BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

KENNON HARTER, Claimant, vs. RAYDIAN PROPERTIES, Employer, and UNKNOWN, Insurance Carrier, Defendants.	FILED JAN 10 2019 WORKERS COMPENSATION	File No. 5064995 ARBITRATION DECISION Head Note Nos.: 2501, 1701

STATEMENT OF THE CASE

Claimant Kennon Harter filed a petition in arbitration on September 7, 2018, alleging she sustained an injury to her left shoulder and body as a whole while working for the defendant, Raydian Properties ("Raydian"), on June 30, 2018. Harter filed a proof of service on September 7, 2018, showing she served Raydian with the petition by U.S. mail on September 5, 2018. Despite being properly served with a copy of the petition, Raydian did not enter an appearance, answer, or file another responsive pleading with this agency to defend Harter's claim.

On October 17, 2018, Hart sent a notice of intent to file written application for default to Raydian by certified mail. On December 3, 2018, Harter filed a motion for entry of default against Raydian. On December 19, 2018, a ruling was entered granting the motion for default and closing the record to further activity from Raydian. Raydian was served with the ruling by regular and certified mail. A telephone hearing for consideration and award of appropriate relief was scheduled for January 4, 2019.

On January 4, 2019, a telephone hearing was held for consideration and award of appropriate relief. Attorney Matthew Petrzelka represented Harter. Harter appeared and testified. Exhibits 1 through 3 were admitted into the record. No communication was received from Raydian prior to the hearing. Raydian did not attend the hearing. The hearing was recorded through digital means pursuant to rule 876 Iowa Administrative Code 4.49. A transcript of the hearing will not be prepared by this agency. If any party wishes to appeal this decision, that party is charged with requesting a copy of the digital audio recording and obtaining a transcript to be prepared and filed by a certified shorthand reporter. Harter submitted a Hearing Report identifying the issues, which was received into the record.

STIPULATIONS

1. An employer-employee relationship existed between Raydian and Harter at the time of the alleged injury.

2. Harter sustained an injury on June 30, 2018, which arose out of and in the course of her employment with Raydian.

3. The alleged injury is a cause of temporary disability during a period of recovery.

4. If the injury is found to be the cause of permanent disability, the disability is a scheduled member disability to the left shoulder.

5. At the time of the alleged injury Harter's gross earnings were $900.00 per week, she was single and entitled to four exemptions.

6. Costs have been paid.

ISSUES

1. Is Harter entitled to alternate medical care?

2. Is Harter entitled to reimbursement for medical expenses?

3. Is Harter entitled to an award of penalty benefits?

4. Should costs be assessed against Raydian?

FINDINGS OF FACT

Harter graduated from high school in 1996. (Harter Testimony) Harter attended Kirkwood Community College to become a surgical technologist. (Harter Testimony) Harter did not complete one class and failed to graduate. (Harter Testimony) Harter is divorced and is a single parent of three children. (Harter Testimony) At the time of the hearing Harter was forty-one. (Harter Testimony)

Harter is a certified nursing assistant ("CNA") and a certified medication assistant ("CMA"). (Harter Testimony) Harter is taking courses and hopes to become a registered nurse. (Harter Testimony)

Harter has experience working as an assistant preschool teacher. (Harter Testimony) She also worked in her mother's restaurant where she waited tables, cooked, ordered food and supplies, and did the scheduling. (Harter Testimony) For most of her career Harter has worked as a CNA/CMA for residential care facilities, taking care of patients.

Raydian hired Harter as a med tech in September 2016, and paid her $12.50 per hour. (Harter Testimony) Due to the resignation of the executive director and wellness director, Raydian assigned Harter additional duties and increased her pay to $15.00 per hour. (Harter Testimony) Raydian changed Harter's title to Wellness Leader. (Harter Testimony)

On June 30, 2018, Harter and another staff member were assisting a resident in transferring from his bed to a wheelchair. (Harter Testimony) The resident resisted the transfer and when he resisted, Harter felt a pop and pain in her left shoulder. (Harter Testimony) Harter reported her work injury to Raydian. (Harter Testimony)

Raydian sent Harter to UnityPoint Clinic Urgent Care on June 30, 2018. (Exhibit 1) Harter was diagnosed with a left shoulder injury, and restricted from working that day and the next day. (Ex. 1) The medical provider imposed a ten pound lifting restriction and ordered Harter to apply ice and heat. (Ex. 1)

Harter was referred to William Manely, a PA-C, with Work Well at UnityPoint Health by Raydian. (Ex. 2) Harter attended three appointments at Work Well on July 16, 2018, August 1, 2018, and August 7, 2018. (Ex. 2) Following each appointment Manely imposed restrictions for Harter's left upper extremity. (Ex. 2) Manely also ordered physical therapy. (Ex. 2; Harter Testimony) The date of her last appointment Manely imposed restrictions for Harter's left arm of no lifting or carrying over ten pounds, no reaching overhead or across her chest, and no forceful pushing or pulling. (Harter Testimony) Harter testified Manely wanted to refer her to an orthopedic surgeon following magnetic resonance imaging, which she received. (Harter Testimony) Harter testified Raydian has refused to pay for her medical bills and has not authorized any additional care. (Harter Testimony) Harter has continued to perform exercises she learned in physical therapy at home. (Harter Testimony)

Harter continued to work for Raydian until the business was sold to Senior Housing on July 27, 2018. (Harter Testimony) Harter testified she worked sixty hours per week for Raydian until the business was sold. (Harter Testimony)

Harter did not accept a position with Senior Housing, and moved to another nursing home in Cedar Rapids. (Harter Testimony) Harter testified she had difficulty finding a new position because she had work restrictions and employers were leery of hiring someone who had sustained a work injury. (Harter Testimony)

Harter's nephew has chronic mental illness and her father is ill. (Harter Testimony) Harter moved from Cedar Rapids to Cherokee, Iowa, to care for her nephew and father. (Harter Testimony) In November 2017, Accura Healthcare hired Harter as a CMA. (Harter Testimony) Harter earns $16.50 per hour. (Harter Testimony) Harter has not requested accommodations from Accura Healthcare, but reported she follows her restrictions by using her right arm to lift patients. (Harter Testimony)

Harter testified she continues to have problems with her left shoulder. (Harter Testimony) Harter requested additional medical care to determine what is wrong with her shoulder, and to receive treatment to improve the condition of her left shoulder. (Harter Testimony)

CONCLUSIONS OF LAW

I. Alternate Medical Care and Medical Expenses

Harter seeks to recover medical expenses totaling $803.00, set forth in Exhibit 3. An employer is required to 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. Iowa Code § 85.27(1) (2017). The employer has the right to choose the provider of care, except when the employer has denied liability for the injury. Id.

"The treatment must be offered promptly and be reasonably suited to treat the injury without undue inconvenience to the employee." Id. § 85.27(4). If the employee is dissatisfied with the care, the employee should communicate the basis for the dissatisfaction to the employer. Id. If the employer and employee cannot agree on alternate care, the commissioner "may, upon application and reasonable proofs of necessity therefor, allow and order other care." Id.

The employee bears the burden of proving the care authorized by the employer is unreasonable. R.R. Donnelly & Sons v. Barnett, 670 N.W.2d 190, 196 (Iowa 2003). "The employer's obligation under the statute turns on the question of reasonable necessity, not desirability." Long v. Roberts Dairy Co., 528 N.W.2d 122, 124 (Iowa 1995). The care authorized by the employer is unreasonable if it is ineffective, inferior, or less extensive than the care requested by the employee. Pirelli-Armstrong Tire Co. v. Reynolds, 562 N.W.2d 433, 437 (Iowa 1997). The determination of whether care is reasonable is a question of fact. Long, 528 N.W.2d at 123.

Harter promptly reported her injury to Raydian the day that it occurred. Raydian initially arranged for medical treatment for Harter at Work Well in Cedar Rapids. (Harter Testimony) Raydian has not paid for any of the treatment, and has refused Harter's requests for additional treatment. (Harter Testimony) At the time of the hearing Raydian had not paid for any treatment, and had refused to authorize additional treatment. Raydian has acted unreasonably. Harter is entitled to recover the $803.00 in medical bills set forth in Exhibit 3. Raydian is also responsible for all causally related medical care necessitated by the work injury, including future care.

II. Penalty

Harter seeks an award of penalty benefits. Iowa Code section 86.13 governs compensation payments. Under the statute's plain language, if there is a delay in payment absent "a reasonable or probable cause or excuse," the employee is entitled to

penalty benefits, of up to fifty percent of the amount of benefits that were denied, delayed, or terminated without reasonable or probable cause or excuse. Iowa Code § 86.13(4); see also Christensen v. Snap-On Tools Corp., 554 N.W.2d 254, 260 (Iowa 1996) (citing earlier version of the statute). "The application of the penalty provision does not turn on the length of the delay in making the correct compensation payment." Robbennolt v. Snap-On Tools Corp., 555 N.W.2d 229, 236 (Iowa 1996). If a delay occurs without a reasonable excuse, the commissioner is required to award penalty benefits in some amount to the employee. Id.

The statute requires the employer or insurance company to conduct a "reasonable investigation and evaluation" into whether benefits are owed to the employee, the results of the investigation and evaluation must be the "actual basis" relied on by the employer or insurance company to deny, delay, or terminate benefits, and the employer or insurance company must contemporaneously convey the basis for the denial, delay, or termination of benefits to the employee at the time of the denial, delay, or termination of benefits. Iowa Code § 86.13(4). An employer may establish a "reasonable cause or excuse" if "the delay was necessary for the insurer to investigate the claim," or if "the employer had a reasonable basis to contest the employee's entitlement to benefits." Christensen, 554 N.W.2d at 260. "A 'reasonable basis' for denial of the claim exists if the claim is 'fairly debatable.'" Burton v. Hilltop Care Ctr., 813 N.W.2d 250, 267 (Iowa 2012). "Whether a claim is 'fairly debatable' can generally be determined by the court as a matter of law." Id. (quoting Rodda v. Vermeer Mfg., 734 N.W.2d 480, 483 (Iowa 2007)). The issue is whether the employer had a reasonable basis to believe no benefits were owed to the claimant. Id. "If there was no reasonable basis for the employer to have denied the employee's benefits, then the court must 'determine if the defendant knew, or should have known, that the basis for denying the employee's claim was unreasonable.'" Id. (quoting Rodda, 734 N.W.2d 483).

Benefits must be paid beginning on the eleventh day after the injury, and "each week thereafter during the period for which compensation is payable, and if not paid when due," interest will be imposed. Iowa Code § 85.30. In Robbennolt, the Iowa Supreme Court noted, "[i]f the required weekly compensation is timely paid at the end of the compensation week, no interest will be imposed . . . . As an example, if Monday is the first day of the compensation week, full payment of the weekly compensation is due the following Monday." Robbennolt, 555 N.W.2d at 235. A payment is "made" when the check addressed to the claimant is mailed, or personally delivered to the claimant. Meyers v. Holiday Express Corp., 557 N.W.2d 502, 505 (Iowa 1996) (abrogated by Keystone Nursing Care Ctr. v. Craddock, 705 N.W.2d 299 (Iowa 2005) (concluding the employer's failure to explain to the claimant why it would not pay permanent benefits upon the termination of healing period benefits did not support the commissioner's award of penalty benefits)).

Harter has not asserted she is owed any temporary or permanent benefits from Raydian. While Raydian has refused to pay her medical bills, Harter has not alleged

Raydian has failed to timely pay any compensation benefits. Harter is not entitled to an award of penalty benefits.

III. Costs

Harter seeks to recover the $100.00 filing fee. Iowa Code section 86.40, provides, "[a]ll costs incurred in the hearing before the commissioner shall be taxed in the discretion of the commissioner." Rule 876 IAC 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, (8) costs of persons reviewing health service disputes.

The administrative rule expressly allows for the recovery of the filing fee. Raydian is assessed the $100.00 filing fee.

ORDER

IT IS THEREFORE ORDERED, THAT:

Raydian shall pay the medical bills set forth in Exhibit 3, totaling eight hundred three and 00/100 dollars ($803.00).

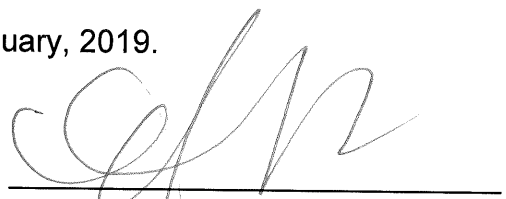
Harter is entitled to alternate care for her left shoulder.

Defendant is assessed one hundred and 00/100 dollars ($100.00) for the filing fee.

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

A copy of this decision is being provided to the Workers' Compensation Commissioner to determine whether further action should take place under Iowa Code section 87.19 for failure to have workers' compensation insurance.

Signed and filed this 10th day of January, 2019.



HEATHER L. PALMER
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

Copies To:

Matthew J. Petrzelka
Attorney at Law
1000 – 42 ND St. SE, Ste. A
Cedar Rapids, IA 52403
mpetrzelka@petrzelkabreitbach.com

Raydian Properties
38 N. Central Ave.
Ramsey, NJ 07628
CERTIFIED AND REGULAR MAIL

HLP/kjw

Right to Appeal: This decision shall become final unless you or another interested party appeals within 20 days from the date above, pursuant to rule 876-4.27 (17A, 86) of the Iowa Administrative Code. The notice of appeal must be in writing and received by the commissioner's office within 20 days from the date of the decision. The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday. The notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 1000 E. Grand Avenue, Des Moines, Iowa 50319-0209.