BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

HELEN GULLY, Claimant, vs. LIGURIA FOODS, INC., Employer, and EMPLOYERS PREFERRED INSURANCE COMPANY, Insurance Carrier, Defendants.	File No. 5063429 APPEAL DECISION Head Note Nos.: 1803, 1802, 2500, 2700, 4000

Defendants Liguria Foods, Inc., employer, and Employers Preferred Insurance Company, insurer, appeal from an arbitration decision filed on April 5, 2019, and a ruling on motion for rehearing filed on April 29, 2019. The case was heard on September 4, 2018, and considered fully submitted in front of the deputy workers' compensation commissioner on November 16, 2018.

On January 22, 2020, the Iowa Workers' Compensation Commissioner delegated authority to the undersigned to enter a final agency decision in this matter. Therefore, this appeal decision is entered as final agency action pursuant to Iowa Code section 17A.15(3) and Iowa Code section 86.24.

In the arbitration decision, the deputy commissioner determined claimant sustained permanent disability as a result of stipulated work-related injury on November 20, 2015. More specifically, the deputy commissioner found claimant sustained a 65 percent industrial disability. In doing so, the deputy commissioner found claimant to be

credible regarding her ongoing complaints of pain in her left shoulder and lower back and her difficulties with repetitive activities.

With respect to claimant's other claims, the deputy commissioner determined claimant did not refuse suitable work and was therefore entitled to healing period benefits. The deputy commissioner additionally found claimant's mental injury arose out of and in the course of her employment. Defendants were therefore ordered to pay for medical expenses relating to claimant's mental injury. Finally, the deputy commissioner awarded penalty benefits for the underpayment of healing period and permanent partial disability benefits.

In the ruling on motion for rehearing, the deputy commissioner corrected a mathematical error in his penalty benefits calculation and clarified that penalty benefits were awarded based upon defendants' failure to pay their acknowledged underpayment. The deputy commissioner also amended his order to specify that claimant's ongoing mental health treatment at Berryhill Center must be authorized by defendants.

On appeal, defendants assert claimant is not credible and did not satisfy her burden to prove her entitlement to permanent partial disability benefits or medical benefits. Defendants also argue claimant refused suitable work and therefore was not entitled to healing period benefits after the date of refusal. Lastly, defendants assert claimant failed to meet her burden to prove her entitlement to penalty benefits.

I performed a de novo review of the evidentiary record before the presiding deputy workers' compensation commissioner and the detailed arguments of the parties. Pursuant to Iowa Code section 86.24 and 17A.15, those portions of the proposed arbitration decision filed on April 5, 2019 and the ruling on motion for rehearing filed on April 29, 2019 that relate to issues properly raised on intra-agency appeal are affirmed in part without additional comment and in part with additional findings, conclusions, and analysis, as set forth below.

Credibility

I affirm the deputy commissioner's finding that claimant was credible with respect to her continued complaints of pain in her left shoulder and lower back and her difficulties with repetitive activities. While I performed a de novo review, I give considerable deference to the credibility findings of the deputy commissioner who presided at the arbitration hearing. I find the deputy commissioner correctly assessed claimant's credibility. I find nothing in the record in this matter which would cause me to

reverse the deputy commissioner's finding that claimant was credible regarding her continued pain complaints and difficulties with repetitive activity.

Permanent Injury and Industrial Disability

I affirm the deputy commissioner's finding that claimant sustained a permanent injury. More specifically, I affirm the deputy commissioner's determination that claimant sustained a 65 percent industrial disability. I affirm the deputy commissioner's findings, conclusions, and analysis regarding this issue.

Mental Injury and Related Medical Treatment

With the following findings, conclusions, and analysis, I affirm the deputy commissioner's determination that claimant's mental injury was work-related.

Claimant testified she sought mental health treatment on her own after the November 20, 2015 injury due to stress she attributed to "hurting" and the resulting inability to return to work. (Hearing Transcript, p. 58) This testimony is consistent with her complaints to her providers at Berryville Center and her independent medical examiners. (See Joint Exhibit 11, pp. 77, 84-85, 91-92; JE 12, pp. 94, 96; JE 13, p. 109)

After claimant's initial presentation at Berryhill Center, she was diagnosed with "moderate episode of recurrent major depressive disorder" by the evaluating nurse practitioner. (JE 11, p. 83) She then started counseling with a licensed mental health counselor who also assessed claimant with the same diagnosis. (JE 11, p. 90)

In her independent medical examination (IME) with Todd Hansen, M.D., a pain specialist, Dr. Hansen addressed claimant's "[d]epression which has been exacerbated after her fall." (JE 12, p. 96) Dr. Hansen noted no numerical impairment rating could be assigned for claimant's depression under the 5th Edition of the AMA Guides to the Evaluation of Permanent Impairment, but he indicated she met the criteria for class 2 (mild impairment) based on her activities of daily living and concentration and class 3 (moderate impairment) based on her deterioration in complex or work-related settings. (JE 12, pp. 96-97)

Claimant was also evaluated by Kunal Patra, M.D., a psychiatrist, for purposes of an IME at defendants' request. Dr. Patra diagnosed claimant with "Somatic Symptom Disorder, with predominant pain, Persistent, Moderate Severity" and "Adjustment Disorder, with depressed mood." (JE 13, p. 113) However, he opined these conditions were "not related to her alleged inability to work." (JE 13, p. 128) Dr. Patra also opined

that claimant does not have any permanent impairment or require any permanent restrictions as a result of her mental conditions. (JE 13, p. 131)

The shortcoming of Dr. Patra's causation opinion, however, is that he limited it to claimant's "alleged inability to work." In other words, he failed to address whether claimant's work injury and/or persistent pain may have caused or contributed to claimant's mental conditions.

Dr. Patra indicated in his report that "[a] distinctive characteristic of individuals with somatic symptom disorder is not the somatic symptoms per se, but instead the way they present and interpret them," meaning their "suffering is authentic." (JE 13, p. 118) For claimant specifically, Dr. Patra opined that claimant's somatic symptoms "predominantly involve pain." (JE 13, pp. 113, 118 (emphasis added)) Dr. Patra also noted "[t]he presence of emotional or behavioral symptoms in response to an identifiable stressor (such as a persistent painful illness with increasing disability) is the essential feature of adjustment disorders." (JE 13, p. 125 (emphasis added)). Importantly, I found claimant's ongoing complaints of pain to be credible, and as correctly noted by the deputy commissioner, claimant's work injury is the cause of her persistent pain.

Considering the consistency of claimant's testimony and her complaints in the medical records, along with the fact that claimant's work-related pain was at the heart of both diagnoses identified by Dr. Patra, I find there is sufficient evidence that claimant's work-related injury either caused or was a substantial contributing factor to the mental conditions identified by Dr. Patra.

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 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).

As discussed above, I found there was sufficient evidence that claimant's work injury and resulting persistent pain either caused or was a substantial contributing factor to her diagnosed somatic symptom disorder and adjustment disorder with depressed mood. I therefore conclude claimant satisfied her burden to prove she sustained a mental injury that arose out of and in the course of her employment. Thus, with the above-stated findings, conclusions, and analysis, the deputy commissioner's determination that claimant's mental injury arose out of and in the course of her work for defendant-employer is affirmed.

On appeal, defendants argue the deputy commissioner's modification in the ruling on motion for rehearing that required defendants to specifically authorize and pay for claimant's mental health treatment at the Berryhill Center is inappropriate because claimant does not suffer from the condition for which she was seeking treatment there. Dr. Patra specifically opined that claimant's symptoms did "not meet the full threshold to make a diagnosis of major depressive episode"—which was the diagnosis given by the providers at Berryhill Center. (JE 13, p. 127) With respect to the specific diagnosis for claimant's mental health conditions, I agree with the deputy commissioner that Dr. Patra is the most qualified physician in the record.

That being said, Dr. Patra also acknowledged that claimant "struggles with sadness from the pain and this meets the threshold for adjustment order with depressed mood." (JE 13, p. 128) Thus, although Dr. Patra did not believe claimant was suffering

from all the criteria of major depressive disorder, he agreed with claimant's providers at Berryhill Center that claimant was suffering from sadness and depressed mood. In this sense, although the diagnoses are not identical, they are also not inconsistent.

Unfortunately, Dr. Patra did not address what treatment, if any, claimant requires as a result of her somatic symptom disorder or adjustment disorder with depressed mood. Dr. Hansen, on the other hand, opined claimant should continue her current medication and therapy for her depression. (JE 12, p. 97) This is consistent with claimant's counselor at Berryhill Center, who indicated claimant was benefiting from therapy but also continued to exhibit symptoms that required it. (JE 12, p. 92)

In the ruling on motion for rehearing, the deputy commissioner found claimant showed an established and ongoing therapeutic relationship with her counselor at the Berryhill Center. In light of this ongoing therapeutic relationship and claimant's intellectual functioning (which was discussed in the arbitration decision), the deputy commissioner modified his order to require defendants to authorize and pay for care at Berryhill Center. Based on this rationale, coupled with the fact that all providers agree claimant is suffering from at least a depressed mood, I affirm the deputy commissioner's determination that defendants must authorize and pay for claimant's ongoing care at Berryhill Center.

Defendants are correct that defendants generally have the right to control care pursuant to Iowa Code section 85.27. In this case, however, defendants denied liability for claimant's mental health conditions, and claimant raised "alternate care" as an issue on the hearing report in the event claimant's mental health conditions were found to be work-related. (Hrg. Report; Hrg. Tr., pp. 9-10) When defendants deny liability, claimants often seek care on their own, and like in this case, establish a relationship with those providers. Defendants in this case were not offering alternative or contrary treatment recommendations to the recommendations of claimant's providers at Berryhill Center, nor was there any evidence that the recommended care at Berryhill was not reasonable or necessary. Thus, under the scenario presented in this case, I find sufficient evidence that the continuum of claimant's care should not be disrupted. With this additional analysis, the deputy commissioner's determination that defendants should authorize and pay for claimant's continued care at Berryhill Center is therefore affirmed.

Refusal of Suitable Work and Healing Period Benefits

With the following findings, conclusions, and analysis, I affirm the deputy commissioner's determination that claimant did not refuse suitable work and was therefore entitled to healing period benefits.

Iowa Code section 85.33(3) provides that "[i]f the employer offers the employee suitable work and the employee refuses to accept the suitable work offered by the employer, the employee shall not be compensated with temporary partial, temporary total, or healing period benefits during the period of the refusal."

Refusal of suitable work by an employee results in forfeiture of any temporary disability or healing period benefits pursuant to Iowa Code section 85.33(3). Schutjer v. Algona Manor Care Center, 780 N.W.2d 549, 559 (Iowa 2010). Iowa Code section 85.33(3) only applies, however, if the employer offers suitable work to the employee. Id.

The employer bears the burden to establish the prerequisites of Iowa Code section 85.33(3). Koehler v. American Color Graphics, File No. 1248489 (App. Feb. 25, 2005). Specifically, the employer must establish by a preponderance of the evidence that work was offered to the claimant, that the work was suitable, and that claimant intentionally refused the offered work. Neal v. Annett Holdings, Inc., 814 N.W.2d 512 (Iowa 2012); Raymie v. JB Schott Family Farms, File No. 5041943 (App. Oct. 7, 2016); Brodigan v. Nutri-Ject Systems, Inc., File No. 5001106 (App. April 13, 2004); Woods v. Siemens-Furnas Control, File Nos. 1303082, 1273249 (Arb. July 2002) (Final agency action by Commissioner Trier).

Defendants first argue on appeal that the deputy erred in his determination that defendants failed to offer suitable work. I agree. Claimant testified she returned to light-duty work consistent with the restrictions assigned by David Ruzicka, D.O., for at least a short period of time before her termination. (See Hrg. Tr., p. 66; JE 4, p. 10) I therefore find suitable work was offered by defendants.

The question then becomes whether claimant's behavior—her refusal to have a second drug test performed at her expense or attend an approved drug program at her expense, which ultimately resulted in her termination—was tantamount to a refusal to perform suitable work.

Termination by itself is not sufficient grounds to disqualify an employee from temporary benefits under Iowa Code section 85.33(3). Raymie, File No. 5041943 (App. Oct. 7, 2016); Terhark v. Hope Haven, File No. 5031853 (App. Feb. 26, 2013); Alonzo v.

IBP, Inc., File No. 5009878 (App. Oct. 31, 2006); Franco v. IBP, Inc., File No. 5004766 (App. Feb. 28, 2005). Instead, for misconduct to be tantamount to a refusal to perform suitable work, it must be "serious and the type of conduct that would cause any employer to terminate any employee" and "have a serious adverse impact on the employer." Reynolds v. Hy-Vee, Inc., File No. 5046203 (App. Oct. 31, 2017). The misconduct needs to be more egregious "than the type of inconsequential misconduct that employers typically overlook or tolerate." Id. While an employee "is not entitled to act with impunity toward the employer," the Commissioner has held that "not every act of misconduct justifies disqualifying an employee from workers' compensation benefits even though the employer may be justified in taking disciplinary action." Id. (citation omitted).

In Reynolds, claimant stole a package of cupcakes, some Gatorade from a fountain machine, and a couple packs of cigarettes. Id. The Commissioner held that "claimant's misconduct in stealing the items in question from defendant-employer was tantamount to a refusal to perform light duty work." Id. The Commissioner found claimant's conduct to be "the type of conduct that would reasonably cause any employer to terminate any employee" in part because it "had a serious adverse economic impact on defendant-employer by depriving defendant-employer of revenue." Id.

In this case, a urinalysis was performed when claimant was first evaluated by Dr. Ruzicka on November 27, 2015—a week after her work-related injury. The test results themselves are not in the record; the only information in the record is a check-the-box worksheet signed by Dr. Ruzicka indicating that claimant's test was positive for "marijuana metabolites." (JE 2, p. 6) The record is devoid of any analysis or explanation of the significance of marijuana metabolites. Importantly, claimant testified she did not smoke marijuana but had been around others who were, and defendants offered no evidence to refute claimant's testimony. (See Hrg. Tr., pp. 52-53) Claimant testified she refused to take a second drug test or attend an approved drug program simply because she did not want to incur the expenses. (Hrg. Tr., pp. 53-54) In light of these circumstances, regardless of whether the urinalysis was obtained in compliance with Iowa Code chapter 730.5, I am not convinced claimant's refusal to take a second drug test or attend a drug program had a serious adverse impact on defendant-employer. While defendant-employer certainly has an interest in ensuring its employees are not intoxicated on the job, there is no evidence in the record to suggest that claimant ever appeared intoxicated, acted suspiciously, or created a safety concern while working on the machinery for defendant-employer.

I am likewise not convinced that claimant's refusal in this case to take a second drug test or attend a drug program at her expense is the type of conduct that would cause any employer to terminate any employee. Again, the chain of events that led to claimant's termination in this case was triggered only by the positive identification of marijuana metabolites—without any additional information, quantification, or analysis—in a test that was conducted a week after the occurrence of a work-related injury and without evidence that claimant ever appeared intoxicated or acted suspiciously on the job. The reliability or weight of the check-the-box test results is additionally undercut by the fact that claimant specifically told Dr. Ruzicka, the physician who performed the test, that she did not smoke marijuana but had been around others who were. (Hrg. Tr., pp. 52-53) Considering these specific facts, I do not find claimant's refusal to take a second drug test or enter into a drug program at her expense was the type of behavior that would cause any employer to terminate any employee. In other words, claimant's refusal was not the type of "misconduct" that is tantamount to a refusal to perform suitable work.

Having found that claimant's behavior and choices were not tantamount to a refusal to perform suitable work, I conclude defendants failed to prove claimant should be disqualified under Iowa Code section 85.33(3) from receiving healing period benefits.

The deputy commissioner discussed in great detail the legality of defendants' drug testing under Iowa Code chapter 730.5. Based on my findings, however, defendants' compliance with chapter 730.5 is immaterial. Even if we assume defendant-employer's drug testing was in compliance with chapter 730.5, I determined claimant's actions that led to her termination were not tantamount to a termination of work. Thus, with my above-stated findings, conclusions, and analysis, I affirm the deputy commissioner's determination that claimant is entitled to healing period benefits.

Penalty Benefits

I affirm the deputy commissioner's penalty award with the following additional analysis.

Contrary to defendants' contentions on appeal, penalty was assessed on the rate actually paid by defendants, which was less than the rate they asserted at hearing. Defendants at hearing asserted the correct rate was $341.54, yet they paid benefits at a rate of $332.93; in other words, they admitted they underpaid benefits by at least $8.61 per week. Defendants offered no explanation or justification for this $8.61 underpayment. This was the underpayment for which the deputy commissioner

awarded penalty benefits. Given defendants' admission that they underpaid benefits without any justification, I affirm the deputy commissioner's finding that defendants failed to show reasonable grounds for the underpayment of healing period benefits and permanent partial disability benefits.

Defendants argue on appeal that there is no evidence they failed to pay weekly benefits in a timely fashion. While defendants may have issued checks in a timely manner, the checks were for an amount that defendants have since admitted was wrong. In other words, claimant was not being fully compensated in a timely manner. See Robbennolt v. Snap-On Tools Corp., 555 N.W.2d 229, 236 (Iowa 1996). I therefore affirm the deputy commissioner's penalty award as set forth in the ruling on motion for rehearing.

CONCLUSION

IT IS THEREFORE ORDERED that the arbitration decision, filed on April 5, 2019, and the ruling on motion for rehearing, filed on April 29, 2019, are affirmed with the above-stated findings, conclusions, and analysis.

Defendants shall pay claimant three hundred twenty-five (325) weeks of permanent partial disability benefits at the weekly rate of three hundred fifty-seven and 64/100 dollars ($357.64) per week commencing on February 2, 2017.

Defendants shall have a credit for healing period and permanent partial benefits already paid in this case.

Defendants shall pay claimant the underpayment of healing period and permanent partial benefits as set forth in the arbitration decision.

Defendants shall pay accrued weekly benefits in a lump sum together with interest at the rate of ten percent for all weekly benefits payable and not paid when due which accrued before July 1, 2017, and all interest on past due weekly compensation benefits accruing on or after July 1, 2017, shall be payable 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. See Gamble v. AG Leader Technology File No. 5054686 (App. Apr. 24, 2018).

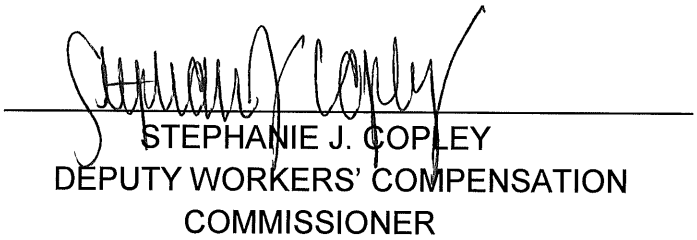
Defendants shall pay claimant four hundred thirteen and 27/100 dollars ($413.27) in penalty benefits.

Defendants shall authorize and pay for claimant's mental health treatment at the Berryhill Center.

Pursuant to rule 876 IAC 4.33, defendants shall pay claimant's costs in the arbitration proceeding in the amount of one hundred and no/100 dollars ($100.00), and defendants shall pay the costs of the appeal, including the costs of the hearing transcript.

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

Signed and filed this 30th day of January, 2020.



STEPHANIE J. COPLEY
DEPUTY WORKERS' COMPENSATION
COMMISSIONER

The parties have been served as follows:

Janece M. Valentine Via WCES

Nathan R. McConkey Via WCES