM RETIREMENT,	:	
	:	A R B I T R A T I O N
Employer,	:	
	:	D E C I S I O N
and	:	
	:	
ACE AMERICAN INSURANCE	:	
COMPANY,	:	
	:	Head Note No.: 1802
Insurance Carrier,	:	
Defendants.	:	

STATEMENT OF THE CASE

Claimant, Sheila O'Hern, has filed petitions in arbitration and seeks workers' compensation benefits from Mercy Medical Center, employer, Ace American Insurance Company, insurance carrier, defendants.

This matter was heard by Deputy Workers' Compensation Commissioner Ron Pohlman on May 30, 2012 at Des Moines, Iowa. The record in the case consists of claimant 's exhibits 1 through 29; defendants' exhibits A through E, G through L as well as the testimony of the claimant.

ISSUES

The parties submitted the following issues:

File No. 5037298:

Whether the work injury of March 10, 2010 was the cause of any permanent disability;

The nature and extent of claimant's entitlement to permanent partial disability;

The commencement date for the payment of permanent disability, if any;

Whether the claimant is entitled to payment of medical expenses pursuant to Iowa Code section 85.27;

Whether the claimant is entitled to alternate medical care pursuant to Iowa Code section 85.27; and

Whether the claimant is entitled to penalties pursuant to Iowa Code section 86.13 for delay in payment of weekly benefits.

File No. 5037898:

Whether the claimant sustained an injury which arose out of and in the course of her employment of May 26, 2010;

Whether the injury was the cause of any permanent disability;

The extent of claimant's entitlement to healing period benefits, if any;

The extent of claimant's entitlement to permanent partial disability pursuant to Iowa Code section 85.34(2)(u);

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Whether the claimant is entitled to the payment of medical expenses pursuant to Iowa Code section 85.27;

Whether the claimant is entitled to alternate medical care pursuant to Iowa Code section 85.27; and

Whether the claimant is entitled to payment of penalties pursuant to Iowa Code section 86.13.

FINDINGS OF FACT

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

At the time of the hearing the claimant was 66 years old. The claimant has a high school education and a Bachelor of Arts degree obtained in 1990 from Buena Vista University. Most of her career she worked as a beautician. She owned her own beauty shop from 1987 to 1999. In 1999 she went to work as a beautician for Bishop Drumm Care Center in Johnston, Iowa. This facility is owned by Mercy Medical Center. She was employed there full time until she was terminated on December 1, 2010.

On February 10, 2010 the claimant began complaining on numbness in her pinky and ring fingers of both hands with numbness going up to her elbows. She was eventually sent for an EMG study which revealed the claimant had mild to moderate carpal tunnel syndrome in her right hand and mild carpal tunnel syndrome in her left hand. The claimant believed that this condition was related to her work so she reported the injury to the employer after she received the results of the EMG study. She was sent to Susan Kennedy, M.D., who diagnosed her with bilateral carpal tunnel syndrome and provided a ten pound lifting restriction and instructions that the claimant should wear splints at all times. She was treated conservatively with physical therapy. The claimant did not obtain significant improvement and was referred for an orthopedic specialist for possible decompression surgery. This referral was made by James McQueen, D.O., at the McFarland Clinic. The employer refused to provide such care and instead provided physical therapy. The claimant was scheduled to be discharged from physical therapy on May 4, 2010, because she had satisfied her push/pull goal of 50 pounds. However, this goal was modified by the employer and the claimant was sent back to physical therapy with the goal of pushing and pulling up to 100 pounds. On May 26, 2010, while the claimant was attempting to reach the 100 pound push/pull goal the claimant reported that she had sustained a back and neck injury.

The employer referred the claimant to Cassim Igram, M.D., who diagnosed the claimant with back strain. Dr. Igram released the claimant to go back work with the restriction that she not push any wheel chairs and follow-up in three to four weeks. He also prescribed medication and physical therapy for the claimant's back. The employer could not accommodate the claimant's restrictions so she remained off of work. On July 12, 2010, Dr. Igram gave the claimant a 50 pound work restriction and released her to modified duty with

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instructions to finish her physical therapy. Dr. Igram placed the claimant at maximum medical improvement on August 6, 2010 and continued the 50 pound restriction indicating the claimant should return to work performing only the job of a cosmetologist.

On June 18, 2010, the claimant was released with respect to her hand injuries by Lorene Mein, ARNP, at the Mercy Campus Medical Clinic indicating that the claimant had reached maximum medical improvement for her carpal tunnel syndrome.

None the less the claimant was still experiencing pain from the carpal tunnel syndrome symptoms and asked for another referral. The claimant persisted in her request for evaluation for carpal syndrome but eventually was sent to Scott Shumway, M.D., on November 3, 2010. Dr. Shumway recommended the claimant have a surgical release first in the right and then on the left side. The claimant underwent a right carpal tunnel release on November 29, 2010 and a left carpal tunnel release on December 23, 2010. On January 19, 2011 Dr. Shumway released the claimant for unrestricted daily and work activities of the left upper extremity.

The claimant was evaluated by Robin Epp, M.D., on August 25, 2011. Dr. Epp diagnosed:

1. Bilateral carpal tunnel syndrome, status post right carpal tunnel release on November 29, 2010, with Dr. Shumway; status post left carpal tunnel release on December 23, 2010, with Dr. Shumway.

2. Low back pain.

3. Neck pain with radicular symptoms.

(Exhibit 14, page 9) Dr. Epp causally connected the bilateral carpal tunnel syndrome to the claimant's work as a beautician. Dr. Epp also causally connected the neck and low back complaints to the claimant's efforts in physical therapy to reach a push/pull goal of 100 pounds.

Dan Miller, D.O., evaluated the claimant for her neck and back pain at the employer's request on December 16, 2010. Dr. Miller's assessment on January 12, 2011 in response to questions from the claims representative was:

1. Diagnosis and relationship physical therapy incident on or about May 26, 2010. It was lumbar, thoracic, cervical strain. This has now become chronic pain. I do believe, with an acceptable degree of medical probability, that this is related to the physical therapy incident of May 26, 2010.

2. Relate any diagnosis to May 26, 2010 therapy incident. Has she recovered from this? Not fully, but improving.

3. Has Ms. O'Hern reach MMI for thoracic or lumbar spine? No, not at this time.

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4. Is Ms. O'Hern able to return to her normal job as a cosmetologist? Based on the job description that was attached with the letter stating that her job requires moderate to heavy work exuding up to 200 pounds of force occasionally and or up to 50 pounds of force frequently and/or up to 20 pounds of force constantly to move residents or object. The answer to this question is no; at least not at this particular job.

PLAN: At this time, we will continue the current medications. We will reduce her restrictions to no lifting over 50 pounds, no overhead work, no pushing or pulling 50 pounds. I will see her back in 1 month.

(Ex. 12, p. 6)

The employer directed the claimant to see David Boarini, M.D., in 2012, but when the claimant traveled to see Dr. Boarini for an appointment he would not see her. (Transcript, p. 64) The claimant continued to treat with her personal physician, Dr. McQueen for her cervical and lumbar issues. In late 2011 the claimant reported she fell on her steps and that that affected her back. However, she did not believe this fall had increased or decreased her back pain. (Tr., p. 61) In February 2012 Dr. McQueen noted the claimant's symptoms had increased in the claimant's back and referred her to Guy Music, M.D., a neurosurgeon. Dr. Music performed a laminectomy from L3 to L5 with a resection of a very large right-sided synovial cyst at L3-4 in March 2012. (Ex. 16, p. 3) Dr. McQueen causally connects the surgery performed by Dr. Music to the work injury of May 26, 2010.

Dr. Epp, when asked to opine regarding whether the claimant was at maximum medical improvement on April 25, 2011 opined:

I would not consider her to be at maximum medical improvement for the cervical spine until the above treatment recommendations are completed.

For the low back pain, I would also not consider her to be at maximum medical improvement at this time until the above treatment recommendations are complete.

For the right carpal tunnel syndrome, status post carpal tunnel release, I would place her at maximum medical improvement as of six months after her surgery, which would be May 29, 2011 as she has noted 90% improvement from her pre-surgery symptoms.

For the left upper carpal tunnel syndrome, status post carpal tunnel release, I would not place her at maximum medical improvement at this time until she has completed treatment with Dr. Shumway. If Dr. Shumway does not recommend any further intervention, I would place her at maximum medical improvement as of six months after her date of surgery, which would be June 23, 2011.

(Ex. 14, p. 10)

With respect to impairment, however, Dr. Epp did offer the following opinions:

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A 15 percent permanent impairment of the whole person for the cervical spine; 5 percent of the whole person for the lumbar spine; 10 percent of the left upper extremity for the left carpal tunnel syndrome; and 3 percent of the right upper extremity for right carpal tunnel syndrome.

With respect to restrictions, Dr. Epp recommends:

I would recommend that she limit lifting, pushing, pulling and carrying to 30 pounds below shoulder height on an occasional basis. I would not recommend she work over the shoulder due to the neck pain. She may sit, stand, walk, stoop and bend on an occasional basis. Upper extremity activities, as well as gripping and grasping, should be limited to an occasional basis. I would not recommend the use of vibratory or power tools.

(Ex. 14, p. 11)

The claimant's employment was terminated on December 1, 2010 because the claimant elected not to become an independent contractor for the employer.

Dr. Music imposed restrictions to avoid lifting more than 25 pounds and avoid activities with lots of bending and twisting. This restriction was imposed on April 17, 2012.

The claimant has obtained some improvement with her neck symptoms but still has pain and experiences some dizziness that she attributes to the neck injury. The claimant has difficulty walking or bending over to pick things up from the floor. However, she believes she did obtain some improvement from the surgery. As of the date of the hearing the claimant had not been released by Dr. Music. The claimant never planned to retire or at lease was not planning on retiring immediately at the time she was injured.

The claimant has sought employment through access points with Iowa Workforce Development but has not been offered work. She estimates she applies for two jobs per week and that she has gone to three interviews but has not been hired. She takes muscle relaxers that are prescribed by Dr. McQueen and hydrocodone at night that is prescribed by Dr. McQueen. She goes to physical therapy with a goal to get rid of the cane that she currently uses for balance.

REASONING AND CONCLUSIONS OF LAW

The issue in this case in each file is ultimately the nature and extent of claimant's entitlement to disability.

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

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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).

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).

It is agreed that the claimant sustained a bilateral carpal tunnel injury on March 10, 2010. Further, it is agreed that the claimant sustained at least a temporary exacerbation of a neck and back problem in physical therapy for her carpal tunnel syndrome admitted injury on May 26, 2010. The dispute here is really whether or not the sequela incident of May 26, 2010 resulted in something more than a temporary exacerbation.

The greater weight of evidence in this record establishes that it did. The claimant's condition has physically deteriorated from a point in time that she experienced back and neck pain trying to meet the 100 pound physical therapy goal on May 26, 2010. This culminated in the need for the claimant to have surgery performed by Dr. Music. As of the time of the hearing the claimant had not reached maximum medical improvement in the opinion of the surgeon who had performed her back surgery. Dr. Music is in the best position to opine with respect to whether the claimant's at maximum medical improvement.

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And his opinion is also corroborated by that of Dr. Epp, although Dr. Epp offered an opinion related to permanent disability that was done before the claimant had surgery. It is concluded that the claimant sustained a healing period as a result of the May 26, 2010 injury which was a sequela of the March 10, 2010 injury. It is concluded that this is one injury process and that ultimately this is an injury to the body as a whole to be compensated industrially when the claimant has reached the end of her healing period. Therefore the claimant is entitled to healing period benefits commencing March 28, 2011.

The next issue is the claimant's entitlement to payment of medical expenses pursuant to Iowa Code section 85.27 as well as additional medical care or alternate medical care pursuant to Iowa Code section 85.27.

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 issue here is really whether or not the additional care for the back beyond that temporary exacerbation which is acknowledged by the defendants is causally related to the work injury. The claimant has proven that she sustained more than just a temporary exacerbation to a preexisting back condition on May 26, 2010. Specifically, the claimant is seeking payment for treatment with Dr. McQueen, Dr. Music as well as physical therapy and additional care with Dr. McQueen and Dr. Music for her neck and back condition. As the claimant has established that this care was causally connected, she is entitled to payment of those medical expenses as well as reimbursement for those expenses that she has personally paid.

Finally the claimant seeks penalties for delay in payment of her healing period.

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.

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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. SeeChristensen, 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. SeeChristensen, 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 claim¾the "fairly debatable" basis for delay. SeeChristensen, 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

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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).

The claimant argues that exhibit 23 documents the claimant's difficulty in obtaining her weekly benefits during the course of her healing period. Exhibit 23 consists of an email from the claimant's counsel to a claims representative requesting additional treatment after Dr. Hines told the claimant she was able to return to work with respect to her carpal tunnel syndrome. However, there is not sufficient evidence in this record to establish what payments were late or when they were late in order for the undersigned to make any conclusions that would entitle the claimant to payment of penalty benefits.

ORDER

THEREFORE IT IS ORDERED:

File Nos. 5037298 and 5037898:

Defendants shall pay claimant healing period benefits commencing March 28, 2011, at the weekly rate of four hundred eighty-two and 69/100 dollars ($482.69) for those periods for which the claimant remains in a healing period.

Accrued benefits shall be paid in lump sum together with interest pursuant to Iowa Code section 85.30 with subsequent reports of injury filed as directed by this agency.

Defendants shall pay the claimant's medical expenses directly and shall reimburse those expenses that she has personally paid pursuant to Iowa Code section 85.27.

Defendants shall provide care with Dr. McQueen and Dr. Music for the claimant's work injury to her bilateral upper extremities and for her neck and back injury as a result of the sequela of her bilateral upper extremity injuries pursuant to Iowa Code section 85.27.

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Costs are taxed to the defendants pursuant to rule 876 IAC 4.33.

Signed and filed this ____5th_____ day of March, 2013.

RON POHLMAN DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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