BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

MAYRA RIVERA, Claimant, vs. SEABOARD TRIUMP FOODS, INC., Employer, and ACE AMERICAN INSURANCE COMPANY, Insurance Carrier, Defendants.	File No. 19006935.01 ARBITRATION DECISION Head Note Nos.: 1403.30, 1801

STATEMENT OF THE CASE

Claimant Mayra Rivera seeks workers' compensation benefits from the defendants, employer Seaboard Triumph Foods, Inc. (Seaboard) and insurance carrier Ace American Insurance Company (Ace). The undersigned presided over an arbitration hearing on July 21, 2021, held via internet-based video under order of the Commissioner. Rivera participated personally and through attorney Dennis M. McElwain. The defendants participated by and through attorney Meredith G. Ashley. Maria de la Garza served as the interpreter.

ISSUES

Under rule 876 IAC 4.149(3)(*f*), the parties jointly submitted a hearing report defining the claims, defenses, and issues submitted to the presiding deputy commissioner. The hearing report was approved and entered into the record via an order because it is a correct representation of the disputed issues and stipulations in this case. The parties identified the following disputed issues in the hearing report:

1) Is Rivera entitled to a running award of temporary disability or healing period benefits commencing on November 12, 2020?

2) Is Rivera entitled to payment of the medical expenses listed in Claimant's Exhibits 15 and 16?

3) Is Rivera entitled to a penalty under Iowa Code section 86.13?

4) Is Rivera entitled to taxation of the costs against the defendants?

The issue of permanent disability was not ripe for determination at the time of hearing. The parties agreed that the issue of permanency shall be bifurcated from the disputed issues listed above that are ripe for determination. An agency determination on the question of permanent disability will be made in another arbitration decision after a future hearing.

STIPULATIONS

In the hearing report, the parties entered into the following stipulations:

1) An employer-employee relationship existed between Rivera and Seaboard at the time of the stipulated injury.

2) Rivera sustained an injury on October 4, 2019, which arose out of and in the course of her employment with Seaboard.

3) At the time of the stipulated injury:

    a) Rivera's gross earnings were seven hundred ninety-one and 29/100 dollars per week.

    b) Rivera was single.

    c) Rivera was entitled to two exemptions.

4) Prior to hearing, the defendants paid to Rivera workers' compensation at the rate of five hundred seventeen and 21/100 dollars per week from May 3, 2021, through June 29, 2021.

The parties' stipulations in the hearing report are accepted and incorporated into this arbitration decision. The parties are bound by their stipulations. This decision contains no discussion of any factual or legal issues relative to the parties' stipulations except as necessary for clarity.

FINDINGS OF FACT

The evidentiary record in this case consists of the following:

- Joint Exhibits (Jt. Ex.) 1 through 12;
- Claimant's Exhibits (Cl. Ex.) 1 through 17;
- Defendants' Exhibits (Def. Ex.) A through C; and

- Hearing testimony by Rivera.

After careful consideration of the evidence and the parties' post-hearing briefs, the undersigned enters the following findings of fact.

Rivera was born in El Salvador, San Salvador. (Hrg. Tr. p. 12) She moved to the United States in 2016. (Hrg. Tr. p. 12) Spanish is her first language. (Hrg. Tr. p. 23) Rivera has limited English proficiency. (Hrg. Tr. p. 23)

Rivera was forty-five years of age at the time of hearing. (Hrg. Tr. p. 12) She is right-hand dominant. (Hrg. Tr. p. 12) Rivera began working for Seaboard on March 12, 2018, at a hog-slaughter and processing plant. (Hrg. Tr. p. 12)

Rivera worked first shift at the Seaboard plant. (Hrg. Tr. pp. 13–14) Her primary job duty was removing tails from pigs. (Hrg. Tr. p. 13) Rivera would grab a pig's tail with her left hand and cut it off using a Whizard knife with her right hand. (Hrg. Tr. p. 13) She did not miss a day of work during her first eighteen months of employment with Seaboard. (Hrg. Tr. p. 14)

Rivera slipped and fell at work on October 4, 2019, injuring her left shoulder. (Jt. Ex. 1, p. 1; Jt. Ex. 2, p. 7) She reported the injury to Seaboard that day. (Hrg. Tr. p. 15) Rivera returned to work the following Monday to request Seaboard arrange care with a doctor for her work injury because her pain was unbearable. (Hrg. Tr. p. 15) The defendants made an appointment for Rivera to receive care on the following day. (Hrg. Tr. p. 16)

Rodney Cassens, M.D., treated Rivera for the work injury before referring her to Brian Johnson, M.D., after magnetic resonance imaging (MRI) showed she sustained a torn rotator cuff. (Hrg. Tr. p. 16; Jt. Ex. 1, pp. 1–6; Jt. Ex. 2, pp. 7–9) Dr. Johnson performed surgery on December 27, 2019. (Hrg. Tr. p. 16; Jt. Ex. 2, pp. 10–11) Dr. Johnson released Rivera to return to light-duty work on February 7, 2020. (Hrg. Tr. p. 16; Jt. Ex. 2, p. 13) He prescribed work restrictions, including: no use of the left arm except for typing, texting, writing, or playing cards. (Jt. Ex. 2, p. 13) Rivera returned to light-duty work at Seaboard on February 7, 2020. (Hrg. Tr. p. 16)

Seaboard had Rivera sign a document written in English that stated she was returning to her original job, removing tails. (Hrg. Tr. p. 18; Jt. Ex. 2, p. 24) Even though Seaboard required Rivera to sign a document stating she was returning to her pre-injury job, her supervisors assigned her to the personal protective equipment (PPE) room, where she worked instead of removing tails. (Hrg. Tr. pp. 17–18) She accepted the light-duty assignment. (Hrg. Tr. p. 17; Jt. Ex. 2, p. 24)

Rivera worked normal hours during the typical six-day workweek at Seaboard. (Hrg. Tr. p. 17) Her duties in the PPE room consisted of handing out PPE to other employees. (Hrg. Tr. p. 17) Rivera was under work restrictions throughout her employment with Seaboard after Dr. Johnson's surgery. (Jt. Ex. 2, pp. 14–42) She did

not return to her pre-injury job of removing tails before her employment with Seaboard ended. (Hrg. Tr. pp. 18–19)

Rivera continued to work in the PPE room until November 10, 2020, because of her limited functional capacity. (Hrg. Tr. p. 19) In the PPE room, Rivera worked alongside other Seaboard employees, some of whom also needed light-duty work and others who worked in PPE full time. (Hrg. Tr. p. 21) The group included Blanca Gomez, Nhung Nguyen, and Maria Olmedo, who went by Lola. (Hrg. Tr. pp. 21–22; Jt. Ex. 8, Depo. p. 7; Jt. Ex. 10, Depo. p. 9; Jt. Ex. 12, p. 154) Because the witnesses in this case referred to her as Lola in their testimony, this decision will do the same.

Nguyen is of Vietnamese descent. (Hrg. Tr. pp. 22–23) Like Rivera, she spoke little English. (Hrg. Tr. p. 23) Rivera and Nguyen were limited in their ability to speak and understand one another but could communicate with one another using Google Translate on a mobile phone. (Hrg. Tr. p. 23) The two became friends. (Hrg. Tr. p. 23)

On occasion, Rivera would have lunch with Nguyen. (Hrg. Tr. p. 24) Sometimes Nguyen's husband, who also worked at Seaboard, would join them. (Hrg. Tr. p. 24) Rivera would occasionally give Nguyen a ride to work when she did not have other transportation. (Hrg. Tr. p. 24)

Rivera credibly testified Lola often engaged in inappropriate behavior towards coworkers in the PPE room. (Hrg. Tr. pp. 29–30) Lola's behavior included unwanted touching of the groin and buttocks and putting her hands underneath coworkers' clothes while they worked. (Hrg. Tr. p. 34; Jt. Ex. 8, Depo. p. 8; Jt. Ex. 9, Depo. pp. 4–5) Her actions bothered Rivera even though Lola said it was in jest. (Hrg. Tr. p. 35) Lola did not stop even after Rivera asked her to do so. (Hrg. Tr. p. 36) Lola's behavior made it difficult for Rivera and others to do their jobs. (Hrg. Tr. p. 36)

Seaboard has a Harassment/Discrimination Policy. (Def. Exs. A, C) It has been interpreted into Spanish. (Def. Ex. C) Seaboard provided Rivera with a copy of the Spanish version of the policy and she signed an acknowledgement that she had received it on October 9, 2020. (Ex. C, p. 3)

The Seaboard Harassment/Discrimination Policy defines "harassment" in pertinent part as "any unwelcome conduct, whether verbal, physical or visual, which discriminates against any person or groups of people based on their sex." (Def. Ex. A, p. 1) One of the examples of harassment it addresses is sexual harassment. (Def. Ex. A, p. 1) The policy defines "sexual harassment" as "unwelcome sexual advances, request for sexual favors, and other verbal physical conduct of a sexual nature when submission is a condition of employment, submission or rejection affects employment opportunities, or conduct interferes with the work or creates an intimidating, hostile, or offensive work environment." (Def. Ex. A, p. 1)

Rivera complained about Lola engaging in unwelcome touching of her and other employees to Seaboard human resources supervisor Christina Scott, whose job included working on investigations, employee relations, tenants' notifications, and charges filed with the federal Equal Employment Opportunity Commission (EEOC). (Hrg. Tr. p. 34; Jt. Ex. 10, p. 95) Scott investigated Rivera's complaint. (Jt. Ex. 10, p. 95) When Scott interviewed Lola during the investigation, Lola shared with Scott a video she had recorded of Rivera and Nguyen during lunch on November 10, 2020. (Jt. Ex. 10, pp. 95, 101)

Scott took the video to the office of Deb Garnand, her immediate supervisor and a human resources manager at Seaboard. (Jt. Ex. 10, pp. 95–96; Jt. Ex. 12, p. 153) Alfonso Cota, Garnand's supervisor and a senior human resources manager at Seaboard, was in Garnand's office at the time. (Jt. Ex. 10, p. 96; Jt. Ex. 11, p. 120–21) Scott showed them the video. (Jt. Ex. 10, p. 96; Jt. Ex. 11, p. 122; Jt. Ex. 12, pp. 155–56)

After watching the video, Cota concluded Rivera's actions merited termination because she touched Nguyen between her legs and on her buttocks despite Nguyen's protests. (Jt. Ex. 10, p. 10; Jt. Ex. 11, pp. 122–23) Garnand agreed with her supervisor's assessment. (Jt. Ex. 12, pp. 156, 166) Scott conceded during her deposition testimony the video could be open to an alternative interpretation to Cota's: Rivera and Nguyen's were engaged in good-natured horseplay. (Jt. Ex. 10, p. 109) Nonetheless, there was no further discussion among Seaboard human resources employees or any additional investigation into the matter. (Jt. Ex. 10, pp. 96, 106–09; Jt. Ex. 12, pp. 156, 161–63) Seaboard discharged Rivera based on Cota's interpretation of Rivera and Nguyen's behavior as shown on the video instead of how Nguyen viewed Rivera's actions. (Jt. Ex. 10, pp. 96, 106–09; Jt. Ex. 11, p. 130; Jt. Ex. 12, p. 163)

The video is in evidence as Claimant's Exhibit 1. The footage shows Nguyen in possession of Rivera's mobile phone. (Cl. Ex. 1) Rivera asked Nguyen to return her phone. (Cl. Ex. 1) Nguyen refused and the two engaged in keep-away with Rivera attempting to get her phone back and Nguyen refusing to return it. (Cl. Ex. 1)

Lola is heard laughing, suggesting she was in on the joke. (Cl. Ex. 1) Rivera consistently smiles and laughs during her interaction with Nguyen. (Cl. Ex. 1) Nguyen also smiles at times. (Cl. Ex. 1) Rivera credibly testified at hearing she did not believe Nguyen was actually trying to steal her phone and the video supports her description. (Cl. Ex. 1; Hrg. Tr. p. 38) Nguyen refuses to return Rivera' phone while accessing it for an unknown reason. (Cl. Ex. 1)

Rivera frequently touches and grabs Nguyen while trying to get her phone back. (Cl. Ex. 1) The video does not definitively show Rivera touching Nguyen on her groin or below the waistline of her back. (Cl. Ex. 1) Nguyen refuses to return Rivera's phone, stating "no" multiple times and removing Rivera's hands. (Cl. Ex. 1) It is unclear from the video whether Nguyen saying "no" is in response to Rivera's attempts to get her phone

back or touching her. (Cl. Ex. 1) Ultimately, Nguyen returned Rivera's phone to her, got up, and left the table smiling. (Cl. Ex. 1)

Had Seaboard interviewed Nguyen after Cota, Garnand, and Scott viewed the video, there would likely be evidence from close in time to the events Lola filmed on the question of how Nguyen subjectively perceived the events caught on the video. But Seaboard did not ask Nguyen if Rivera's conduct was unwelcome. As a result, Nguyen did not give a statement close in time to the events shown on the video.

The parties deposed Nguyen during the litigation of this case. During the deposition, defense counsel (Q) asked Nguyen (A) about unwelcome harassment from coworkers in the following interaction:

> Q. Do you remember sometime before November 10, 2020, a female coworker attempting to touch you underneath your clothes while at work?
>
> A. Oh, yes, I remember.
>
> Q. Do you remember that coworkers' name?
>
> A. Lola.
>
> Q. Was there another woman who did that with you as well that Lola may have videotaped?
>
> A. Actually, that person, she just make a joke, like some fun. She put the logo on my chest and then call me and ask me about that.

(Jt. Ex. 9, p. 85–86)

Thus, when asked about unwelcome harassment, only one coworker came to mind for Nguyen: Lola. It took a follow-up question for Nguyen to think of another person who touched her in a way that might be viewed as inappropriate and she immediately made clear that person was making a joke for fun, not engaging in unwanted touching. The statement she made appears to be describing another occurrence involving the placement of a logo on Nguyen's chest, not the events on Lola's video. Nonetheless, the fact that Nguyen could not recall the videotaped events with Rivera and was unable to identify another coworker who engaged in unwelcome touching of her is consistent with Rivera's hearing testimony that the two of them were joking about her not returning the phone. (Hrg. Tr. p. 39) It also makes Seaboard's interpretation of the events shown on the video unpersuasive.

It is more likely than not that Nguyen would recall Rivera when asked about inappropriate touching if she felt Rivera had engaged in unwelcome conduct toward her. The weight of the evidence establishes Nguyen did not feel that Rivera's behavior in the lunchroom when she was playfully withholding Rivera's phone from her was unwelcome. Rather, it was horseplay in which the two willingly engaged for fun.

Seaboard determined Rivera's conduct merited termination without interviewing her or Nguyen about what was on the video. (Jt. Ex. 10, pp. 96, 106–09; Jt. Ex. 12, pp. 156, 161–63) Scott met with Rivera to inform her Seaboard had terminated her employment for violation of its sexual harassment policy. (Jt. Ex. 10, p. 97) Seaboard concluded Rivera's behavior was not severe enough to disqualify her from re-hire with the company. (Jt. Ex. 10, p. 103) Seaboard has classified Rivera as eligible for re-hire. (Jt. Ex. 10, p. 103–04; Cl. Ex. 9, p. 14)

Rivera continued to treat for the stipulated work injury after Seaboard discharged her. Because of Rivera's ongoing symptoms, Dr. Johnson referred Rivera to Chad Laurich, M.D. (Jt. Ex. 2, pp. 26, 29; Jt. Ex. 4, p. 37) Dr. Laurich diagnosed Rivera with complex regional pain syndrome (CRPS). (Jt. Ex. 4, pp. 41, 43) Dr. Laurich recommended nerve blocks to address Rivera's symptoms, which Jeremy Poulsen, D.O., performed. (Jt. Ex. 5, pp. 43–44, 49; Jt. Ex. 7) On May 3, 2021, Dr. Laurich then performed a left thoracoscopic sympathectomy. (Jt. Ex. 5, pp. 48–51) The procedure helped reduce Rivera's symptoms. (Jt. Ex. 5, p. 52)

Rivera's attorney sent Dr. Laurich a letter dated July 1, 2021, with questions regarding her injury and care. (Jt. Ex. 5, pp. 54–56) In response to the questions, Dr. Laurich opined Rivera's work injury at Seaboard was a substantial factor causing her CRPS. (Jt. Ex. 5, p. 55) He further stated she was not at maximum medical improvement and stated she should continue with a five-pound lifting restriction until released from it by Dr. Johnson. (Jt. Ex. 5, p. 55) This is consistent with the work restrictions from Dr. Poulsen of June 30, 2021. (Jt. Ex. 7, p. 69) Dr. Laurich signed and dated his response July 1, 2021. (Jt. Ex. 5, p. 56)

CONCLUSIONS OF LAW

In 2017, the Iowa legislature amended the Iowa Workers' Compensation Act. See 2017 Iowa Acts, ch. 23. The 2017 amendments apply to cases in which the date of an alleged injury is on or after July 1, 2017. Id. at § 24(1); see also Iowa Code § 3.7(1). Because the injury at issue in this case occurred after July 1, 2017, the Iowa Workers' Compensation Act, as amended in 2017, applies. Smidt v. JKB Restaurants, LC, File No. 5067766 (App. December 11, 2020).

1. Temporary Disability Benefits.

Under the Iowa Workers' Compensation Act, an injured employee may be entitled to temporary benefits as follows:

- Temporary total disability (TTD) benefits for time lost from work for an injury that does not result in a permanent disability. Iowa Code § 85.33(1).

- Temporary partial disability (TPD) benefits when the employee is able to perform light-duty work within restrictions but cannot return to work substantially similar to the job performed at the time of the work injury. Id. at § 85.33(2).

- Healing period (HP) benefits for time lost from work for an injury that results in permanent partial disability (PPD). Id. at § 85.34(1).

The difference between TTD benefits and HP benefits is whether the injured employee ultimately sustains a permanent disability from the work injury. In the current case, the issue of permanency is not presently ripe for determination. Consequently, this decision will consider the question of whether Rivera is entitled to TTD benefits with the understanding that these benefits may be reclassified as HP benefits in the future if Rivera is found to have sustained a permanent disability from the stipulated work injury.

The parties do not dispute Rivera was under work restrictions from the date of the stipulated work injury through the end of June 2021 that prevented her from returning to work similar in nature to what she was performing when she sustained the injury. And Dr. Laurich's uncontroverted opinion of July 1, 2021, establishes Rivera had not reached MMI and remained under work restrictions that prevented her from returning to work similar in nature to that which she was performing at the time of the stipulated work injury. The parties' dispute regarding whether Rivera is entitled to TTD benefits centers on whether the behavior that led to Seaboard discharging her constitutes a rejection of suitable work under Iowa Code section 85.33(3)(*a*), which provides in pertinent part:

> If an employee is temporarily, partially disabled and the employer for whom the employee was working at the time of injury offers to the employee suitable work consistent with the employee's disability the employee shall accept the suitable work, and be compensated with temporary partial benefits. If the 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.

In Schutjer v. Algona Manor Care Center, the Iowa Supreme Court articulated the following two-factor test to determine whether an injured worker is ineligible from benefits under section 85.33(3):

1) The employer offered the employee suitable work; and

2) The employee refused the offer. 780 N.W.2d 549, 559 (Iowa 2010).

The court concluded that an injured employee's voluntary quit may constitute refusal of an offer of suitable work in satisfaction of the second requirement. Id.

Two years later, the court held "[t]he language of the statute requires that the work offered to an injured worker must be both 'suitable' and 'consistent with the employee's disability' before the employee's refusal to accept such work will disqualify him from receiving temporary partial, temporary total, and healing period benefits." Neal v. Annett Holdings, Inc., 814 N.W.2d 512, 520 (Iowa 2012). Geographic proximity is a factor that may be considered when evaluating suitability. Id. at 520–25. Thus, in order for the sanction provisions in Iowa Code section 85.33(3) to come into play, the employer must first offer the injured employee suitable work that is consistent with the employee's disability.[1]

Here, Seaboard offered Rivera work at the same job she was working when injured, which makes the location suitable under Iowa law. See id. The offer was also consistent with Rivera's disability because its duties were within her work restrictions. Id. at 520; Iowa Code § 85.33(3)(*a*). Consequently, the record shows Seaboard offered Rivera work that meets the statutory criteria. It is therefore appropriate to consider Seaboard's argument that the behavior by Rivera that led to her discharge constitutes a rejection of suitable work.

Under the Iowa Workers' Compensation Act, "Termination by itself is not sufficient grounds to disqualify an employee from temporary benefits under Iowa Code section 85.33(3)." Gully v. Liguria Foods, Inc., File No. 5063429 (App. January 30, 2020). "[N]ot every act of misconduct justifies disqualifying an employee from workers' compensation benefits even though the employer may be justified in taking disciplinary act." Reynolds v. Hy-Vee, Inc., File No. 5046203 (App. October 31, 2017). For termination to disqualify an employee from compensation it must be for misconduct so extreme it is "tantamount to refusal to perform the offered work" because it is "the type of conduct that would cause any employer to terminate any employee" due to the "serious adverse impact on the employer." Id. (citing Brodigan v. Nutri-Ject Systems, Inc., File No. 5001106 (App. April 13, 2004) and Wortley v. Lowe's Home Centers, Inc., File No. 1298582 (App. December 22, 2006)).

Examples of misconduct so extreme that it constitutes a refusal of suitable work under section 85.33(3) include theft from the employer, id., and threatening to kill coworkers, Black v. John Deere Des Moines Works, File No. 5010502 (App. March 29, 2006). In contrast, misconduct the agency has found insufficiently severe to disqualify a claimant from temporary benefits includes:

- Taking a piece of paper with customer personal information on it from employer premises, Wortley v. Lowe's Home Centers, Inc., File No. 1298582 (App., December 22, 2006);

[1] The 2017 amendments made changes to section 85.33(3) that do not alter the statutory requirement that an employer must offer "suitable work consistent with the employee's disability" before the sanction for employee refusal is triggered. See 2017 Iowa Acts ch. 23, § 5. Consequently, Schujter and Neal remain good law after the 2017 amendments on the question of whether a claimant rejected an offer of suitable work.

- The claimant leaving work before the end of a scheduled shift in violation of work rules and without supervisor permission for the third time, Franco v. IBP, No. 5004766 (App. February 28, 2005);

- The claimant leaving work to be with his sick mother despite his supervisor informing him his leave of absence had not been approved because he had only made an oral request for a leave of absence and not filled out the appropriate form, Alonzo v. IBP, Inc., File No. 5009878 (App. October 31, 2006); and

- The claimant's failing a drug test and refusing to take a second test or attend a drug program at the employee's own expense, Gully, File No. 5063429; see also Edwards v. Weitz Corporation, File No. 5032285 (Arb. June 22, 2011) (finding termination for a positive drug test did not constitute disqualifying misconduct) (aff'd and adopted as final agency action (App. August 22, 2012)).

While an employer's personnel policies do not govern eligibility of benefits under the Iowa Workers' Compensation Act, Franco, No. 5004766 (citing Woods v. Seimens-Furnas Controls, File Nos. 1303082, 1273249 (App. July 22, 2003)), the defendants allege Rivera's conduct violated its Harassment/Discrimination Policy. The Seaboard Harassment/Discrimination Policy is intended to implement the standards governing an employee's right to equal opportunity in employment under Title VII of the federal Civil Rights Act and the Iowa Civil Rights Act of 1965 (ICRA). Therefore, it is appropriate to consider the contours of equal opportunity law.

The "unwelcome" standard articulated in Seaboard's policy comes from Supreme Court precedent holding "the gravamen" of any harassment claim is "unwelcome" conduct. Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 68, 106 S.Ct. 2399, 2406 (1986). For conduct to be harassment that constitutes discrimination in violation of Title VII, it must be unwelcome. Williams v. Herron, 687 F.3d 971, 975 (8th Cir. 2012). The Iowa Supreme Court drew on Title VII caselaw when articulating the "unwelcome harassment" standard that applies under the ICRA. Farmland Foods, Inc. v. Dubuque Human Rights Comm'n, 672 N.W.2d 733, 744 (Iowa 2003) (citing Beard v. Flying J, Inc., 266 F.3d 792, 797 (8th Cir.2001)).

Thus, both Title VII and the ICRA require unwelcome harassment for a violation to occur. What constitutes unwelcome harassment? The conduct in question "'must be unwelcome in the sense that the employee did not solicit or incite it, and in the sense that the employee regarded the conduct as undesirable or offensive.'" Lynch v. City of Des Moines, 454 N.W.2d 827, 834 (Iowa 1990) (quoting Henson v. City of Dundee, 682 F.2d 897, 903 (11th Cir.1982)).

Thus, under Seaboard's policy and state and federal equal opportunity law, conduct must be unwelcome to constitute unlawful harassment. Had Nguyen felt Rivera's behavior was unwelcome, it likely would have constituted harassment in

violation of the policy. It can be inferred that conduct was unwelcome when an employee complains about it to the employer. But in this case, Nguyen made no complaint to Seaboard about Rivera's behavior.

Seaboard only became aware of Rivera's actions when Lola, then the target of a hostile work environment investigation because of Rivera's complaint, showed Scott video of the Nguyen and Rivera. Seaboard human resources personnel interpreted the video of Rivera and Nguyen to show unwelcome harassment without interviewing Nguyen to determine if she subjectively perceived Rivera's actions as unwelcome harassment. Seaboard discharged Rivera based on this interpretation.

Such an investigation also could have delved into the events preceding what Lola caught on film. State and federal law holds that conduct "must be unwelcome in the sense that the employee did not solicit or incite it." Lynch, 454 N.W.2d at 834 (quoting Henson, 682 F.2d at 903). If Seaboard had interviewed Rivera and Nguyen, they would have learned that Nguyen solicited or incited Rivera's conduct by taking Rivera's mobile phone and refusing to return it. This reality further undermines the conclusion Seaboard made about the video without an investigation.

As found above, there is an insufficient basis in the evidence from which to conclude Rivera's conduct toward Nguyen was unwelcome. Nguyen did not complain about Rivera or tell Seaboard during an investigation Rivera's behavior was unwelcome. Nguyen could only identify one coworker who touched her in an unwelcome way and that was Lola. Rivera credibly testified the two were joking around in the video. Further, the evidence establishes Nguyen solicited or incited Rivera's behavior by taking her phone and refusing to return it.

The defendants have the burden to prove the affirmative defense that Rivera rejected suitable work by committing misconduct so extreme it would cause any employer to fire any employee because of its detrimental impact on the employer. Gully, File No. 5063429. The defendants have failed to meet their burden of proof. There is an insufficient basis in the evidence from which to conclude Rivera's conduct towards Nguyen was unwelcome harassment in violation of Seaboard policy. The weight of the evidence shows Rivera and Nguyen were joking around during their lunchbreak by engaging in consensual horseplay.

For these reasons, Rivera's actions do not rise to the level of extreme conduct necessary to constitute a rejection of suitable work under the Iowa Workers' Compensation Act. The evidence shows Seaboard offered Rivera suitable work, she accepted the offer, and Seaboard effectively rescinded its offer of suitable work by discharging her. See Spence v. Tyson Fresh Meats, Inc., File No. 5046863 (Arb. July 6, 2015) aff'd (App. February 7, 2017). Rivera is entitled to a running award of TTD benefits commencing on November 12, 2020, and continuing until such time as Rivera meets the criteria of Iowa Code section 85.34(1).

2. Rate.

The parties stipulated that Rivera's gross earnings at the time of the stipulated work injury were seven hundred ninety-one and 29/100 dollars per week. She was single and entitled to two exemptions. Based on the parties' stipulations, Rivera's workers' compensation rate is five hundred ten and 2/100 dollars per week.

3. Penalty.

Rivera seeks penalty benefits under Iowa Code section 86.13(4)(*a*). There is no dispute the defendants did not pay Rivera TTD benefits to which she is entitled, as found above. The defendants argue that the delay was reasonable because it was fairly debatable whether the video showed the type of misconduct so extreme that any employer would have fired Rivera for it even though Seaboard did not interview Rivera or Nguyen, the alleged victim, about whether Rivera's conduct was unwelcome before firing Rivera.

"Because penalty benefits are a creature of statute, our discussion begins with an examination of the statutory parameters for such benefits." Keystone Nursing Care Ctr. v. Craddock, 705 N.W.2d 299, 307 (Iowa 2005). Under Iowa Code section 86.13(4)(a)

> If a denial, a delay in payment, or a termination of benefits occurs without reasonable or probable cause or excuse known to the employer or insurance carrier at the time of the denial, delay in payment, or termination of benefits, the workers' compensation commissioner shall award benefits in addition to those benefits payable under this chapter, or chapter 85, 85A, or 85B, up to fifty percent of the amount of benefits that were denied, delayed, or terminated without reasonable or probable cause or excuse.

This provision "codifies, in the workers' compensation insurance context, the common law rule that insurers with good faith disputes over the legal or factual validity of claims can challenge them, if their arguments for doing so present fairly debatable issues." Covia v. Robinson, 507 N.W.2d 411, 412 (Iowa 1993) (citing Dirks v. Farm Bureau Mut. Ins. Co., 465 N.W.2d 857, 861 (Iowa 1991) and Dolan v. Aid Ins. Co., 431 N.W.2d 790, 794 (Iowa 1988)). "The purpose or goal of the statute is both punishment and deterrence." Robbennolt v. Snap-On Tools Corp., 555 N.W.2d 229, 237 (Iowa 1996).

The legislature established in Iowa Code section 86.13(4)(b) a burden-shifting framework for determining whether penalty benefits must be awarded in a workers' compensation case. See 2009 Iowa Acts ch. 179, § 110 (codified at Iowa Code § 86.13(4)(b)); see also Pettengill v. Am. Blue Ribbon Holdings, LLC, 875 N.W.2d 740, 746–47 (Iowa App. 2015) as amended (Feb. 16, 2016) (discussing the burden-shifting required by the two-factor statutory test). The employee bears the burden to establish a prima facie case for penalty benefits. See Iowa Code § 86.13(4)(b). To do so, the employee must demonstrate a denial, delay in payment, or termination of workers'

compensation benefits. Iowa Code § 86.13(4)(b)(1). If the employee fails to prove a denial, delay, or termination, there can be no award of penalty benefits and the analysis stops. See id. at § 86.13(4)(b); see also Pettengill, 875 N.W.2d at 747.

Rivera has established the requisite delay. The defendants did not timely pay her TTD benefits to which she is entitled. Consequently, the burden of proof shifts to the defendants. See id. at § 86.13(4)(b); see also Pettengill, 875 N.W.2d at 747.

To avoid an award of penalty benefits, the employer must "prove a reasonable or probable cause or excuse for the denial, delay in payment, or termination of benefits." Iowa Code§ 86.13(4)(b)(2). An excuse must meet all of the following criteria to be "a reasonable or probable cause or excuse" under the statute:

> (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.

Id. § 86.13(4)(c).

> This paragraph creates a mandatory timeline for the employer to follow in showing it had a "reasonable or probable cause or excuse" for the termination of benefits. Iowa Code § 86.13(4)(c)(1)-(3). First, the employer's excuse for the termination must have been *preceded* by an investigation. *Id.* § 86.13(4)(c)(1). Second, the results of the investigation were "*the actual basis ... contemporaneously*" relied on by the employer in terminating the benefits. Third, the employer "*contemporaneously* conveyed the basis for the ... termination of benefits to the employee *at the time of the ... termination*." *Id.* § 86.13(4)(c)(3)

Pettengill, 875 N.W.2d at 747 (emphasis in original). "An employer cannot unilaterally decide to terminate an employee's benefits without adhering to Iowa Code section 86.13; to allow otherwise would contradict the language of that section." Id.

"A 'reasonable basis' for denial of the claim exists if the claim is 'fairly debatable.'" Keystone Nursing Care Ctr., 705 N.W.2d at 307 (quoting Christensen v. Snap-On Tools Corp., 554 N.W.2d 254, 260 (Iowa 1996)). A claim may be fairly debatable because of a good faith legal or factual dispute. See Covia, 507 N.W.2d at 416 (finding a jurisdictional issue fairly debatable because there were "viable arguments

in favor of either party"). "[T]he reasonableness of the employer's denial or termination of benefits 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." Keystone Nursing Care Ctr., 705 N.W.2d at 307–08.

The question is not whether Seaboard's discharge of Rivera was reasonable. It is whether the defendants' refusal to pay benefits based on the reason for discharge was reasonable. As discussed in detail above, Iowa law imposes a high standard for misconduct to disqualify a claimant from workers' compensation. Further, Seaboard's policy requires conduct to be unwelcome for it to constitute harassment, which is consistent with state and federal equal opportunity law. Given the high standard under the Iowa Workers' Compensation Act and the lack of investigation by Seaboard before discharging Rivera, it was unreasonable in this case for the defendants to conclude this standard had been met with respect to Rivera's termination from employment by Seaboard.

The defendants had access to Nguyen before the decision to discharge Rivera and after it. Nguyen remained employed at Seaboard. Yet nobody spoke with Nguyen about Rivera's actions until her deposition in the litigation of this case. Because a violation of the Harassment/Discrimination Policy hinged on the question of whether Rivera's conduct was unwelcome harassment in Nguyen's view and nobody talked to Nguyen about Rivera's conduct until late in the litigation of this case, it was unreasonable for the defendants to refuse to pay Rivera TTD benefits based on Seaboard's reason for discharge.

If the employee establishes a "reasonable or probable cause or excuse," no penalty benefits are awarded. However, if the employer fails to meet its burden of proof, penalty benefits must be awarded. The following factors are used in determining the amount of penalty benefits:

- 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. Robbennolt, 555 N.W.2d at 238.

There was one delay. It was extended because of the litigation of this case. Rivera has presented no evidence of prior penalties imposed against Seaboard. The information at issue, Nguyen's perception of Rivera's conduct, was available to the defendants before the discharge and throughout the refusal to pay benefits. Taken together, the defendants shall pay a penalty of five hundred dollars.

4. Medical Expenses.

At hearing, Rivera asserted she was seeking payment of medical expenses and provided evidence regarding them. (Cl. Exs. 15, 16) The undersigned granted the defendants additional time to submit an exhibit regarding the medical expenses in question because the defendants felt they had been paid. (Def. Ex. D) Neither party addressed medical expenses in post-hearing briefing. Consequently, the undersigned concludes the defendants have paid the medical expenses in dispute in accordance with Iowa Code section 85.27.

5. Costs.

Under Iowa Code section 86.40, the agency has discretion to tax costs. "Fee-shifting statutes using 'all costs' language have been construed 'to limit reimbursement for litigation expenses to those allowed as taxable court costs.'" Des Moines Area Reg'l Transit Auth. v. Young, 867 N.W.2d 839, 846 (Iowa 2015) (quoting City of Riverdale v. Diercks, 806 N.W.2d 643, 660 (Iowa 2011)). Statutes and administrative rules providing for recovery of costs are strictly construed. Id. (quoting Hughes v. Burlington N. R.R., 545 N.W.2d 318, 321 (Iowa 1996)).

Under the administrative rules governing contested case proceedings before the agency, Rivera is entitled to taxation of the following costs against the defendants:

- Two hundred fifty and 00/100 dollars for the reasonable costs of Dr. Laurich's report, 876 IAC 4.33(6); and
- One hundred and 00/100 dollars for the filing fee, id. at 4.33(7).

ORDER

Based on the above findings of fact and conclusions of law, it is ordered:

1) The defendants shall pay Rivera a running award of temporary total disability benefits at the rate of five hundred ten and 2/100 dollars per week ($510.02) from the commencement date of November 12, 2020, and continuing until such time as Rivera meets the criteria of Iowa Code section 85.34(1).

2) The defendants shall pay accrued weekly benefits in a lump sum.

3) The defendants shall pay interest on unpaid weekly benefits awarded herein as set forth in Iowa Code section 85.30.

5) The defendants shall be given the credit for benefits previously paid for the stipulated amount.

4) The defendants shall pay a penalty of five hundred and 00/100 dollars ($500.00).

5) The defendants shall file subsequent reports of injury as required by Rule 876 IAC 3.1(2).

6) The defendants shall pay to Rivera the following amounts for the following costs:

    a) Two hundred fifty and 00/100 dollars ($250.00) for the reasonable costs of Dr. Laurich's report; and

    b) One hundred dollars and 00/100 ($100.00) for the filing fee.

Signed and filed this 24th day of March, 2022.

BENJAMIN G. HUMPHREY
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Dennis M. McElwain (via WCES)

Meredith G. Ashley (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, 86) 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.