

IN THE IOWA DISTRICT COURT
IN AND FOR POLK COUNTY

REGIONAL CARE HOSPITAL PARTNERS,
INC., and ZURICH AMERICAN
INSURANCE COMPANY,
Petitioners,

v.

ROBERTA MARRS,
Respondent.

CASE NO.: CVCV057489

ORDER:

Ruling on Petition for
Judicial Review

This matter came before the Court on a petition for judicial review from a final decision of the Iowa Workers' Compensation Commission. A hearing was held on June 28, 2019. Petitioners, Regional Care Hospital Partners, Inc. and Zurich American Insurance Company (collectively "Regional Care"), appeared through attorney Brittney Steel. Respondent, Roberta Marrs ("Marrs"), appeared through attorney John Dougherty. Upon review of the court file and applicable law, the Court enters the following order:

I. BACKGROUND FACTS AND PROCEDURAL POSTURE

On July 28, 2014, Marrs suffered a work-related injury when she tried to prevent a very heavy patient from falling down. At the time, Marrs was employed as a nurse at Ottumwa Regional Health Center. Marrs explained that on the date of the incident, she was helping a patient back to their bed. The patient started to fall towards her, and in assisting the patient to stay upright and get back into bed, Marrs was injured. Following the incident, Marrs went to the emergency room down the hallway and communicated that she had pain in her back and neck.

On August 1, 2014, at Marrs' first appointment at Occupational Medicine, she reported lower back pain that "radiates up [the] spine." Marrs did not mention having neck pain at this time. Marrs was diagnosed with a thoracic strain and a high lumbar strain. Marrs' subsequent medical records from Occupational Medicine mainly focus on her thoracic spine, but there are also references to neck spasms and scapular pain.

Marrs' treatment plan from August 2014 to November 2014 included physical and massage therapy, prescription medications, injections, and work restrictions. Marrs' physical therapy records at Ottumwa Regional Health Care Outpatient Physical

Rehabilitation and Universal Therapy Group document that Marrs often reported pain and received therapy for her upper back and neck.

On November 17, 2014, Occupational Medicine released Marrs to return to light-duty work. Regional Care did not make Marrs an offer of light-duty work following this date, and Marrs testified that Regional Care also stopped all payment of medical expenses and temporary benefits without communicating to her that they were stopping such payments or the reason why.

Regional Care authorized no additional care for Marrs until February 2015 when they scheduled an independent medical examination (IME) for Marrs with Dr. Chad Abernathey. At her March 16, 2015, appointment with Dr. Abernathey, Marrs noted she was experiencing chronic neck and upper back pain which began on July 28, 2014. Dr. Abernathey recommended that Marrs have an MRI of her cervical spine. After undergoing an MRI, Marrs followed-up with Dr. Abernathey on April 6, 2015. Dr. Abernathey indicated that the MRI study showed that Marrs had focal disc degeneration with osteophyte formation and stenosis at C6-C7. Dr. Abernathey discussed a C6-C7 anterior cervical discectomy and fusion (ACDF) surgery with Marrs.

In an April 13, 2015, letter to Regional Care's counsel, Dr. Abernathey stated that were Marrs to pursue surgical intervention, he would not consider it to be a work-related procedure. In this letter, Dr. Abernathey's diagnosis was that Marrs had a cervical strain and indicated Marrs reached Maximum Medical Improvement (MMI) six months from the date of her injury. Dr. Abernathey also stated that he believed Marrs suffered no permanent impairment and no physical restrictions. On April 27, 2017, at the behest of Regional Care's counsel, Dr. Abernathey confirmed in a letter that he did not recommend any additional medical treatment for Marrs' cervical strain.

Marrs consulted with Dr. Sarkis Kaspar, apparently using her private health insurance, on September 1, 2015. Dr. Kaspar discussed treatment options with Marrs, which included cervical epidural steroid injections (ESI) or an ACDF surgery. Marrs decided to pursue the ESI option, which was performed at the Pain Medicine Clinic on January 4, 2016.

Dr. Kaspar indicated in a letter dated December 22, 2015, that, in his opinion, Marrs' July 28, 2014, work-injury either caused an injury to Marrs' neck or materially

aggravated, lighted-up, or accelerated some pre-existing degenerative condition which resulted in the pain she sought treatment for. Dr. Kaspar's opinion was based on a number of factual assumptions presented to him, which included: that Marrs did not have prior neck problems and that since the work-injury, Marrs' neck had not been pain free.

After Marrs' ESI, she decided to pursue surgical treatment with Dr. Kaspar. Before the surgery, Dr. John Kanis, Marrs's primary care physician, referred Marrs to Dr. Cassim Igram for a second opinion. Marrs first met with Dr. Igram on June 20, 2016. Dr. Igram recommended that Marrs get a repeat MRI of her cervical spine. Marrs met with Dr. Igram again on July 26, 2016, to review her condition and the MRI scan. Dr. Igram recommended a possible C6-C7 ACDF surgery. Marrs returned to Dr. Igram on November 7, 2016, for another appointment. At this appointment, Dr. Igram told Marrs that the surgery would only address her arm pain and not her neck pain and headaches. Marrs still wished to proceed with the surgery, but Marrs was unable to undergo the scheduled surgery due to personal health issues.

On February 13, 2017, Marrs had an IME with Dr. Todd Harbach at the request of Regional Care. Following his examination, Dr. Harbach diagnosed Marrs with a broad-based disc bulge and uncovertebral osteophyte complex that causes neural foraminal stenosis. Dr. Harbach also noted that Marrs had intractable interscapular pain and mild to moderate cervical spine pain. With respect to the question of causation, Dr. Harbach noted that: "[He] agree[s] with the opinion of Dr. Kaspar. In his opinion, the degenerative disc condition described in the patient's cervical spine existed on the date of her injury, but the injury 'lit up' or significantly aggravated the condition, which causes her current symptom complex." Dr. Harbach noted that Marrs had not reached MMI for her work-injury and also recommended ACDF surgery.

At hearing, Marrs testified that the lumbar pain she experienced following her injury was resolved, but the pain in her thoracic spine and neck continued to bother her.

On April 4, 2017, this case was arbitrated before Iowa Deputy Workers' Compensation Commissioner Stan McElderry. In his Arbitration Decision, Deputy McElderry found that: Marrs sustained a work-related injury to the thoracic and cervical portions of her spine on July 28, 2014; Marrs' injury entitled her to a running award of

healing period benefits from October 22, 2014, at a weekly rate of \$559.49; future medical benefits and reimbursement for past medical expenses; and that Marrs was entitled to penalty benefits of \$50,000. Regional Care filed an intra-agency appeal.

On appeal, Iowa Workers' Compensation Commissioner Joseph S. Cortese II, after a de novo review, entered an Appeal Decision affirming Deputy McElderry's findings, but modified his penalty assessment. The Commissioner reduced Marrs' penalty benefits to \$39,000. Regional Care filed a Petition for Judicial Review.

II. STANDARD OF REVIEW

Final decisions rendered by the Iowa Workers' Compensation Commission are reviewed under Iowa Code Chapter 17A, the Iowa Administrative Procedures Act.¹ "Under the Act, [a court] may only interfere with the commissioner's decision if it is erroneous under one of the grounds enumerated in the statute, and a party's substantial rights have been prejudiced."² The standard of review depends on the type of error alleged by the Petitioner.³

If the alleged error is one of fact, the standard of review is whether the findings are supported by substantial evidence.⁴ "[A] reviewing court can only disturb those factual findings if they are 'not supported by substantial evidence in the record before the court when that record is reviewed as a whole.'"⁵ Additionally, in workers' compensation cases, factual questions are "delegated by the legislature to the [C]ommissioner."⁶ Consequently, the Court does not apply a "scrutinizing analysis" to factual findings of the Commissioner, but only reverses the Commissioner's findings if they are not supported by substantial evidence.⁷

¹ *Ramirez-Trujillo v. Quality Egg, L.L.C.*, 878 N.W.2d 759, 768 (Iowa 2016), *reh'g denied* (May 27, 2016); *see* Iowa Code § 86.26 (2019).

² *Meyer v. IBP, Inc.*, 710 N.W.2d 213, 219 (Iowa 2006).

³ *Jacobson Transp. Co. v. Harris*, 778 N.W.2d 192, 196 (Iowa 2010).

⁴ *Harris*, 778 N.W.2d at 196; *Schutjer v. Algona Manor Care Ctr.*, 780 N.W.2d 549, 557 (Iowa 2010).

⁵ *Burton*, 813 N.W.2d at 256 (quoting Iowa Code § 17A.19(10)(f)).

⁶ *Larson Mfg. Co., v. Thorson*, 763 N.W.2d 842, 850 (Iowa 2009).

⁷ *Mercy Med. Ctr. v. Healy*, 801 N.W.2d 865, 870 (Iowa Ct. App. 2011) (citing *Midwest Ambulance Serv. v. Ruud*, 754 N.W.2d 860, 864, 866 (Iowa 2008)).

“Evidence is substantial if a reasonable person would find the evidence adequate to reach the same conclusion.”⁸ The Court is “not to determine whether the evidence supports a different finding; rather, our task is to determine whether substantial evidence, viewing the record as a whole, supports the findings actually made.”⁹

If the claimed error is in the ultimate conclusion reached, “then the challenge is to the agency’s application of the law to the facts.”¹⁰ In workers’ compensation cases, “[t]he application of the law to the facts is also an enterprise vested in the [C]ommissioner.” As such, this Court “reverse[s] only if the [C]ommissioner’s application was irrational, illogical, or wholly unjustifiable.”¹¹

III. REGIONAL CARE’S PETITION FOR JUDICIAL REVIEW

Regional Care contends the Commissioner: (a) erred in concluding that Marrs sustained an injury to her neck arising out of and in the course of her employment with Regional Care; (b) erred in determining that the two-week period ending June 28, 2014, should be excluded from Marrs’ benefit rate calculation; and (c) erred in determining that Marrs is entitled to an assessment penalty against Regional Care for unreasonable denial of benefits.

A. CAUSATION – NECK INJURY

Regional Care argues the evidence is insufficient to support the Commissioner’s finding that Marrs suffered a work-related neck injury and was based upon an irrational, illogical, or wholly unjustifiable application of law to fact.

Under Iowa workers’ compensation law, the injured worker must demonstrate a causal connection between their injury and their right to receive benefits.¹² They must prove the causal connection by a preponderance of the evidence.¹³ “A preponderance of

⁸ *Grundmeyer v. Weyerhaeuser Co.*, 649 N.W.2d 744, 748 (Iowa 2002) (citing *Ehteshamfar v. UTA Engineered Sys. Div.*, 555 N.W.2d 450, 452 (Iowa 1996)).

⁹ *Cedar Rapids Community School District v. Pease*, 807 N.W.2d 839, 845 (Iowa 2011) (internal citations and quotations omitted).

¹⁰ *Meyer*, 710 N.W.2d at 219.

¹¹ *Healy*, 801 N.W.2d at 870 (citing *Larson Mfg.*, 763 N.W.2d at 850).

¹² *George A. Hormel & Co. v. Jordan*, 569 N.W.2d 148, 153 (Iowa 1997).

¹³ *Id.*

the evidence exists when the causal connection is probable rather than merely possible.”¹⁴ “Medical causation presents a question of fact that is vested in the discretion of the workers' compensation commission. We will, therefore, only disturb the commissioner's finding of medical causation if it is not supported by substantial evidence.”¹⁵ Furthermore, “the [C]ommissioner, not the court, weighs the evidence, and [their] findings are liberally construed to uphold rather than defeat the decision.”¹⁶

Regional Care’s view is that Marrs’ initial reporting and presentation of injury was limited to her lumbar spine. They contend that it was not until several weeks later that Marrs began complaining of thoracic and neck pain. Regional Care posits that Marrs’ ongoing pain and subsequent imaging reflect a natural progression of Marrs’ degenerative spine condition, which they argue was unrelated to her July 28, 2016, injury. They also suggest that the Commissioner and Deputy McElderry did not acknowledge Marrs’ “history of degenerative disc disease in her spine and prior back problems” and that Marrs’ “pre-existing history of spinal disease is an important aspect of this case and was wholly ignored by the agency.”

However, on appeal, the ultimate question is not whether the evidence supports a different finding, but whether the evidence supports the findings actually made.¹⁷ While this case did not involve expert witnesses, there were several doctors who consulted with Marrs, provided diagnoses, treated her, and offered their expert opinion on her injury and its origins. The Commissioner weighed these opinions. He did not find Dr. Abernathey’s opinion persuasive because Dr. Abernathey “provided no explanation whatsoever for [his] opinions, which is especially problematic given the fact the [Marrs’] neck was asymptomatic before her July 28, 2014, work injury.” Instead, the Commissioner noted:

[He found] the opinion of Dr. Harbach, which is buttressed by Dr. Kaspar, to be most convincing. Dr. Harbach, who was chosen by [Regional Care], opined that [Marrs’ work-injury] significantly aggravated [Marrs’] pre-existing degenerative cervical spine condition. This opinion is consistent with the absence of symptoms in [Marrs’] neck before the July

¹⁴ *Sherman v. Pella Corp.*, 576 N.W.2d 312, 321 (Iowa 1998).

¹⁵ *Miron Const. v. Poula*, 815 N.W.2d 410 (Iowa Ct. App. Mar. 28, 2012) (citing *Dunlavey v. Econ. Fire & Cas. Co.*, 526 N.W.2d 845, 853 (Iowa 1995); Iowa Code § 17A.19(10)(f)).

¹⁶ *Musselman v. Cent. Tel. Co.*, 261 Iowa 352, 361, 154 N.W.2d 128, 133 (1967).

¹⁷ *Reed v. Iowa Dept. of Transp.*, 478 N.W.2d 844, 846 (Iowa 1991) (citations omitted).

28, 2015, work injury and the progression of symptoms after her work injury.

The Commissioner's Appeal Decision reflects that he balanced the opinions of several medical experts, relied on those who opined that Marrs' neck condition was related to her work-injury, and based his decision on a thorough review of Marrs' medical records. The Commissioner acknowledged that while the majority of Marrs' treatment in the months following her injury was focused on her thoracic spine, he found the record did reflect that Marrs had symptoms in her upper back, neck, and scapular region during this time period.

In this case, although Regional Care identifies an alternative theory of causation and argues that the Commissioner and Deputy McElderry did not weigh certain evidence as much as they would have liked, the Court finds, based on its analysis above, that the Commissioner's finding of a causal connection between Marrs' neck condition and her work-place injury was supported by substantial evidence and that the Commissioner correctly applied the law to the facts in the case.¹⁸

B. BENEFIT-RATE CALCULATION

Regional Care next contends that the Commissioner erred by excluding the two-week pay period ending June 28, 2014, from Marrs' benefit-rate calculation. The Commissioner excluded this pay period pursuant to Iowa Code section 85.36(6) because he found it did not fairly reflect Marrs' customary earnings. Regional Care claims that the exclusion of this period is not supported by substantial evidence and is based on an irrational, illogical, or wholly unjustifiable application of law to fact.

Specifically, Regional Care takes issue with the fact that Marrs did not take any formal vacation hours during this pay period, and that factoring in Marrs' on-call hours, Marrs had more hours than the other relevant pay periods. Regional Care acknowledges that Marrs made less in the pay period ending July 28, 2014, but notes that Marrs' payroll records indicated that her pay fluctuated depending on her on-call hours, and, as such, the pay period should not be excluded simply because Marrs earned less.

¹⁸ See Iowa Code § 17A.19(10)(f); *Cedar Rapids Cmty. Sch. Dist. v. Pease*, 807 N.W.2d 839, 845 (Iowa 2011) ("We will, therefore, only disturb the commissioner's finding of medical causation if it is not supported by substantial evidence.").

Iowa Code section 85.36(6) states that for benefit-rate calculations, the Commissioner must disregard any “week which does not fairly reflect the employee’s customary earnings.” Consequently, Regional Care’s focus on Marrs’ combined regular hours and on-call hours is misplaced, because the Court “must look to the earnings themselves to see if they are customary.”¹⁹ The Iowa Supreme Court has previously defined “customary” in this context as “typical.”²⁰ Additionally, the Court has rejected “a bright-line rule that any employee whose wages vary may not have weeks excluded as noncustomary. Instead ... the determination of whether wages are customary under the circumstances is a matter expressly committed by section 85.36(6) to the discretion of the [C]ommissioner.”²¹ Consequently, this Court will only reverse if the Commissioner’s application was irrational, illogical, or wholly unjustifiable.²²

The Court finds that substantial evidence supports the Commissioner’s decision to exclude the pay period ending July 28, 2014. The record indicates that Marrs altered her schedule for her daughter’s wedding, that Marrs worked fewer regular hours as a result, and that Marrs’ earnings were markedly less during this two-week period.²³

Furthermore, in light of the discretion afforded to the Commissioner on the matter, the Commissioner’s decision that Marrs’ compensation and regular hours during the excluded pay period were not customary was not an “illogical, irrational, or wholly unjustifiable” application of law to fact. Given Marrs’ significantly lower earnings in the pay-period ending July 28, 2014, and considering Marrs’ testimony that she modified her schedule to assist with her daughter’s wedding, it was not “illogical, irrational or wholly unjustifiable” to exclude this pay period, even though it included Marrs’ lowest-wage weeks. In due consideration of the Court’s standard of review on this issue, as well as the statutory mandate to apply workers’ compensation laws to benefit the worker,²⁴ this

¹⁹ *Harris*, 778 N.W.2d at 198.

²⁰ *Griffin Pipe Prods. Co. v. Guarino*, 663 N.W.2d 862, 866 (Iowa 2003).

²¹ *Harris*, 778 N.W.2d at 200.

²² *Healy*, 801 N.W.2d at 872.

²³ Deputy McElderry noted that excluding the pay period ending July 28, 2014, would give Marrs average weekly wages of \$854.27 for a benefit rate of \$559.49, while including the two weeks would give Marrs average weekly wages of \$806.84 for a benefit rate of \$532.58.

²⁴ *Harris*, 778 N.W.2d at 200-01.

Court finds that the Commissioner did not err in calculating Marrs' benefit rate to be \$559.49.

C. PENALTY

The Court next addresses the Commissioner's revised penalty award of \$39,000. Regional Care contends that the Commissioner's determination that Marrs is entitled to a penalty assessment is not supported by substantial evidence and is based on an irrational, illogical, or wholly unjustifiable application of law to fact. Regional Care makes a number of arguments that it should not be obligated to pay a penalty assessment. First it suggests that the healing period may end when it is medically indicated that significant improvement from the work-related injury is not anticipated. Regional Care contends that Marrs' November 26, 2017, appointment, where in Regional Care's words "it was noted conservative treatment had failed and there was no additional care to offer [Marrs] other than a referral" is evidence of a medical indication that significant improvement from the injury was not anticipated, and, as such, the healing period ended. Regional Care also suggests that its penalty should be reduced to sixty-seven weeks because, in its view, there was no medical opinion indicating that Marrs' neck complaints were work related until December 21, 2105. Upon a review of the record and the relevant case law, the Court does not find these arguments persuasive.

Instead, Iowa Code section 86.13(4) controls. Pursuant to section 86.13(4):

b. The workers' compensation commissioner shall award benefits under this subsection if the commissioner finds both of the following facts:

- (1) The employee has demonstrated a denial, delay in payment, or termination of benefits.
- (2) The employer has failed to prove a reasonable or probable cause or excuse for the denial, delay in payment, or termination of benefits.

c. In order to be considered a reasonable or probable cause or excuse under paragraph "b," an excuse shall satisfy all of the following criteria:

- (1) The excuse was preceded by a reasonable investigation and evaluation by the employer or insurance carrier into whether benefits were owed to the employee.

- (2) The results of the reasonable investigation and evaluation were the actual basis upon which the employer or insurance carrier contemporaneously relied to deny, delay payment of, or terminate benefits.
- (3) The employer or insurance carrier contemporaneously conveyed the basis for the denial, delay in payment, or termination of benefits to the employee at the time of the denial, delay, or termination of benefits.

Furthermore, if an employer cannot show excuse or reasonable cause for its delay or denial of benefits, the Commissioner must impose a penalty award not to exceed fifty percent of the amount determined to be unreasonably delayed or denied.²⁵ As the Supreme Court noted in *Robbennolt v. Snap-On Tools Corporation*, “[i]n determining the amount of the penalty, the commissioner shall consider such factors as the length of the delay, the number of the delays, the information available to the employer regarding the employee's injuries and wages, and the prior penalties imposed against the employer under section 86.13.”²⁶

The Commissioner “found the results of Dr. Abernathey’s evaluation were not the actual basis on which [Regional Care] contemporaneously relied to terminate [Marrs’] benefits” and concluded that Regional Care “failed to prove a reasonable or probable cause or excuse for their denial of liability and termination of benefits.” To support his finding, the Commissioner noted that Regional Care terminated Marrs’ benefits about four months before they sought to have Dr. Abernathey perform an IME, and, as such, they could not have contemporaneously relied on his opinion. The Commissioner next “found [Regional Care] offered insufficient evidence to prove they conveyed the basis of their denial of liability and termination of benefits to [Marrs], but even if they did make such a communication, they failed to do so contemporaneously.” The Commissioner noted that Regional Care failed to enter as an exhibit at the hearing any letter to Marrs or her counsel communicating their denial. And even assuming, as Regional Care alleged, that they communicated their denial of liability and termination of benefits in April 2015, the Commissioner found that they did not convey this basis until six months after the denial. Based on these findings, the Commissioner concluded that pursuant to Iowa Code

²⁵ *Christensen v. Snap-On Tools Corp.*, 554 N.W.2d 254, 258 (Iowa 1996); Iowa Code § 86.13(4)(a).

²⁶ *Robbennolt v. Snap-On Tools Corp.*, 555 N.W.2d 229, 238 (Iowa 1996).

section 86.13(4)(c)(3), Regional Care “failed to prove a reasonable or probable cause or excuse for their denial of liability and termination of benefits.”

With respect to the Commissioner’s determination of a penalty award, he affirmed Deputy McElderry, who the Court finds correctly weighed the *Robbennolt* factors, and concluded an award of fifty percent was appropriate. At the time of the hearing, the Commissioner noted that about \$80,000 of the benefits were unpaid without reasonable cause or excuse, and the Commissioner’s award reflects a penalty under the fifty percent statutory maximum.

The Court finds that the Commissioner did not err in his application of section 86.13(4)(c). As the Iowa Court of Appeals has noted, paragraph (c) of this section “creates a mandatory timeline for the employer to follow in showing it had a ‘reasonable or probable excuse’ for the termination of benefits.”²⁷ Regional Care did not carry its burden in demonstrating it followed this timeline. Likewise, this Court is not empowered to disturb the Commissioner’s penalty determinations if they are supported by substantial evidence and not unreasonable or arbitrary. The Court finds no infirmity in the Commissioner’s penalty award on either score, so it must affirm.

ORDER

IT IS THEREFORE ORDERED that the ruling of the Commissioner is AFFIRMED. The Petition for Judicial Review is DENIED and DISMISSED. Costs shall be assessed to Petitioners.

So Ordered.

²⁷ *Pettengill v. Am. Blue Ribbon Holdings, LLC*, 875 N.W.2d 740, 747 (Iowa Ct. App. 2015); Iowa Code § 86.13(4)(c)(1)–(3).



State of Iowa Courts

Type: OTHER ORDER

Case Number	Case Title
CVCV057489	ROBERTA MARRS VS REGIONAL CARE HOSPITAL ET AL

So Ordered

A handwritten signature in black ink, appearing to read 'David Porter', is written over a horizontal line.

David Porter, District Court Judge,
Fifth Judicial District of Iowa