

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

CYNTHIA DECORMIER,

Claimant,

vs.

U.S. NURSING CORP. D/B/A
FASTAFF, INC.,

Employer,

and

SAFETY NATIONAL CASUALTY CORP.,

Insurance Carrier,

Defendants.

File No. 23007660.01

ARBITRATION DECISION

Headnotes: 1703; 1802; 3001; 4000

STATEMENT OF THE CASE

Cynthia DeCormier, claimant, filed a petition in arbitration seeking workers' compensation benefits from U.S. Nursing Corp. d/b/a Fastaff, Inc., employer, and Safety National Casualty Corp., insurance carrier, as defendants. The hearing was held on May 5, 2023. Pursuant to an order from the Iowa Workers' Compensation Commissioner, this case was heard via videoconference using Zoom with all parties and the court reporter appearing remotely.

The parties filed a hearing report at the commencement of the arbitration hearing. On the hearing report, the parties entered into various stipulations. Those stipulations were accepted and are hereby incorporated into this arbitration decision and no factual or legal issues relative to the parties' stipulations will be raised or discussed in this decision. The parties are now bound by their stipulations.

Cynthia DeCormier was the only witness to testify live at the trial. The evidentiary record also contains claimant's exhibits 1-16 and defendants' exhibits A-P. The parties submitted post-hearing briefs on June 15, 2023, at which time the case was fully submitted to the undersigned.

ISSUES

The parties identified the following disputed issues on the hearing report:

1. Claimant's average weekly wage and weekly rate.
2. Whether claimant is entitled to additional healing period benefits.
3. Whether claimant is entitled to penalty benefits.
4. Assessment of costs.

FINDINGS OF FACT

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

At the time of the hearing the claimant, Cynthia DeCormier (hereinafter "DeCormier") was 59 years old. (Hearing Transcript, p. 14). She resides in Wildwood, Missouri. (Id.). DeCormier graduated from high school in 1982. (See Ex. P, depo p. 8). After high school she attended art school and paramedic training. (Id.). She received her paramedic license in 1992. (Id. at depo p. 9). After that, DeCormier attended nursing school, graduating in 2005. (Id.). Following graduation, De Cormier worked as a nurse in an emergency room and the ICU.¹ (Id. at depo p. 12).

DeCormier started working as a traveling nurse in 2011. (Tr., p. 14; Ex. P, depo p. 11). During her deposition, she testified that Fastaff has been the primary source for her work assignments, but she has also worked for Favorite Staffing and Aya Healthcare. (Ex. P, depo p. 11; Tr., p. 16). DeCormier testified she receives potential work assignments through a recruiter. (Ex. P, depo p. 14). The recruiter sends her an email with available assignments, and if she is interested, she applies for an assignment. (Id.; see also Tr., p. 35). DeCormier signs a separate contract for each assignment she accepts. (Ex. P, depo p. 14). Most contracts guarantee that she will work 48 hours a week, but some offer less hours. (Id. at 15). DeCormier indicated the terms of each contract are specific to the position offered and her rate of pay varies. (Id. at 16). Fastaff pays for her travel to and from the job location and provides her housing for the duration of the contract. (Id. at 17).

DeCormier alleges an injury date of November 12, 2020. At that time, she was working the night shift at Mercy Medical Center in Sioux City, Iowa. (Ex. 5, p. 31). At the hearing, DeCormier testified that she fell in the bathroom of her hotel room, hitting the bottom of the vanity. (Tr., p. 19; Ex. P, depo p. 23). The fall fractured her right wrist. (Ex. P, depo pp. 23-24). The manager of her hotel drove her to the emergency room (ER). (Id. at 25). According to the medical records, DeCormier presented to the Unity Point ER just after noon on November 12, 2020, stating that she fell in the parking lot of her hotel and fell onto her right arm. (Ex. B, p. 2). The attending physician noted a right wrist deformity.

¹In her discovery responses, DeCormier objected to providing the names of past employers, so the names of these hospitals are unknown. (Ex. L, pp. 62, 65; see also Ex. G., p. 42).

(Id.). DeCormier remained at Unity Point through November 14, 2020, though the remainder her treatment records are not in evidence. (Id.). DeCormier testified that she was diagnosed with a commuted fracture. (Tr., p. 19). The physicians in the ER were unable to reduce or set the fracture. (Id.). She was then taken to the Unity Point OR where an open reduction internal fixation of the right distal radius and a right carpal tunnel release surgery were performed. (See Ex. A, p. 1). It is unclear who performed this surgery. (Id.).

DeCormier received follow-up treatment from Timothy Lang, M.D., at Woods Mill Orthopedics, Ltd in Chesterfield, Missouri. (Ex. A, p. 1). DeCormier underwent two more surgeries—a right wrist hardware excision x 1 plate on January 21, 2021, and a right wrist excision 2nd plate on June 2, 2021. (See id.). The records from these surgeries are not in evidence. (Id.). DeCormier also attended physical therapy. (Ex. P, depo p. 28). DeCormier testified the physical therapy helped with her residual symptoms. (Id.).

DeCormier testified that she remained off work with restrictions for close to a year after the wrist injury. (Tr., p. 19; Ex. P, depo p. 29). According to the medical records in evidence, Dr. Lang released her to return to full duty work without restrictions on October 25, 2021. (Ex. A, p. 1). On September 15, 2022, Dr. Lang assigned DeCormier five percent permanent impairment to the right upper extremity for loss of range of motion in the distal radioulnar joint, radiocarpal joint, and soft tissues. (Cl. Ex. 7, p. 43).²

Fastaff accepted liability for the November 12, 2020 injury date and volunteered weekly indemnity benefits. Both parties submitted summaries of the indemnity benefits paid by Fastaff. (Ex. 12; Ex. F). The summaries appear to be identical. At the hearing, the parties stipulated defendants paid DeCormier forty-nine weeks and three days of healing period benefits at the rate of \$966.83. (Tr., p. 8). They also paid \$12,315.40 in permanency benefits. (Id. at 9).

On November 5, 2021, DeCormier accepted a new nursing assignment with Fastaff in Redlands, California. (Ex. 6, p. 36). The assignment started on November 15, 2021. (Id.). At the hearing, DeCormier testified this was the first Fastaff position available to her after Dr. Lang's October 25, 2021 work release. (Tr., p. 24). However, during her deposition DeCormier stated that the recruiter sends her three emails a week with available positions. (Ex. P, depo p. 17). DeCormier also testified that she generally takes a few weeks off between assignments. (Tr., p. 21). She does not receive pay during that time period. (Id.). DeCormier continues to accept assignments with Fastaff. (See Ex. N, p. 75). Since 2021, she has accepted assignments in North Carolina, New York, and California. (Id. at 71, 75-79; Ex. P, depo p. 31). Each of those assignments were approximately three months in duration. (See Ex. N, p. 75).

The parties have a rate disagreement. They agree DeCormier was single and entitled to one exemption at the time of her injury but disagree on how her rate should be

² According to DeCormier's hearing testimony, defendants attempted to procure a rating earlier, but DeCormier was working in California and unable to attend the appointment scheduled. (Tr., p. 36).

calculated. DeCormier contends her rate should be determined under either Iowa Code section 85.36(7) or in the alternative under Iowa Code section 85.36(6). In support of her argument for applying subsection (7), DeCormier points out that she had only worked at Mercy Medical Center for ten weeks before injuring her right upper extremity on November 12, 2020. According to the documents produced by the parties, DeCormier's work assignment at Mercy Medical Center in Sioux City started on September 8, 2020, and was scheduled to end on December 5, 2020, but ended earlier due to her work injury. (Ex. 5, pp. 31-35). Under the language of the contract, DeCormier was scheduled to work 48 hours per week. (CI Ex. 5, p. 33). She was paid \$65.00 per hour base rate, and \$97.50 per hour for a call back rate. (Id. at 31).

Defendants claim DeCormier's rate does not logically fall under either Iowa Code sections 85.36(6) or 85.36(7). (Defendants' Post-Hearing Brief, p. 3). Instead, defendants argue DeCormier's rate should be determined under the "averaging test" articulated by the Iowa Supreme Court in Hanigan v. Hedstrom Concrete Products, Inc., 524 N.W.2d 158, 160 (Iowa 1994). Defendants contend DeCormier was/is a full-time intermittent employee at Fastaff, and this is the correct test for determining the rate of intermittent employees under Iowa Code section 85.36(9). (Id. at 4).

The parties submitted wage documents. (CI Ex. 10, p. 52; Ex. D, pp. 6-33). Those documents show DeCormier received the following payments from Fastaff in 2020:

Week	Pay Period Begin	Pay Period End	Hours	Rate	Actual Earnings	WC Calculated Earnings	WC Week Total
1.	4/12/20	4/18/20	26	\$70	\$1,820.00	\$1,820.00	
	4/12/20	4/18/20	22 (not worked-guaranteed)	\$70	\$1,540.00	\$1,540.00	\$3,360.00
2.	7/5/20	7/11/20	8-OT	\$45	\$540.00	\$360.00	
	7/5/20	7/11/20	.25-OT	\$45	\$16.88	\$11.25	
	7/5/20	7/11/20	40	\$45	\$1,800.00	\$1,800.00	\$2,171.25
3.	7/12/20	7/18/20	8-OT	\$45	\$540.00	\$360.00	
	7/12/20	7/18/20	4-OT	\$45	\$270.00	\$180.00	
	7/12/20	7/18/20	40	\$45	\$1,800.00	\$1,800.00	\$2,340.00
4.	7/19/20	7/25/20	44 (not worked-guaranteed)	\$45	\$1,980.00	\$1,980.00	
	7/19/20	7/25/20	4	\$45	\$180.00	\$180.00	\$2,160.00
5.	7/26/20	8/1/20	3 (sick time)	\$45	\$135.00	\$135.00	
	7/26/20	8/1/20	5	\$45	\$225.00	\$225.00	
	7/26/20	8/1/20 (paid on 8/8/20)	35	\$45	\$1,575.00	\$1,575.00	
	7/26/20	8/1/20 (paid on 8/8/20)	1-OT	\$45	\$67.50	\$45.00	\$1,980.00

Week	Pay Period Begin	Pay Period End	Hours	Rate	Actual Earnings	WC Calculated Earnings	WC Week Total
6.	8/2/20	8/8/20	8-OT	\$45	\$607.50	\$360.00	
	8/2/20	8/8/20	.5-OT	\$45	\$33.75	\$22.50	
	8/2/20	8/8/20	40	\$45	\$1,800.00	\$1,800.00	\$2,182.50
7.	8/9/20	8/15/20	8-OT	\$45	\$540.00	\$360.00	
	8/9/20	8/15/20	40	\$45	\$1,800.00	\$1,800.00	\$2,160.00
8.	8/23/20	8/29/20	3	\$65	\$195.00	\$195.00	\$195.00
9.	9/6/20	9/12/20	8-OT	\$65	\$780.00	\$520.00	
	9/6/20	9/12/20	3-OT	\$65	\$292.50	\$195.00	
	9/6/20	9/12/20	40	\$65	\$2,600.00	\$2,600.00	\$3,315.00
10.	9/13/20	9/19/20	8-OT	\$65	\$780.00	\$520.00	
	9/13/20	9/19/20	2.50-OT	\$65	\$243.75	\$162.50	
	9/13/20	9/19/20	40	\$65	\$2,600.00	\$2,600.00	\$3,282.50
11.	9/20/20	9/26/20	8-OT	\$65	\$780.00	\$520.00	
	9/20/20	9/26/20	4.25-OT	\$65	\$414.38	\$276.25	
	9/20/20	9/26/20	40	\$65	\$2,600.00	\$2,600.00	\$3,396.25
12.	9/27/20	10/3/20	38	\$65	\$2,470.00	\$2,470.00	\$2,470.00
13.	10/4/20	10/10/20	8-OT	\$65	\$780.00	\$520.00	
	10/4/20	10/10/20	4.05-OT	\$65	\$394.88	\$263.25	
	10/4/20	10/10/20	40	\$65	\$2,600.00	\$2,600.00	\$3,383.25
14.	10/11/20	10/17/20	8-OT	\$65	\$780.00	\$520.00	
	10/11/20	10/17/20	4-OT	\$65	\$390.00	\$260.00	
	10/11/20	10/17/20	40	\$65	\$2,600.00	\$2,600.00	\$3,380.00
15.	10/18/20	10/24/20	8	\$65	\$780.00	\$520.00	
	10/18/20	10/24/20	4	\$65	\$390.00	\$260.00	
	10/18/20	10/24/20	40	\$65	\$2,600.00	\$2,600.00	\$3,380.00
16.	10/25/20	10/31/20	44 (not worked-guaranteed)	\$65	\$2,860.00	\$2,860.00	
	10/25/20	10/31/20	4	\$65	\$260.00	\$260.00	\$3,120.00
17.	11/1/20	11/7/20	7 (not worked-guaranteed)	\$65	\$455.00	\$455.00	
	11/1/20	11/7/20	1	\$65	\$103.05	\$65.00	
	11/1/20	11/7/20	40	\$65	\$2,600.00	\$2,600.00	\$3,120.00
18.	11/8/20	11/14/20	6.68 (not worked-guaranteed)	\$75	\$501.00	\$501.00	
	11/8/20	11/14/20	1.32-OT	\$75	\$156.50	\$75.00	
	11/8/20	11/14/20	40	\$75	\$3,000.00	\$3,000.00	\$3,576.00
Totals:					\$52,276.69		\$48,971.75

(Ex. D, pp. 6-33).

Based on this information, DeCormier calculated her rate to be \$1,723.46 under Iowa Code section 85.36(7)³ and \$1,584.38 under Iowa Code section 85.36(6). (CI Ex. 11, p. 53). In calculating these figures, DeCormier excluded the week of August 23 – August 29, 2020, as non-representative of her normal earnings. (See CI Ex. 11, p. 53). The undersigned sees nothing in the record to contradict this assertion and agrees that the week ending on August 29, 2020 should be excluded. Defendants contend DeCormier's rate is actually \$571.05 under Iowa Code section 85.36(9) and/or under the "averaging test" used in Hanigan. (Ex. H, pp. 43-45).

In discovery, DeCormier objected to defendants' request for copies of her tax returns as "not reasonably calculated to lead to the discovery of admissible evidence." (Ex. G, p. 42). During the hearing, however, she admitted that she did not file income taxes in 2020. (Tr., p. 39). Copies of DeCormier's W-2s show that she earned \$56,718.15 with Fastaff in 2019 and \$48,923.12 in 2020. (Ex. E, pp. 34-35).

Based upon the evidence presented, I find DeCormier was a full-time intermittent contract employee at Fastaff at the time of the injury.

DeCormier had only worked at Mercy Medical Center in Sioux City for ten weeks when the injury occurred. However, Fastaff was her actual employer, not Mercy Medical Center. According to the wage information provided by the parties, DeCormier had worked for Fastaff for more than 13 weeks at the time of her injury. DeCormier's prior assignment ended on August 15, 2020, quite close in time to the start of her position at Mercy Medical Center. Based on these facts, I find DeCormier's rate should be calculated under Iowa Code section 85.36(6). Excluding the week ending on August 29, 2023, I find DeCormier's gross earnings to be \$37,329.50 for the thirteen representative weeks of completed work prior to the November 12, 2020 injury date. This produces an average weekly wage of \$2,871.50 and a weekly rate of \$1,562.60 with DeCormier listed as single and receiving one exemption.

CONCLUSIONS OF LAW

The primary issue to be resolved is what is DeCormier's weekly rate of compensation. Iowa Code section 85.36 states the basis of compensation is the weekly earnings of the employee at the time of the injury. The section defines weekly earnings as the gross salary, wages, or earnings which an employee would have been entitled to had the employee worked the customary hours for the full pay period in which the employee was injured as the employer regularly required for the work or employment. The various subsections of section 85.36 set forth methods of computing weekly earnings depending upon the type of earnings and employment. The parties have put forth three possible subsections for calculating DeCormier's rate in this case—subsections (6), (7), and (9). The language of those subsections reads as follows:

³ In her post-hearing brief DeCormier argues this figure was an under calculation and her actual rate is \$1,747.22 due to a rate increase on November 14, 2020. (Claimant's Post-Hearing Brief, pp. 4-5).

(6). In the case of an employee who is paid on a daily or hourly basis, or by the output of the employee, the weekly earnings shall be computed by dividing by thirteen the earnings, including shift differential pay but not including overtime or premium pay, of the employee earned in the employ of the employer in the last completed period of thirteen consecutive calendar weeks immediately preceding the injury. If the employee was absent from employment for reasons personal to the employee during part of the thirteen calendar weeks preceding the injury, the employee's weekly earnings shall be the amount the employee would have earned had the employee worked when work was available to other employees of the employer in a similar occupation. A week which does not fairly reflect the employee's customary earnings shall be replaced by the closest previous week with earnings that fairly represent the employee's customary earnings.

(7). In the case of an employee who has been in the employ of the employer less than thirteen calendar weeks immediately preceding the injury, the employee's weekly earnings shall be computed under subsection 6, taking the earnings, including shift differential pay but not including overtime or premium pay, for such purpose to be the amount the employee would have earned had the employee been so employed by the employer the full thirteen calendar weeks immediately preceding the injury and had worked, when work was available to other employees in a similar occupation. If the earnings of other employees cannot be determined, the employee's weekly earnings shall be the average computed for the number of weeks the employee has been in the employ of the employer.

. . . .

(9). If an employee earns either no wages or less than the usual weekly earnings of the regular full-time adult laborer in the line of industry in which the employee is injured in that locality, the weekly earnings shall be one-fiftieth of the total earnings which the employee has earned from all employment during the twelve calendar months immediately preceding the injury.

Iowa Code § 85.36(6)(7) and (9).

Defendants contend that DeCormier's rate should be determined under Iowa Code section 85.36(9).⁴ However, before utilizing the methodology under subsection 9, the agency must make a preliminary factual finding that the employee either (1) earns no

⁴ In their brief, defendants also claim that DeCormier's rate should be calculated using the "averaging test" in Hanigan v. Hedstrom Concrete Products, Inc., 524 N.W.2d 158, 160 (Iowa 1994). (Defendants' Post-Hearing Brief, pp. 3-4). However, besides quoting the Court's statement that rates should fairly reflect "the claimant's probable future earning loss," defendants do not explain how the "averaging test" should be applied to the facts of this case outside of Iowa Code section 85.36(9).

wages or (2) earns “less than the usual weekly earnings of the regular full-time adult laborer in the line of industry in which the employee is injured in that locality.” Swiss Colony, Inc. v. Deutmeyer, 789 N.W.2d 129, 134 (Iowa 2010) (quoting King v. City of Mt. Pleasant, 474 N.W.2d 564, 566 (Iowa 1991)). In this case, there is no evidence in the record indicating DeCormier earned no wages or less than the usual weekly earnings of a regular full-time traveling nurse. According to the parties’ exhibits, DeCormier earned wages from Fastaff prior to the alleged injury, and defendants did not introduce any evidence that those wages were less than those of a regular full-time traveling nurse. (See Ex. D, pp. 6-33). DeCormier did not file any tax returns in 2020, and though she testified to working for other temporary agencies, defendants did not introduce any evidence that those other assignments took place in 2020. DeCormier’s claim does not meet the requirements of subsection 9.

Defendants point to the Court of Appeal’s decision in Lopez v. Midstates Horse Shows, Inc., 776 N.W.2d 302 (Table) (Iowa Ct App. 2009), for the proposition that the above listed preliminary findings are unnecessary because the workers’ compensation statutes are “meant to be applied, not mechanically nor technically, but flexibly, with a view always to achieving the ultimate objective of reflecting fairly the claimant’s probable future earning loss.” Id. (citing to King, 474 N.W.2d 566). That, however, was not the Court’s holding in Lopez. In Lopez, the Commissioner found that the claimant was semi-retired and had worked for multiple employers the year he was injured; the Commissioner reasoned that a semi-retired worker earns less than one that is available full time. Lopez v. Midstates Horse Shows, Inc., File No. 5017146 (App. Feb. 22, 2008). The Court of Appeals determined this factual finding was supported by substantial evidence in the record and was sufficient to determine Lopez earned less than the usual weekly earnings of a regular full-time laborer. Lopez, 776 N.W.2d at *6. In this case, DeCormier is not semi-retired and there is no evidence she worked for another employer in 2020. The holding in Lopez is not applicable to this case.

As found above, DeCormier was paid hourly and worked for Fastaff for more than thirteen weeks prior to the work injury. Given this, her rate will be calculated under Iowa Code section 85.36(6). DeCormier’s rate is \$1,562.60.

The next issue that must be determined is whether DeCormier is entitled to additional healing period benefits. The parties stipulated DeCormier was paid 49 weeks and three days of healing period benefits at the rate of \$966.83. (Tr., p. 8). According to the hearing report, those benefits were paid through October 25, 2021. (See Hearing Report). DeCormier, however, argues she is entitled to healing period benefits through November 15, 2021—the first day of work under her new contract with Fastaff. (Tr., pp. 24-25).

Iowa Code section 85.34(1) governs healing period benefits. It states as follows:

[T]he employer shall pay to the employee compensation for a healing period, as provided in section 85.37, beginning on the first day of disability after the injury, and until the employee has returned to work or it is medically

indicated that significant improvement from the injury is not anticipated or until the employee is medically capable of returning to employment substantially similar to the employment in which the employee was engaged at the time of the injury, whichever occurs first.

Iowa Code § 85.34(1).

Dr. Lang released DeCormier to return to work without restrictions on October 25, 2021. (Ex. A, p. 1). On November 2, 2021, DeCormier accepted a new nursing assignment with Fastaff in Redlands, California. (Ex. 6, p. 36). That assignment started on November 15, 2021. (Id.).

In their post-hearing brief defendants argue DeCormier is only entitled to healing period benefits through October 25, 2021, because Dr. Lang's full duty release essentially placed DeCormier at maximum medical improvement (MMI), thus triggering the end of her healing period under Code section 85.34(1). (Defendants' Post-Hearing Brief, p. 11). DeCormier contends that Dr. Lang's medical note doesn't actually state she is at MMI and also indicates she needs a follow-up appointment in three months. (Claimant's Post-Hearing Brief, p. 6; Ex. A, p. 1). DeCormier argues she is entitled to healing period benefits until her actual return to work on November 15, 2021. (Claimant's Post-Hearing Brief, p. 6). Neither argument is correct. Under the language of Iowa Code section 85.34(1), "whichever [triggering event] occurs first," ends the claimant's entitlement to healing period benefits. Id.; see also, Evenson v. Winnebago Industries, Inc., 881 N.W.2d 360, 372-73 (Iowa 2016). When DeCormier was released to full duty work on October 25, 2021, she was "medically capable of returning to employment substantially similar to the employment [she] was engaged in at the time of the injury." Iowa Code § 85.34(1). This is the first triggering event after the start of DeCormier's healing period. DeCormier is not entitled to additional healing period benefits.

DeCormier also asserts a claim for penalty benefits. Specifically, DeCormier claims she is entitled to penalty benefits because she was "grossly underpaid benefits and Defendants made no attempt" to correct her rate after being apprised of the deficiency. (Claimant's Post-Hearing Brief, p. 7). Defendants counter that DeCormier was uncooperative during discovery and refused to provide necessary and relevant rate information. (Defendants' Post-Hearing Brief, pp. 9-10). Defendants further argue that DeCormier's correct rate is fairly debatable under the statutory language and a penalty is not warranted.

Penalty benefits are created by Iowa Code section 86.13, which provides two clear prerequisites before penalty benefits can be imposed: (1) "a delay in commencement or termination of benefits" that occurs (2) "without reasonable or probable cause or excuse." Iowa Code § 86.13. When the prerequisites have been met, the Iowa Code instructs the commissioner "shall award" penalty benefits "up to fifty percent of the amount of benefits that were unreasonably delayed or denied." Id. "To receive a penalty benefit award under section 86.13, the claimant must first establish a delay in the payment of benefits." Schadendorf v. Snap-On Tools Corp., 757 N.W.2d 330, 334 (Iowa 2008).

DeCormier has established an underpayment in benefits, which is essentially a delay in the payment of her full benefits. See Robbenolt v. Snap-on Tools Corp., 555 N.W.2d 229, 237 (Iowa 1996) (finding an underpayment in the absence of an excuse required the commissioner to apply a penalty). “The burden then shifts to the employer to prove a reasonable cause or excuse for the delay.” Schadendorf, 757 N.W.2d at 334–35. The Iowa Supreme Court has explained this second statutory requirement:

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.”

Keystone Nursing Care Ctr. v. Craddock, 705 N.W.2d 299, 307 (Iowa 2005).

The reasonableness of the employer's actions “does not turn on whether the employer was right. The issue is whether there was a reasonable basis for the employer's position that no benefits were owing.” Id. at 307–08. Stated another way, the “focus is on the existence of a debatable issue, not on which party was correct.” Bellville v. Farm Bureau Mut. Ins. Co., 702 N.W.2d 468, 473–74 (Iowa 2005). In Rodda v. Vermeer Mfg., 734 N.W.2d 480, 483 (Iowa 2007), the court explained:

A reasonable basis for denying insurance benefits exists if the claim is “fairly debatable” as to either a matter of fact or law. A claim is “fairly debatable” when it is open to dispute on any logical basis. Whether a claim is “fairly debatable” can generally be determined by the court as a matter of law. If the court determines that the defendant had no reasonable basis upon which to deny the employee's benefits, it must then determine if the defendant knew, or should have known, that the basis for denying the employee's claim was unreasonable.

Id. (Internal citations and quotations omitted.) In City of Madrid v. Blasnitz, 742 N.W.2d 77, 84 (Iowa 2007), the Iowa Supreme Court stated that when there are facts that create a genuine dispute between the parties, the claimant's case is fairly debatable as a matter of law. DeCormier's claim was originally filed in a different state. Additionally, at the time of her injury, she was a full-time intermittent contract employee. Intermittent employment does not fit easily into any of the rate categories listed in Iowa Code section 85.34. See Lopez, 776 N.W.2d at *6 (stating “Lopez does not fit perfectly into a category”). Further, the undersigned finds some merit in defendants' contention that DeCormier was uncooperative during discovery, and that her refusal to provide necessary financial information slowed down the process of investigating her rate under Iowa law. DeCormier objected to defendants' request for her tax information, as well as questions about her marital and exemption status, and employment history/status. (Ex. G, p. 42; Ex. L, pp. 60, 62, 65). These were relevant areas of inquiry given the disputed issues in this case. See Iowa Code § 85.36(9) (stating weekly earnings are one-fiftieth of claimant's total earnings in the twelve months preceding the injury) (emphasis added). Given the above facts, I

find DeCormier's rate was fairly debatable; she has not proven entitlement to penalty benefits for defendants' underpayment.

DeCormier seeks the award of costs outlined in claimant's exhibit 16. Costs are to be assessed at the discretion of the deputy commissioner hearing the case. See 876 Iowa Administrative Rule 4.33; Iowa § Code 86.40. Administrative Rule 4.33(6) provides:

[c]osts taxed by the workers' compensation commissioner or a deputy commissioner shall be (1) attendance of a certified shorthand reporter or presence of mechanical means at hearings and evidential depositions, (2) transcription costs when appropriate, (3) costs of service of the original notice and subpoenas, (4) witness fees and expenses as provided by Iowa Code sections 622.69 and 622.72, (5) the costs of doctors' and practitioners' deposition testimony, provided that said costs do not exceed the amounts provided by Iowa Code sections 622.69 and 622.72, (6) the reasonable costs of obtaining no more than two doctors' or practitioners' reports, (7) filing fees when appropriate, including convenience fees incurred by using the WCES payment gateway, and (8) costs of persons reviewing health service disputes.

876 IAC 4.33(6).

DeCormier incurred costs of \$103.00 for her filing fee and \$12.53 for service of the petition. (CI Ex. 16, p. 85). DeCormier was successful in challenging defendants' rate calculation. Given this, she is due the cost of her filing fee and service of the same. DeCormier also seeks reimbursement for the cost of ordering copies of her deposition and the deposition of employer's representative, Marjorie Wheeler. (*Id.*). Ms. Wheeler's deposition did not reveal any new and/or relevant information about DeCormier's rate issue. It was not helpful in this case. It is not appropriate to assess Wheeler's deposition transcript as a cost. DeCormier also seeks the cost of her deposition transcript. DeCormier did not even submit a copy of the deposition transcript as an exhibit at hearing—it was submitted by the defendants. Given this, I conclude it would not be appropriate to assess DeCormier's deposition transcript as a cost.

I assess costs totaling \$115.53.

ORDER

THEREFORE, IT IS ORDERED:

DeCormier's rate is \$1,562.60 as calculated under Iowa Code section 85.36(6).

Defendants shall pay DeCormier 12.5 weeks of permanent partial disability benefits at the rate of one thousand five hundred sixty-two and 60/100 dollars (\$1,562.60) per week commencing on October 25, 2021. Defendants, however, are entitled to a credit of \$12,315.40 for permanent partial disability benefits paid prior to hearing.


Defendants shall pay DeCormier 49 weeks and 3 days of healing period benefits at the rate of one thousand five hundred sixty-two and 60/100 (\$1,562.60) for the time period from November 12, 2020, through October 24, 2021. Defendants, however, are entitled to a credit for the 49 weeks and 3 days of permanent partial disability benefits already paid prior to hearing.

Defendants shall pay accrued weekly benefits in a lump sum together with interest at an annual rate equal to the one-year treasury constant maturity published by the federal reserve in the most recent H15 report settled as of the date of injury, plus two percent.

Defendants shall pay costs of one hundred and fifteen dollars and fifty-three cents. (\$115.53).

Defendants shall file subsequent reports of injury (SROI) as required by this agency pursuant to rules 876 IAC 3.1 (2) and 876 IAC 11.7.

Signed and filed this 28th day of September, 2023.


AMANDA R. RUTHERFORD
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served as follows:

Matthew G. Novak (via WCES)

Stephen W. Spencer (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, 10A) 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.