BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

LORI BRANNAN,

Claimant,

vs.

CASEY'S MARKETING CO.,

Employer,

and

EMCASCO INSURANCE CO.

Insurance Carrier,
Defendants.

File No. 5063484

ARBITRATION

DECISION

Head Note Nos.: 1803, 2700, 4000

STATEMENT OF THE CASE

Lori Brannan, claimant, filed a petition in arbitration seeking workers' compensation benefits from Casey's Marketing, Co., the employer and EMCASCO, the workers' compensation insurance carrier.

The matter proceeded to hearing on February 14, 2018. The parties submitted post-hearing briefs on April 30, 2018, and the matter was considered fully submitted on that date.

The evidentiary record includes: Joint Exhibits JE1 through JE5; Defendants' Exhibits A through G, I through K, M and N; and, Claimant's Exhibits 1 and 4 through 6. At hearing, claimant and Peggy Lettington, Casey's Store Manager, provided testimony.

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

ISSUES

The parties submitted the following disputed issues for resolution:

1. Extent of permanent partial disability.

2. Defenses of notice and statute of limitations regarding the cumulative injury claim.

3. Alternate Medical Care.

4. Penalty concerning underpayment.

5. Costs

FINDINGS OF FACT

After a review of the evidence presented, I find as follows:

The parties agree that claimant sustained an injury that arose out of and in the course of her employment on July 18, 2014. The parties agree that if the undersigned finds that claimant sustained permanent partial disability, the same is a scheduled member involving claimant's right leg. The parties further agree that the commencement date for permanent partial disability benefits is January 21, 2015 and the proper workers' compensation weekly rate is $347.02. (Hearing Report, page 1) The parties stipulate that claimant was paid 22 weeks of permanent partial disability and 4.286 weeks of TTD/HP at the above stipulated rate prior to the hearing. (Hearing Report, p .2)

Claimant started working part-time for the defendant employer in Vinton, Iowa in May, 2005. She worked the cash register and in the kitchen. Claimant unloaded trucks, stocked product and did outside cleaning. She moved to a full-time position of 35 to 40 hours per week in the fall of 2006 continuing with the same work duties. Her job required her to be on her feet throughout her shift. In 2009 she was promoted to store manager. Her hours increased to 45 to 50 hours per week. She continued to do some of the same work duties, but added other obligations, like preparing grocery orders, checking in vendors, preparing a work schedule and doing bookkeeping.

In December 2013, she transferred to a store in Oskaloosa and took the position of assistant manager/food service manager. She was in charge of the kitchen and prepared supply orders. She worked about 45 to 50 hours per week and stood on her feet the entire shift on a hard surface. She later accepted a store manager position at the Oskaloosa store. This job involved work duties similar to the store manager position that she had in Vinton. The job description for the store manager position states that the individual must "be able to stand for an extended period of time and . . . lift up to 50 pounds." (Ex. C, p. 14)

Prior Medical

Claimant had a history of right knee pain before this work injury on July 18, 2014. Claimant had right knee pain in February 2008. She was working full-time at Casey's and on her feet a lot. Her diagnosis at that time was a right knee sprain. (Ex. 1, p. 2) She had follow-up care and received injections. (Ex. JE1, p. 3) A referral was made to

the University of Iowa Orthopedics where she was seen on July 31, 2008. She described experiencing grinding, popping and occasionally giving way in her knee. (Ex. JE2, p. 12) She was diagnosed with patellofemoral syndrome, with chondromalacia. (Ex. JE2, p. 14) On January 5, 2009, claimant described the pain as gradually occurring over the prior two years and that most of her pain was "in the anterior aspect with kneeling, squatting, and stairs. She has occasional painful popping with walking." (Ex. JE2, p. 18) The treatment plan involved potential weight loss. It is noted that "She understands that the patellofemoral knee pain is a difficult problem and will take some time and patience to address." (Ex. JE2, p. 21) Claimant testified that from the time she was at the Vinton Store to the time of the hearing her weight has dropped about 50 pounds, from about 319 pounds to about 268 pounds. (Transcript, p. 54)

On April 20, 2009, claimant reported anterior knee pain after she slipped and struck her knee on a car bumper. (Ex. JE2, p. 23) The impression at that time was "[r]ight patellofemoral knee pain with significant lateral tilt and early degenerative changes." (Ex. JE2, p. 24) An MRI was obtained and showed "a lateral facet patellar chondral defect and lateral tilt to the patella," with "evidence suggesting a medial meniscus tear." (Ex. JE2, p. 31) Surgery was performed on her right knee on June 15, 2009, which was a lateral release and chondroplasty of the patella and medial femoral condyle. (Ex. JE2, p. 32) As her treatment progressed, on or about July 29, 2009, claimant was noted to have good range of motion, and minimal crepitus. (Ex. JE2, p. 41)

Claimant testified that after her treatment in 2009, she had only occasional issues with her right knee and she was generally functional. She stated that she did not have the sort of pain, swelling or instability that she has had after the July 18, 2014 work injury.

I note that the records indicate two incidents with the right knee between 2009 and the work injury on July 18, 2014.

In November, 2011, claimant reported "a lot of right knee pain," after she "twisted it at work about a week ago." (Ex. JE1, p. 7) She was diagnosed with a right knee sprain. (Id.) She was prescribed prednisone and Lortab, and told to elevate and ice her knee and follow-up if she had any further problems. (Id.) There is no indication that she sought further care for this incident.

She reported falling down the stairs in January, 2014 and having x-rays of her knee. (Ex. JE3, p. 45) There does not seem to be any significant additional medical care related to this incident.

Following the 2009 surgery, claimant felt that she had generally been doing pretty well until she sustained this work injury on July 18, 2014. (Ex. JE3, p. 63) I find claimant was generally doing well over the five years period prior to the work injury in spite of the two episodes described above.

The Injury

On July 18, 2014, claimant was operating the cash register when a customer got into an argument with the kitchen staff. Claimant asked the customer to calm down and the individual charged claimant and pushed her, into a kitchen door, twisting her right knee. Claimant followed the customer into the kitchen and "drug her out of the kitchen." (Tr. p. 19) Claimant stated that she did not notice her right knee pain immediately because she was "too keyed up" from the incident. (Tr. p. 20) She noticed the pain thereafter. She went home, stayed off her right knee and woke up the next morning with her right knee "swollen up huge" and she "couldn't stand on it." (Id.) Claimant was supposed to work the day after the incident, and her husband had to help her get to work. She called her area supervisor, Millie Vroegh, and reported the injury. Ms. Vroegh told claimant to go to the emergency room.

Post-Injury Medical Treatment

Per the instructions of Ms. Vroegh, claimant went to the Mahaska Health Partnership Emergency Department on July 19, 2014. (Ex. JE3, p. 42) She reported being shoved against a door, twisting her knee and having increasing pain and swelling in her right lateral knee. (Id.) She was placed in an immobilizer. (Ex. JE3, pp. 45, 47)

Claimant was placed on light duty restrictions. (Ex. JE3, p. 49; Tr. pp. 21, 22) She described her understanding of those restrictions as no lifting heavy things and no bending, kneeling or standing for excessive periods of time. (Tr. pp. 21, 22)

Claimant had follow-up treatment and an MRI was ordered. (Ex. JE3, p. 46) The MRI showed degenerative changes and "focal thinning of the lateral patellar retinaculum, site of previous lateral release in 2009, and thinning of the lateral patellar facet cartilage; no acute ligamentous or tendon derangement seen with moderate peripatellar effusion, greatest over the lateral condyle." (Ex. JE4, p. 89)

On August 7, 2014, claimant was seen by Sreedhar Somisetty, M.D. (Ex. JE3, p. 55) Dr. Somisetty noted claimant's prior right knee history and her prior surgery. He stated that the right knee probably had a medial meniscal tear and that "[i]t is quite possible that the patient flared up her preexisting condition." (Id.)

On August 7, 2014, claimant was returned to work with no restrictions. (Ex. JE3, p. 54)

On August 28, 2014, Dr. Somisetty stated,

> I am not quite sure how much the work related incident could be a factor in her present day symptomology. I believe that the patient is headed towards needing a right total knee arthroplasty. I cannot confirm if the work related incident is the cause for her pain although this may have been aggravated from this incident.

(Ex. JE3, p. 56) She was prescribed crutches to help reduce pain and improve ease of ambulation. (Ex. JE3, p. 58)

On October 22, 2014, Dr. Somisetty stated that claimant may be looking at knee replacement sooner rather than later. He recommended diagnostic arthroscopic surgery, and claimant underwent said surgery on December 22, 2014, with Dr. Somisetty. (Ex. JE3, p. 63; Ex. 3, p. 73) The procedure involved a partial medial and partial lateral meniscectomy. (Id.) Claimant was off work for two weeks and returned on January 21, 2015. (Ex. JE3, p. 75)

On April 8, 2015, Dr. Somisetty said:

> It is extremely difficult for me to comment if the one-time injury on July 18, 2014 may have been the whole and only cause for her symptoms in the right knee. It is quite possible that she may have had mild symptoms and relatively asymptomatic arthritis that flared up following the injury.

(Ex. JE3, p. 78) He placed claimant at maximum medical improvement (MMI) and returned claimant "to all activities as tolerated with no restrictions." (Id.) However, he also stated that "I believe that the patient is headed towards a total knee arthroplasty eventually," but that given her age and weight "she needs to wait for a few more years." (Id.)

In August, 2015, claimant had a popping incident in her right knee that caused her to seek medical treatment. (Ex. JE3, p. 82) She was seen by Dr. Somisetty in August and November, 2015.

On January 6, 2016, claimant was seen by Dr. Somisetty, who assigned 4 percent permanent impairment to the whole person based on the American Medical Association Guides to the Evaluation of Permanent Impairment, Fifth Edition, due to loss of range of motion. He then discharged claimant at that time, again noting that claimant will eventually need a total knee replacement, which should be postponed "as long as possible considering her age and body mass index." (Ex. JE3, p. 87)

On February 1, 2016, Dr. Somisetty responded to a "check the box" letter from defense counsel indicating that claimant's July 18, 2014 work injury was limited to her right knee and that claimant sustained a 9 percent functional impairment to her right lower extremity. (Ex. A, pp. 1, 2) He also indicated that he agreed he was unable to state within a reasonable degree of medical certainty that claimant's work injury was a substantial and material factor contributing to her need for total knee replacement. (Ex. A, p. 2)

On May 27, 2016, claimant was seen by Sunil Bansal, M.D., at the request of claimant's counsel for the purpose of an independent medical evaluation (IME). (Ex. 1) Dr. Bansal agreed with Dr. Somisetty that claimant reached MMI on April 8, 2015. (Ex. 1, p. 12) He concluded that the incident of July 18, 2014 caused the meniscal tears

and also aggravated claimant's underlying condition. (Id.) Dr. Bansal assigned 10 percent permanent impairment to the lower extremity based on the AMA Guides, due to the medial and lateral meniscectomies. (Ex. 1, p. 14) He stated that claimant may need injections in the future and he agreed again with Dr. Somisetty, that her condition will eventually require a right knee replacement. However, he stated that the need for knee replacement surgery was accelerated by the July 18, 2014 work injury. (Ex. JE1, p. 14)

On December 6, 2016, John Kuhnlein, D.O., issued a report stating that the claimant "had aches and pains before the injury, but not to the extent that they were present after the injury." (Ex. B, p. 5) He agreed with Dr. Bansal's assessment of 10 percent permanent partial disability to the lower extremity. (Id.) Dr. Kuhnlein stated that the x-rays from August 27, 2015 and November 19, 2015 were interpreted as showing moderate and mild joint space narrowing, respectively, which he stated was "confusing" because it is not logical that the condition would have improved following the injury. (Ex. B, p. 5) He stated that "there is no convincing objective evidence in the currently available file that the arthritic changes progressed after the injury," and that "[i]t is unknown whether the arthritic changes noted in the x-rays after the injury changed, or whether they were related to the initial surgery performed on June 15, 2009, with medial femoral chondroplasty performed before the date of this injury." (Id.) Dr. Kuhnlein stated that although the injury occurred, "there is no evidence in the currently available file that the injury accelerated the need for the total knee arthroplasty anticipated by Dr. Somisetty," and that an "increase in symptoms does not translate to a material aggravation or progression of the arthritic condition." (Id.) However, Dr. Kuhnlein also indicated that he did not have the opportunity to review the x-rays themselves and stated that "[i]f the plain x-rays were available, I would be happy to review them, or asking Dr. Somisetty might be of some benefit, as he was the treating physician in this case." (Ex. B, p. 6)

Additional Findings

I find that claimant sustained an acute injury to her right knee on July 18, 2014, and did not sustain a cumulative injury. She testified that although she had some issues prior to the work injury, she did not have the constant pain and swelling and sense of instability that she had after the work injury. Dr. Kuhnlein noted that claimant "had aches and pains before the injury, but not to the extent that they were present after the injury." (Ex. B, p. 5)

Claimant testified that she is willing to proceed with knee replacement surgery if it was available to her. (Tr. p. 36) However, at this time, there is no physician recommending that she proceed with knee replacement.

Dr. Somisetty, Dr. Bansal and Dr. Kuhnlein concluded that claimant sustained permanent impairment from the stipulated work injury. Dr. Somisetty assigned 9 percent impairment based on reduced range of motion. Dr. Bansal and Dr. Kuhnlein opined that claimant sustained a 10 percent permanent impairment based on the

meniscal tears, which is supported by the explanation given by both Dr. Bansal and Dr. Kuhnlein.

At the time of the hearing, claimant testified that she continued to have constant right knee pain, which was made worse with standing. (Tr. p. 24) She has regular swelling in her knee and reduced range of motion and instability. (Tr. p. 35)

Peggy Lettington, a former store manager and current area manager testified that she became claimant's supervisor in November, 2015. (Tr. pp. 73, 74) She stated that she has observed claimant working about two or three times per month and claimant does not appear to be unable to do any part of her job. Peggy further stated that claimant has not asked for any accommodations at work, and has not complained to her about pain. (Tr. pp. 74, 75)

I accept the opinions of Dr. Bansal and Dr. Kuhnlein that claimant sustained 10 percent permanent partial disability to the right lower extremity, based on the meniscal tears. As explained by Dr. Kuhnlein, this rating cannot be combined with the range of motion rating per the AMA Guides and when there are competing ratings that are not combined, "the higher rating is usually assigned . . ." (Ex. B, p. 5)

Dr. Somisetty and Dr. Bansal have indicated that total knee replacement is the eventual treatment needed to address claimant's knee condition. This is based on the underlying arthritic condition, not the meniscal tears that were addressed in the surgery performed by Dr. Somisetty.

Dr. Somisetty, the treating physician originally stated that it was "quite possible that she may have had mild symptoms and relatively asymptomatic arthritis that flared up following the injury." (Ex. JE3, p. 78) However, on February 1, 2016, when asked to respond to a "check the box" letter, Dr. Somisetty stated that he was unable to state within a reasonable degree of medical certainty that claimant's work injury was a substantial and material factor contributing to her need for total knee replacement. (Ex. A, p. 2) I understand the February 1, 2016, opinion to be a statement that Dr. Somisetty is unable to affirmatively make a conclusion on the matter, although his prior opinion leaves the door open to the fact that the work injury may have aggravated the underlying arthritic condition. I also note that on October 22, 2014, Dr. Somisetty stated that claimant may be looking at knee replacement sooner rather than later and that there was no recommendation or discussion of knee replacement prior to the work injury. (Ex. JE3, p. 63)

Dr. Kuhnlein opined that there is no objective evidence in the medical record to support a conclusion that the arthritic condition advanced the need for knee replacement surgery by accelerating the work injury. His conclusion is based primarily on the lack of any progression in the condition as observed on the August 27, 2015 x-ray to the November 19, 2015 x-ray. In fact, the x-rays tend to suggest an apparent improvement in the condition, from moderate to mild. However, Dr. Kuhnlein concluded that the condition would not "progress from mild to moderate status, only to improve to a

mild status again." (Ex. B, p. 5) Dr. Kuhnlein therefore did not appear to believe that the condition would spontaneously improve. I therefore must consider the credibility/consistency of the radiology reports. (Ex. B, p. 5) Dr. Kuhnlein agreed that he was only able to review the radiologist interpretive reports and not the actual x-rays. He suggested that reviewing that actual films and speaking with Dr. Somisetty, "might be of some benefit" when addressing this question. (Ex. B, p. 6) I find that Dr. Kuhnlein's opinion is not an affirmative statement that the work injury did not accelerate the arthritic condition, but that the medical record is inconsistent and therefore one cannot find from the objective data a clear progression. However, the objective data available to Dr. Kuhnlein is questionable in its reliability considering the highly improbable spontaneous improvement the record suggests. However, rather than end the inquiry with a perusal of the objective data, it is appropriate to consider additional information such as claimant's history, symptoms and the fact that knee replacement was not recommended until after the work injury occurred. For example, although Dr. Kuhnlein stated that an increase in symptoms is not determinative concerning whether the condition was accelerated, I note that he found that claimant "had aches and pains before the injury, but not to the extent that they were present after the injury." (Ex. B, p. 5)

Dr. Bansal discussed the degenerative effect of an injury like claimant's within joints, and considering claimant's compatible history of symptomology and the recommendation for knee replacement surgery following the July 18, 2014 work injury, he opined that claimant's knee condition was accelerated due to the July 18, 2014 work injury. His conclusion appears sound to the undersigned in view of the entirety of the evidence presented in this case, and I accept the same.

Given Dr. Somisetty's opinion that the acceleration of the underlying condition is certainly possible, but that he is simply unable to say whether this occurred in claimant's specific case, and the opinion of Dr. Kuhnlein, who due to no fault of his own, stated that additional data would be helpful to reach a final conclusion on the issue; and, considering Dr. Bansal's reasonable explanation of the acceleration of the knee condition and the overall history of claimant's symptoms and the evidence presented in this case, including the lack of any recommendation for knee replacement prior to the occurrence of the work injury, I find that the July 18, 2014 work injury did accelerate the underlying arthritic condition and accelerate the need for the knee replacement surgery.

Considering claimant's care going forward, I find that at this time, there is no pending recommendation for knee replacement, although it is clearly anticipated that it will be needed at some point in the future.

I find the failure to provide medical care that is not yet recommended is not unreasonable.

Defendants initially paid weekly benefits at the incorrect rate of $271.75 for healing period (4.286 weeks) and permanent partial disability benefits (22 weeks). (Ex. 5; Ex. J; Hearing Report, p. 2) On or about May 31, 2017, claimant's counsel pointed

out the incorrect rate to defendants. (Ex. 5, p. 34) On or about June 26, 2017, defendants agreed with claimant's rate calculation and confirmed their agreement to pay the underpayment. (Ex. 5, p. 37) The discrepancy in the rate appeared to be defendants' incorrect exclusion of a particular week in the calculation. The correct weeks to be included in the rate calculation were available to defendants from the beginning of the case and did not represent new information when it was presented by claimant's counsel. The information had been available to defendants through the course of a reasonable investigation into the matter of assessing the correct rate. I find that defendants failed to conduct a reasonable investigation that would have revealed which weeks were to be included in the rate calculation and the underpayment was unreasonable.

The total underpayment as calculated by defendants and accepted by claimant is $1,745.66 per claimant's post-hearing brief. (Claimant's Post-Hearing Brief, p. 15) I accept the same as the amount of the underpayment. About 40 percent of the underpayment is $698.00. I note that the delay was significant, the amount delayed was also significant compared to the total healing period and permanent partial disability benefits owed in this case (about 20 percent of the total amount owed) but that there is no history of penalty from these defendants provided.

CONCLUSIONS OF LAW

Extent of Permanent Partial Disability, Notice and Statute of Limitations

The first issue is the extent of permanent partial disability and defendants' defense of notice and statute of limitations regarding cumulative injury.

I have found above that claimant sustained an acute injury to her right knee on July 18, 2014, and not a cumulative injury. Therefore, the defenses related to the claim of a cumulative injury are moot.

Under the Iowa Workers' Compensation Act, permanent partial disability is compensated either for a loss or loss of use of a scheduled member under Iowa Code section 85.34(2)(a)-(t) or for loss of earning capacity under section 85.34(2)(u). The extent of scheduled member disability benefits to which an injured worker is entitled is determined by using the functional method. Functional disability is "limited to the loss of the physiological capacity of the body or body part." Mortimer v. Fruehauf Corp., 502 N.W.2d 12, 15 (Iowa 1993); Sherman v. Pella Corp., 576 N.W.2d 312 (Iowa 1998). The fact finder must consider both medical and lay evidence relating to the extent of the functional loss in determining permanent disability resulting from an injury to a scheduled member. Terwilliger v. Snap-On Tools Corp., 529 N.W.2d 267, 272-273 (Iowa 1995); Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417, 420 (Iowa 1994).

Concerning claimant's functional impairment, I have considered the expert testimony and the lay testimony and found above that claimant has sustained a 10 percent permanent impairment to her right lower extremity, which is 22 weeks. This

includes consideration of the recommended permanent restrictions, claimant's reported current condition and symptoms and her employment status along with all other appropriate considerations for the assessment of permanent partial disability.

The parties agreed that claimant was paid 22 weeks of permanent partial disability benefits at the stipulated rate prior to the hearing. Therefore, no additional permanent partial disability benefits are owed.

Alternate Medical Care

I now consider claimant's entitlement to alternate medical care and the knee replacement surgery.

The employer shall 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. The employer shall also allow reasonable and necessary transportation expenses incurred for those services. The employer has the right to choose the provider of care, except where the employer has denied liability for the injury. Section 85.27. Holbert v. Townsend Engineering Co., Thirty-second Biennial Report of the Industrial Commissioner 78 (Review-Reopening October 16, 1975).

By challenging the employer's choice of treatment – and seeking alternate care – claimant assumes the burden of proving the authorized care is unreasonable. See Iowa R. App. P 14(f)(5); Bell Bros. Heating v. Gwinn, 779 N.W.2d 193, 209 (Iowa 2010); Long v. Roberts Dairy Co., 528 N.W.2d 122 (Iowa 1995). Determining what care is reasonable under the statute is a question of fact. Long v. Roberts Dairy Co., 528 N.W.2d 122 (Iowa 1995). The employer's obligation turns on the question of reasonable necessity, not desirability. Id.; Harned v. Farmland Foods, Inc., 331 N.W.2d 98 (Iowa 1983).

An application for alternate medical care is not automatically sustained because claimant is dissatisfied with the care he has been receiving. Mere dissatisfaction with the medical care is not ample grounds for granting an application for alternate medical care. Rather, the claimant must show that the care was not offered promptly, was not reasonably suited to treat the injury, or that the care was unduly inconvenient for the claimant. Long v. Roberts Dairy Co., 528 N.W.2d 122 (Iowa 1995).

I have found above that claimant's July 18, 2014 work injury aggravated her underlying knee condition and accelerated the need for knee replacement surgery. However, I have also found that there is no presently pending recommendation for knee replacement surgery, although it is expected at some point in the future. I conclude, as stated above, that it is not unreasonable at this juncture for defendants to fail to authorize knee replacement surgery, when no doctor has suggested that the surgery should occur at this time. I agree with defendants' argument, that at this time, the issue

is essentially not yet ripe because there is no current recommendation to proceed with knee replacement surgery.

I conclude that claimant has failed to carry her burden of proof that she is entitled to medical treatment of knee replacement surgery at this time.

Penalty

Claimant asserts a claim for penalty benefits related to underpayment of healing period and permanent partial disability.

If weekly compensation benefits are not fully paid when due, section 86.13 requires that additional benefits be awarded unless the employer shows reasonable cause or excuse for the delay or denial. Weekly compensation payments are due at the end of the compensation week. Robbennolt v. Snap-on Tools Corp., 555 N.W.2d 229, 235 (Iowa 1996).

Delay attributable to the time required to perform a reasonable investigation is not unreasonable. Kiesecker v. Webster City Meats, Inc., 528 N.W.2d 109 (Iowa 1995).

It is not unreasonable to deny a claim when a good faith issue of law or fact makes the employer's liability fairly debatable. An issue of law is fairly debatable if viable arguments exist in favor of each party. Covia v. Robinson, 507 N.W.2d 411 (Iowa 1993). An issue of fact is fairly debatable if substantial evidence exists which would support a finding favorable to the employer. Gilbert v. USF Holland, Inc., 637 N.W.2d 194 (Iowa 2001).

An employer's bare assertion that a claim is fairly debatable is insufficient to avoid imposition of a penalty. The employer must assert facts upon which the commissioner could reasonably find that the claim was "fairly debatable." Meyers v. Holiday Express Corp., 557 N.W.2d 502 (Iowa 1996).

If the employer fails to show reasonable cause or excuse for the delay or denial, the commission must impose a penalty in an amount up to fifty percent of the amount unreasonably delayed or denied. Christensen v. Snap-on Tools Corp., 554 N.W.2d 254 (Iowa 1996). The factors to be considered in determining the amount of the penalty include the length of the delay, the number of delays, the information available to the employer and the employer's past record of penalties. Robbennolt, 555 N.W.2d at 238.

The parties seem to be in agreement that there was an underpayment that was not paid until about a year or more after the benefits were due. The amount delayed was $1,745. 66. The information that brought about the correction of the rate was available to defendants from the time of their original calculation. I therefore conclude that defendants failed in their investigation and the same was not reasonable. The period of delay was significant, the amount delayed was also significant compared to the amount of benefits that are payable in this case, and there was no evidence presented of the history of penalty from the defendants. Because I am unable from the

evidence provided to consider the defendants' record of penalties as required under Robbennolt, I do not award the maximum penalty. Rather, I conclude that 40 percent is appropriate and that $698.00 is about 40 percent of the amount delayed.

Costs

The final issue is costs. Assessment of costs is a discretionary function of this agency. Iowa Code section 86.40. Costs are to be assessed at the discretion of the deputy commissioner or workers' compensation commissioner hearing the case. 876 IAC 4.33. I conclude that it is appropriate to assess costs to defendants. Exhibit 6 sets forth costs, which appear to be the $100.00 filing fee plus the service fee of $13.12. Defendants are obligated to pay costs of $113.12.

ORDER

THEREFORE, IT IS ORDERED:

Defendants shall pay penalty benefits of six hundred ninety eight and 00/100 dollars ($698.00).

Defendants shall pay costs of one hundred thirteen and 12/100 dollars ($113.12).

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

Signed and filed this 30th day of August, 2018.

TOBY J. GORDON
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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TJG/sam

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.