Crozier, Tom-5032987D

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

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:

TOM CROZIER, :

:

Claimant, :

:

vs. :

: File No. 5032987

CARDINAL IG COMPANY, :

: A R B I T R A T I O N

Employer, :

: D E C I S I O N

and :

:

SENTRY INSURANCE :

:

Insurance Carrier, :

Defendants. : Head Note No.: 1803, 2401

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STATEMENT OF THE CASE

Thomas Crozier, claimant, filed a petition in arbitration seeking workers' compensation benefits from Cardinal IG Company (also referred to as Cardinal Glass), employer, and

Sentry Insurance, insurance carrier, both as defendants, as a result of injuries he allegedly sustained on or about May 4, 2009. This case was heard on April 26, 2011, in Des Moines, Iowa, and was considered fully submitted on May 19, 2011. The evidence in this case consists of claimant's exhibits 1through 9; claimant's exhibit 1, pages 6 and 7 were excluded, as they were not timely disclosed; and defendant's exhibits A through F were admitted.

ISSUES

Whether the claimant sustained an injury on May 4, 2009 that arose out of and in the course of employment.

Whether the claimant has suffered a temporary disability and the period of any temporary disability.

Whether the claimant has suffered a permanent disability.

The extent, if any, of the claimant's permanent disability.

Whether the claimant's alleged injury is a scheduled member injury or injury to the body as a whole.

Whether the claimant provided notice to the employer as required by Iowa Code section 85.23.

Whether the claimant is entitled to reimbursement for medical expenses.

The parties stipulated as to the claimant's weekly rate of $341.82 per week. The stipulations contained in the hearing report and order is incorporated by reference into this decision.

FINDINGS OF FACT

The claimant, Thomas Crozier was 57 years old at the time of the hearing. The claimant graduated from high school in 1979. After high school, claimant went into partnership with his parents, in farming. (Exhibit F, page 2) At the time of the hearing, the claimant was farming in partnership with his mother. (Ex. F, p. 3) In April 1999, the claimant started work for defendant, Cardinal Glass, in Greenfield, Iowa. The claimant was hired to perform factory labor. The claimant worked at that position for nine years. He was subjected to seasonal layoffs. The claimant primarily worked the second or third shift and worked eight hours. The claimant stated he was on his feet during his work. The claimant accepted a layoff starting December 1, 2008, with the expectation he would be recalled in the spring of 2009. The claimant received unemployment benefits during this layoff. The claimant testified his feet began bothering him about six months before his layoff. He did not seek any medical treatment or inform his employer. (Ex. F, p. 13) The claimant testified he did not tell his employer before he went on layoff in December 1, 2008, that he believed he injured his feet at work. The claimant was still engaged in farming while he was on layoff and his feet continued to cause him pain. The claimant reported he spoke to Lori Ramsey, Human

Resource Director, on April 30, 2009. Ms. Ramsey called to inform him of the recall to work. Ms. Ramsey informed the claimant that he was being recalled to work and his hours of work would be four ten-hour shifts per week, instead of the eight-hour shifts he had previously worked. The claimant testified he told Ms. Ramsey he could not work the ten-hour shifts because of standing on the concrete all shift long. He requested to work an eight-hour shift. He was told by Ms. Ramsey there were no longer any eight-hour shifts. The claimant testified he told Ms. Ramsey that standing on the cement floor caused problems with his feet. Claimant received his vacation pay May 15, 2009, through direct deposit and assumed he was fired.

The claimant first talked to a doctor about his feet problems the end of May 2009. The claimant took his mother to Andrew Stanislav, D.P.M., and talked to him about his feet problems. The claimant received some liners for his shoes. The claimant saw Dr. Stanislav on July 9, 2009. The claimant received an injection in his right foot and was provided additional shoe liners. The claimant received work restrictions of working eight-hour days. The claimant retuned to Dr. Stanislav on July 23, 2009, and received an injection in his left foot. The claimant testified the shots were helpful and reduced his pain. The claimant did not request the employer pay for these visits in 2009. The claimant testified when he started to experienced greater foot pain in 2008, he began to experience problem with his right hip. He did not see a doctor about his hip during this time. The claimant testified he received chiropractic treatment for his hip from 2002 through 2004.

The claimant testified he was receiving unemployment after his layoff in December 2008. He was terminated, as of May 5, 2009, and his employer protested continued receipt of employment benefits. A telephone fact-finding hearing was held on June 26, 2009, in which he claimant and Lori Ramsey participated. The claimant stated he discussed the injury to his feet and that he could not work the 10-hour shift and stand on concrete during the fact-finding interview.

The claimant testified that he continues to have foot pain. He said his feet hurt for an hour or so when he gets up and then gets better. Latter in the day they begin to hurt after he has been active for a while. He testified his hip hurts after standing for a while. In claimant's deposition of April 26, 2010, he testified he was not having ongoing issues with his feet; he was not having pain and could do all the walking he needed to do. (Ex. F, p. 14) After the claimant continued to work on his farm after he was laid off. The claimant received treatment for heel pain and hip pain from a chiropractor from 2001 through 2004. (Ex. D, pp. 19-39) The claimant testified he did not experience hip pain from 2004 until 2008. The claimant testified Dr. Stanislav told him the reason his hip was bothering him was because of the way he was walking due to his plantar fasciitis.

Lori Ramsey, Human Resource Manager for the defendant employer, testified at the hearing. Ms. Ramsey called the claimant on April 30, 2009, to recall him back to work. For business reasons, the employer had decided to eliminate a shift and have four ten-hour work days, rather than five eight-hour work days. The claimant told her he could not work ten-hour days, that he was having problems with his heels. Ms. Ramsey testified the claimant did tell

her his heel problems were related with his work for Cardinal Glass. She testified that since the claimant had not worked for five months, she did not relate his heel pain to his work with Cardinal Glass. She testified the claimant was fired on May 4, 2009, when he claimant did not return to work. Ms. Ramsey testified she had no knowledge the claimant believed his feet problems were related to work until the claimant's unemployment appeal hearing in November 2009. She denied being told of the problem by the claimant at any earlier date.

On July 23, 2009 Andrew Stanislav, D.P.M., wrote that he started treating the claimant on July 9, 2009 for bilateral heel pain. He noted the claimant was not currently working. The claimant requested an eight-hour limitation for work, which Dr. Stanislav agreed with. Dr. Stanislav diagnosed the claimant's heel problem as plantar fasciitis bilateral. (Exhibit 2, pages 1-3) The claimant received a cortisone shot in his right heel on July 9, 2009 and left heel on July 23, 2009. (Ex. 2, p. 1) Dr. Stanislav saw the claimant in September 2010 and December 2010. Dr. Stanislav's analysis of his condition was the same, plantar fasciitis bilateral. (Ex. 2, pp. 4-5) Dr. Stanislav completed a form with two check boxes prepared by claimant's attorney. On May 3, 2010, Dr. Stanislav agreed claimant's bilateral plantar fasciitis was more likely caused or aggravated by his work for defendant. (Ex. 2, p. 8) On December 20, 2010, Dr. Stanislav agreed that since signing defendant attorney's July 28, 2010, letter the claimant continued to have plantar fasciitis which was unresolved and he would defer to another physician who was more familiar with the AMA Guides to rate the claimant. (Ex. 2, p. 10)

On July 28, 2010, Dr. Stanislav signed off on a letter prepared by defendant's counsel. In this letter, Dr. Stanislav agreed that claimant's condition to be work related, the claimant's initial pain would have to have started while the claimant was at work. He also agreed that the 8-hour work restriction is no longer applicable and that as the claimant's condition had resolved, the claimant did not have a permanent impairment. (Ex. A, pp.1-2) On February 22, 2011, Dr. Stanislav signed off on a letter prepared by defendants' attorney. In this letter, Dr. Stanislav agreed the bilateral plantar fasciitis was not related to work, that any permanent impairment was not work related, and even if the initial treatment in July and August 2009 were possible work related, there are people who develop plantar fasciitis without standing at work like the claimant. (Ex. A, pp. 3-4)

On January 12, 2011, Vincent Mandrachia, D.P.M., performed an independent medical examination (IME) of the claimant. (Ex. 1, pp. 1-5) The claimant reported to Dr. Mandrachia he could only stand in one area one-half hour before needing to rest due to heel pain. The claimant also reported he had developed a limp on his right side. (Ex. 1, p. 2) Dr. Mandrachia's assessment was "1. Acute over chronic plantar fasciitis bilaterally with right being worse than the left. 2. Acute sinus tarsitis over the lateral aspect of the right foot." (Ex. 1, p. 3) Dr. Mandrachia opined the claimant's pain in his feet and plantar fasciitis was a direct result of his work for the defendant, Cardinal Glass. (Ex. 1, p. 3) Dr. Mandrachia also opined the claimant suffered from a gait derangement and provided a 1 percent whole body impairment rating for this impairment. Dr. Mandrachia provided a 24 percent impairment rating of the foot based upon AMA Guides to the Evaluation of Permanent Impairment, 5th Edition. (Ex. 1, p. 5)

On March 14, 2011, Michael Lee, D.P.M., performed a record review and provided a report. (Ex. B, pp. 5-9) Dr. Lee concluded the claimant suffers from plantar fasciitis and received appropriate treatment from Dr. Stanislav. Dr. Lee wrote:

. . . . It is very difficult to clearly state that in Mr. Crozier's case that his plantar fasciitis was due solely to his activities at Cardinal Glass. We can assume that he was active and ambulatory while not at Cardinal Glass and these activities that he underwent in his normal daily routine while away from Cardinal Glass certainly would have contributed to his plantar fasciitis as well. I therefore find it difficult to say that there is a casual relationship between his employment and his condition of plantar fasciitis. At a minimum, it may be argued that his plantar fasciitis was aggravated by his employment at Cardinal Glass.

(Ex. B, p. 7) Dr. Lee noted that Dr. Stanislav had provided "courtesy" orthotics several months before the July 2009 appointment. (Ex. B, p. 8) Dr. Lee disagreed with the ratings provided by Dr. Mandrachia. Dr. Lee believed the finding of muscle weakness hard to believe or due to some other preexisting condition. (Ex. B, p. 8) Dr. Lee disagreed with Dr. Mandrachia's rating of the gait derangement. Dr. Lee pointed out that under the AMA Guides, the proper rating of a mild gait derangement is seven percent. He went on further to state the claimant had no evidence of a positive Trendelengerg sign and moderate osteoarthritis and the claimant does not use an assistive device. Dr. Lee opined the claimant's gait derangement did not qualify for an impairment rating under the AMA Guides. (Ex. B, p. 8) Dr. Lee also wrote the claimant had ". . . . 0% permanent impairment rating as a result of his plantar fasciitis. " (Ex. B, p. 9)

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).

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).

Functional impairment is an element to be considered in determining industrial disability which is the reduction of earning capacity, but consideration must also be given to the injured employee's age, education, qualifications, expe-rience and inability to engage in employment for which the employee is fitted. Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963); Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961).

A finding of impairment to the body as a whole found by a medical evaluator does not equate to industrial disability. Impairment and disability are not synonymous. The degree of industrial disability can be much different than the degree of impairment because industrial disability references to loss of earning capacity and impairment references to anatomical or functional abnormality or loss. Although loss of function is to be considered and disability can rarely be found without it, it is not so that a degree of industrial disability is proportionally related to a degree of impairment of bodily function.

Factors to be considered in determining industrial dis-ability include the employee's medical condition prior to the injury, immediately after the injury, and presently; the situs of the injury, its severity and the length of the healing period; the work experience of the employee prior to the injury and after the injury and the potential for rehabilitation; the employee's qualifications intellectually, emotionally and physically; earnings prior and subsequent to the injury; age; education; motivation; functional impairment as a result of the injury; and inability because of the injury to engage in employment for which the employee is fitted. Loss of earnings caused by a job transfer for reasons related to the injury is also relevant. Likewise, an employer's refusal to give any sort of work to an impaired employee may justify an award of disability. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980). These

are matters which the finder of fact considers collectively in arriving at the determination of the degree of industrial disability.

There are no weighting guidelines that indicate how each of the factors is to be considered. Neither does a rating of functional impairment directly correlate to a degree of industrial disability to the body as a whole. In other words, there are no formulae which can be applied and then added up to determine the degree of industrial disability. It therefore becomes necessary for the deputy or commissioner to draw upon prior experience as well as general and specialized knowledge to make the finding with regard to degree of industrial disability. See Christensen v. Hagen, Inc., Vol. 1 No. 3 State of Iowa Industrial Commissioner Decisions 529 (App. March 26, 1985); Peterson v. Truck Haven Cafe, Inc., Vol. 1 No. 3 State of Iowa Industrial Commissioner Decisions 654 (App. February 28, 1985).

Compensation for permanent partial disability shall begin at the termination of the healing period. Compensation shall be paid in relation to 500 weeks as the disability bears to the body as a whole. Section 85.34.

When the injury develops gradually over time, the cumulative injury rule applies. The date of injury for cumulative injury purposes is the date on which the disability manifests. Manifestation is best characterized as that date on which both the fact of injury and the causal relationship of the injury to the claimant's employment would be plainly apparent to a reasonable person. The date of manifestation inherently is a fact based determination. The fact-finder is entitled to substantial latitude in making this determination and may consider a variety of factors, none of which is necessarily dispositive in establishing a manifestation date. Among others, the factors may include missing work when the condition prevents performing the job, or receiving significant medical care for the condition. For time limitation purposes, the discovery rule then becomes pertinent so the statute of limitations does not begin to run until the employee, as a reasonable person, knows or should know, that the cumulative injury condition is serious enough to have a permanent, adverse impact on his or her employment. Herrera v. IBP, Inc., 633 N.W.2d 284 (Iowa 2001); Oscar Mayer Foods Corp. v. Tasler, 483 N.W.2d 824 (Iowa 1992); McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985).

The court in Herrera stated:

To summarize, a cumulative injury is manifested when the claimant, as a reasonable person, would be plainly aware (1) that he or she suffers from a condition or injury, and (2) that this condition or injury was caused by the claimant's employment. Upon the occurrence of these two circumstances, the injury is deemed to have occurred. Nonetheless, by virtue of the discovery rule, the statute of limitations will not begin to run until the employee also knows that the physical condition is serious enough to have a permanent adverse impact on the claimant's employment or employability, i.e., the claimant knows or should know the "nature, seriousness, and probable compensable character" of his injury or condition. Orr, 298 N.W.2d at 257.

Herrera v. IBP, Inc., 633 N.W.2d p. 288. It was not until Dr. Stanislav provided the eight-hour restriction on July 9, 2009, did the claimant's injury "manifest."

The time period both for giving notice and filing a claim does not begin to run until the claimant as a reasonable person, should recognize the nature, seriousness, and probable compensable character of the injury. The reasonableness of claimant's conduct is to be judged in light of claimant's education and intelligence. Claimant must know enough about the condition or incident to realize that it is work connected and serious. Claimant's realization that the injurious condition will have a permanent adverse impact on employability is sufficient to meet the serious requirement. Positive medical information is unnecessary if information from any source gives notice of the condition's probable compensability. Herrera v. IBP, Inc., 633 N.W.2d 284 (Iowa 2001); Orr v. Lewis Cent. Sch. Dist., 298 N.W.2d 256 (Iowa 1980); Robinson v. Department of Transp., 296 N.W.2d 809 (Iowa 1980).

Iowa Code section 85.23 requires an employee to give notice of the occurrence of an injury to the employer within 90 days from the date of the occurrence, unless the employer has actual knowledge of the occurrence of the injury.

The purpose of the 90-day notice or actual knowledge requirement is to give the employer an opportunity to timely investigate the facts surrounding the injury. The actual knowledge alternative to notice is met when the employer, as a reasonably conscientious manager, is alerted to the possibility of a potential compensation claim through information which makes the employer aware that the injury occurred and that it may be work related. Dillinger v. City of Sioux City, 368 N.W.2d 176 (Iowa 1985); Robinson v. Department of Transp., 296 N.W.2d 809 (Iowa 1980).

Failure to give notice is an affirmative defense which the employer must prove by a preponderance of the evidence. DeLong v. Highway Commission, 229 Iowa 700, 295 N.W. 91 (1940).

The defendants have not proven by a preponderance of the evidence that they did not receive notice of the injury. The defendants were put on notice in the June 26, 2009, unemployment fact-finding interview that claimant believed work contributed to his feet injuries. This was sufficient to put the defendant on notice about a possible work injury claim. In this case, the claimant testified he participated in an unemployment fact-finding telephone interview on June 26, 2009. Lori Ramsey participated in on the phone call. The claimant testified he told the fact finder her could not work 10-hour days because of standing on the concrete. He testified he discussed the injury to his feet in the phone interview. Ms. Ramsey testified she does not have a clear recollection of the statements the claimant made in his fact-finding interview. Ms. Ramsey was clear in her testimony the first time she felt she had actual knowledge of the claimant's claim of work injury was at the unemployment appeal hearing in November 2009. Based upon the claimant's clear recollection of the fact-finding interview and Ms. Ramsey's less than clear recollection, I find the claimant's testimony more

convincing on this issue. The employer had notice and knowledge of the claimant's injury on June 26, 2009.

The claimant has proven an injury that arose out of and in the course of his employment with the defendant. In this case, there are three doctors that have offered opinions on the claimant's bilateral planter fasciitis. It is clear the claimant has bilateral plantar fasciitis. Dr. Mandrachia opined that it was work related. Dr. Lee stated that work was not the sole cause of his plantar fasciitis and "[A]t a minimum, it may be argued [sic] that his plantar fasciitis was aggravated by his employment at Cardinal Glass." (Ex. B, p. 7) Dr. Stanislav's opinions are somewhat conflicting. He did agree that "For the bilateral plantar fasciitis to be a work related condition the initial pain and complaint would have had to have started while Mr. Crozier was at work." (Ex. A, pp. 1-2) The claimant credibly testified that his feet were causing him problems while he was working for the defendant employer. Dr. Stanislav provided "courtesy" orthotics several months before his July 2009 appointment. The claimant's heel pain did start while he was working for the defendant employer. Dr. Lee performed a records review rather than the medical examination that Dr. Mandrachia performed. I find the opinions of Dr. Mandrachia to be the most convincing.

While neither party raised the specific Iowa Code section, the claimant's bilateral plantar fasciitis would be considered to be a loss caused by a single accident and compensable under Iowa Code section85.34(2)(s). Iowa Code section 85.34(2)(s) states:

The loss of both arms, or both hands, or both feet, or both legs, or both eyes, or any two thereof, caused by a single accident, shall equal five hundred weeks and shall be compensated as such; however, if said employee is permanently and totally disabled the employee may be entitled to benefits under subsection 3.

Benefits for permanent partial disability of two members caused by a single accident is a scheduled benefit under section 85.34(2)(s); the degree of disability must be computed on a functional basis with a maximum benefit entitlement of 500 weeks. Simbro v. DeLong's Sportswear, 332 N.W.2d 886 (Iowa 1983).

Evidence considered in assessing the loss of use of a particular scheduled member may entail more than a medical rating pursuant to standardized guides for evaluating permanent impairment. A claimant's testimony and demonstration of difficulties incurred in using the injured member and medical evidence regarding general loss of use may be considered in determining the actual loss of use compensable. Soukup, 222 Iowa 272, 268 N.W. 598. Consideration is not given to what effect the scheduled loss has on claimant's earning capacity. The scheduled loss system created by the legislature is presumed to include compensation for reduced capacity to labor and to earn. Schell v. Central Engineering Co., 232 Iowa 421, 4 N.W.2d 339 (1942).

The AMA Guides requires "If impairments from two or more organ systems are to be *combined* to express a whole person impairment, each must first be expressed as a whole person impairment." AMA Guides, page 604 (emphases in original) Using the combined values chart results in a 14 percent impairment rating or 70 weeks of benefits. [500 weeks x

.14 percent = 70 weeks] If the claimant's injuries were limited to bilateral plantar fasciitis, I would award a 14 percent functional impairment, however, as detailed below I find he has an industrial disability because of his gait derangement.

I find the claimant has a gait derangement to his right hip as a result of his bilateral plantar fasciitis. The claimant did not have any hip problems from 2004 through 2008. It is when his plantar fasciitis developed into a significant problem that he developed a gait derangement. Dr. Lee stated the claimant did not qualify for an AMA Guide impairment rating for his gait derangement. Dr. Mandrachia provided an AMA impairment rating of one percent for the claimant's gait derangement, although it appears under the AMA Guides the rating Dr. Mandrachia may have meant to provide a seven percent impairment rating.

This division has adopted the AMA Guides as a guide for determining permanent partial disabilities under Iowa Code sections 85.34(2) "a" to "s." Other medical opinions, guides, or material evidence may be presented for the purpose of establishing the degree of permanent disability, to which a claimant is entitled and that disability may be more or less than the impairment the AMA Guides indicate. Rule 876 IAC 2.4.

Regardless of whether under the AMA Guides the claimant has a seven or one percent rating to the whole body, the critical factor is whether the claimant has a permanent impairment that substantial impacts his ability to work. The AMA Guides rating is but one factor to consider in evaluating industrial disability.

The claimant is limited to work eight-hour days with two fifteen minute breaks. He should avoid ladders, stairs, and extensive work on uneven surfaces. The claimant has a no formal post high school education. The claimant continues to farm, a grain and cattle operation. The claimant has not had surgery. Considering the factors for industrial disability I find the claimant has suffered a 20 percent loss of earning capacity, the claimant has sustained a 20 percent permanent partial industrial disability entitling him to a total of 100 weeks of permanent partial disability pursuant to Iowa Code section 85.34(2)(u). Permanent partial benefits commence on July 29, 2010.

The parties dispute whether the claimant is entitled to healing period benefits. As I have found the claimant has suffered a permanent impairment and did provide timely notice to the defendants, he is entitled to temporary benefits. The defendants have argued he is not entitled to temporary benefits.

If an employee is temporarily, partially disabled and the employer for whom the employee was working at the time of injury offers to the employee suitable work consistent with the employee's disability the employee shall accept the suitable work, and be compensated with temporary partial benefits. If the employee refuses to accept the suitable work with the same employer, the employee shall not be compensated with temporary partial, temporary total, or healing period benefits during the period of the refusal.

Iowa Code § 85.33(3).

The court in Schutjer v. Algona Manor Care Center, 780 N.W.2d 549 (Iowa 2010) set forth the criteria to determine when a claimant may be denied temporary benefits for refusing work under Iowa Code section 85.33(3) The court stated:

The court of appeals, however, stated the issue was not whether

Schutjer voluntarily quit, but whether Schutjer was offered suitable work

within her restrictions and whether she refused it. Only if she was offered

such work and refused it would she be precluded from receiving temporary

partial, temporary total, or healing period benefits. Concluding the agency

failed to clearly address this issue, the court of appeals remanded the case

so the commissioner could make this determination.

We agree the correct test is (1) whether the employee was offered

suitable work, (2) which the employee refused. If so, benefits cannot be

awarded, as provided in section 85.33(3).

Schutjer, Id., p. 559

The defendant employer did not offer the claimant suitable work. Dr. Stanislav stated the eight-hour restriction was appropriately provided to the claimant. On July 28, 2010, Dr. Stanislav removed the eight-hour restriction. The claimant is entitled to healing period benefits from May 4, 2009 through July 28, 2010.

The claimant has requested penalty benefits.

If weekly compensation benefits are not fully paid when due, section 86.13 requires that additional benefits be awarded unless the employer shows reasonable cause or excuse for the delay or denial. Robbennolt v. Snap-on Tools Corp., 555 N.W.2d 229 (Iowa 1996).

Delay attributable to the time required to perform a reasonable investigation is not unreasonable. Kiesecker v. Webster City Meats, Inc., 528 N.W.2d 109 (Iowa 1995).

It also is not unreasonable to deny a claim when a good faith issue of law or fact makes the employer's liability fairly debatable. An issue of law is fairly debatable if viable arguments exist in favor of each party. Covia v. Robinson, 507 N.W.2d 411 (Iowa 1993). An issue of fact is fairly debatable if substantial evidence exists which would support a finding favorable to the employer. Gilbert v. USF Holland, Inc., 637 N.W.2d 194 (Iowa 2001).

An employer's bare assertion that a claim is fairly debatable is insufficient to avoid imposition of a penalty. The employer must assert facts upon which the commissioner could reasonably find that the claim was "fairly debatable." Meyers v. Holiday Express Corp., 557 N.W.2d 502 (Iowa 1996).

The employer's failure to communicate the reason for the delay or denial to the employee contemporaneously with the delay or denial is not an independent ground for imposition of a penalty, however. Keystone Nursing Care Center v. Craddock, 705 N.W.2d 299 (Iowa 2005).

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, 555 N.W.2d at 238.

In this case, both causation and whether the claimant provided timely notice were fairly debatable. The claimant is not entitled to penalty benefits.

The claimant has requested medical expense as itemized in exhibit 4. As I have found the claimant has proven a work-related injury and these expense are related to the injury the defendants shall pay these expense. The defendants shall reimburse the claimant directly any out-of-pocket expenses, medical travel, and the IME expenses as set forth in exhibit 4.

ORDER

THEREFORE, it is orderED:

The defendants shall pay the clamant healing period benefits from May 4, 2009 through July 28, 2010 at the rate of three hundred forty-one and 82/100 dollars ($341.82) per week.

The defendant shall pay the medical expenses as set forth in this opinion.

The defendants shall pay one hundred (100) weeks of permanent partial disability benefits at the rate of three hundred forty-one and 82/100 dollars ($341.82) per week commencing on July 29, 2010.

The defendants shall pay any past due amounts in a lump sum with interest as provided by law.

The defendants shall pay costs and file subsequent reports as required by this agency.

Signed and filed this _____27th_____ day of June, 2011.

_____

JAMES F. ELLIOTT DEPUTY WORKERS' COMPENSATION COMMISSIONER

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