BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

YOURN RIFAS, Claimant, vs. THE REHAB CENTER OF DES MOINES, Employer, and AMERICAN ZURICH INS. CO., Insurance Carrier, Defendants.	:	File No. 5053535.01 REVIEW REOPENING DECISION Head Note Nos.: 1803, 1703, 2501, 2904, 4000.2

STATEMENT OF THE CASE

On January 7, 2020, Yourn Rifas filed a petition seeking workers' compensation benefits from the defendants, employer The Rehab Center of Des Moines (Rehab Center) and insurance carrier American Zurich Insurance Company (American Zurich), under review-reopening for a stipulated work injury sustained on June 30, 2014. Pursuant to agency rules and orders, the undersigned presided over a hearing on January 27, 2021, held by Internet-based video. Rifas participated personally and through attorney Joseph S. Powell. The defendants appeared by and through attorney Abigail A. Wenninghoff.

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 agency for determination. 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) Under Iowa Code section 85.34(2), what, if any, additional permanent disability relating to the stipulated work injury did Rifas sustain?

2) Under Iowa Code section 85.27, is Rifas entitled to payment of the medical expenses in Claimant's Exhibit 9?

3) Under Iowa Code section 86.13, is Rifas entitled to penalty benefits because of the defendants' alleged:

    a) Delay in payment of permanent partial disability benefits to which Rifas was entitled under the agency's first arbitration decision?

    b) Refusal to pay additional permanent partial disability benefits?

4) Under Iowa Code section 86.40 and rule 876 IAC 4.33, are the costs itemized in Claimant's Exhibit 10 taxed against the defendants?

STIPULATIONS

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

1) An employer-employee relationship existed between Rifas and Rehab Center at the time of the stipulated work injury.

2) Rifas sustained an injury on June 30, 2014, which arose out of and in the course of employment with Rehab Center.

3) The stipulated injury is a cause of temporary disability during a period of recovery, but Rifas's entitlement to temporary disability or healing period benefits is no longer in dispute.

4) The stipulated injury is a cause of permanent disability that is industrial in nature.

5) The commencement date for permanent partial disability benefits, if any are awarded, is September 3, 2015.

6) Per the first arbitration decision in this case, Rifas's weekly rate of workers' compensation is four hundred seven and 28/100 dollars ($407.28).

7) With respect to the disputed medical expenses:

    a) The fees or prices charged by providers are fair and reasonable.

    b) The treatment was reasonable and necessary.

    c) The requested expenses were authorized by the defendants.

8) Per the first arbitration decision in this case, the defendants are entitled to a credit for one hundred fifty (150) weeks of compensation paid to Rifas at the rate of four hundred seven and 28/100 dollars ($407.28).

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 FACTS

The evidentiary record in this case consists of the following:

- Joint Exhibits (Jt. Ex.) 1 through 3;
- Claimant's Exhibits (Cl. Ex.) 1 through 12;
- Defendants' Exhibits (Def. Ex.) A through D; and
- Hearing testimony by Rifas.

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

Rifas previously filed a petition in arbitration with the agency. The agency held an arbitration hearing on August 26, 2016. Deputy Joseph L. Walsh issued an arbitration decision on October 23, 2017.

The findings of fact and conclusions of law in the first arbitration decision are binding in the current review-reopening proceeding. Rifas included the October 23, 2017 arbitration decision as Claimant's Exhibit 11. For ease of reference, this decision will cite to the decision as Claimant's Exhibit 11 and the exhibit page numbers as opposed to the decision page numbers.

Rifas worked as a certified nursing assistant (CNA) for Rehab Center. She sustained a work injury on June 30, 2014, while placing a patient in bed. (Cl. Ex. 11, p. 73) She fell to the ground and felt a pop in her low back, after which she experienced pain in her back and hip, with radiation into the left leg. (Cl. Ex. 11, p. 73)

The defendants accepted liability for the work injury and provided care. (Cl. Ex. 11, pp. 73-74) Rifas ultimately underwent L3-5 decompression and L4-5 discectomy surgery. (Cl. Ex. 11, p. 74) At the time of the review-reopening hearing, the defendants had not paid sixteen thousand one hundred seven and 44/100 dollars ($16,107.44) relating to this medical care. (Cl. Ex. 9, pp. 50–55) After completing rehabilitation, she returned to work. (Cl. Ex. 11, p. 74) Rifas continued to experience symptoms in her back and leg. (Cl. Ex. 11, p. 74)

Rifas underwent two functional capacity evaluations (FCEs). (Cl. Ex. 11, p. 74) The FCE requested by the defendants was invalid and placed her in the light category of work. (Cl. Ex. 11, p. 74) The FCE requested by Rifas's attorney was valid and placed her in the medium category of work. (Cl. Ex. 11, p. 74)

Rifas's treating physician disagreed with both FCEs and assigned no work restrictions. (Cl. Ex. 11, p. 74) Rifas then saw Sunil Bansal, M.D. (Cl. Ex. 11, p. 74) Dr. Bansal found her to have sustained a ten percent functional impairment to her whole body and assigned work restrictions in the light work category. (Cl. Ex. 11, p. 74) Rifas continued to work as a CNA for Rehab Center at the time of the arbitration hearing. (Cl. Ex. 11, p. 74)

On the disputed issue of permanent disability, the arbitration decision concluded:

> Claimant was age 41 at the time of injury with a high school diploma and some college coursework. Claimant has a CNA certificate and has worked that profession for the majority of her vocational history. Claimant continues to work for this same employer with some accommodation from co-workers. The claimant is bright and employable with high-demand skills.
>
> I find that claimant has work restrictions consistent with a medium work category. While the assessment of work restrictions was hotly disputed, it is obvious that the three-level surgery performed by Dr. Nelson resulted in a restricted ability to perform repetitive manual labor. There is no "faking" a back surgery. The reality is she had a three-level back surgery. Defendants argue strongly that claimant has embellished her condition; it does not overcome the objective evidence of surgical intervention. Just because the symptoms are not as bad as claimant makes it out to be does not mean this is not a legitimate case for work restrictions. To the contrary, to ignore the invasive procedure at three levels of the lumbar spine would be inconsistent with common sense. After this surgery claimant would be expected to have some work restrictions both on ability to work and precautionary to prevent further injury to the already surgically altered spinal column. It is found that claimant has a safe repetitive lifting capacity in the 25-poung range.
>
> Claimant's ability to return to work is well established. She has continued on in her job with the same employer with a comparable rate of pay. This detracts from a finding of significant industrial disability.
>
> Having considered all industrial disability factors it is held that as a result of the June 30, 2014 injury claimant has sustained 30 percent industrial disability causally connected to the work injury.

(Cl. Ex. 11, pp. 76)

After the arbitration decision, another entity acquired the Rehab Center operation where Rifas worked. (Hrg. Tr. p. 16; Def. Ex. B) But the change in ownership did not result in major changes at Rehab Center. (Hrg. Tr. p. 16) There were no mass layoffs or

other staffing shakeups. (Hrg. Tr. p. 16) By and large the same people were performing the same jobs, just with different ownership. (Hrg. Tr. p. 17)

After the change in ownership, Rifas participated in a physical exam relating to her work on August 10, 2017. (Def. Ex. C, p. 6) She indicated she had no difficulty working. (Def. Ex. C, p. 6) It is more likely than not this was because Rehab Center was honoring Rifas's permanent work restrictions resulting from her work injury.

Rifas continued to work as a CNA for Rehab Center after the arbitration decision. (Hrg. Tr. p. 16) She worked exclusively as a CNA for a time. (Hrg. Tr. p. 16) Her job duties changed after she completed her medication aide certification in 2019. (Hrg. Tr. pp. 14–16; Def. Ex. C, p. 12)

Being a medication aide is different from being a CNA. (Hrg. Tr. p. 15) A CNA cannot pass medicine to patients, but a certified medication aide is authorized to do so. (Hrg. Tr. p. 15) After receiving her medication aide certification, Rifas worked as both a medication aide and CNA when Rehab Center had a CNA staffing need, which was often. (Hrg. Tr. p. 15)

Rehab Center policy prohibited employees from having guests at the facility on any floor but the first floor. (Def. Ex. C, p. 10) On August 2, 2019, Rehab Center disciplined Rifas for having visitors at work. (Def. Ex. C, p. 7) The disciplinary notice referenced video showing Rifas had visitors, but the defendants offered no video evidence. (Def. Ex. C, p. 7) The disciplinary notice contained no specific allegations with respect to the dates of the alleged violation. (Cl. Ex. C, p. 7) Rifas denied having visitors at work. (Def. Ex. C, p. 7)

Rifas worked on the night of November 27, 2019. (Hrg. Tr. p. 17) She went into a patient's room, woke her up, and gave her medication. (Hrg. Tr. p. 17; Def. Ex. D, p. 16, Depo. p. 10) Then Rifas exited the room and left the door about halfway open. (Hrg. Tr. p. 17; Def. Ex. D, p. 16, Depo. p. 10) Rifas continued to pass medication through the end of her shift. (Hrg. Tr. p. 17) The patient did not ask her for anything else. (Hrg. Tr. p. 17) Shortly thereafter, Rehab Center discharged Rifas. (Hrg. Tr. p. 17)

Only one person testified under oath regarding the discharge: Rifas. No one else with direct knowledge of Rehab Center's discharge of Rifas testified. The record here includes documentary evidence, the substance of which is hearsay, with respect to what motivated Rehab Center's discharge of Rifas.

Director of nursing Kendra Himes signed the "Counseling/Disciplinary Notice," dated November 27, 2019, regarding Rehab Center's discharge of Rifas. (Cl. Ex. 3, p. 20) Section 2 of the Notice directs the manager completing it to provide the "[r]eason(s) why counseling/disciplinary action is necessary, including a complete explanation of the conduct constituting the violation." (Cl. Ex. 3, p. 20) Under this instruction, the Notice states (sic):

> On Monday, 11/25/2019 an occurrence happened on the 3rd floor that lead a resident to feel secluded and the resident called her family urgently feeling unsafe after the staff gave her medications and would not further assist her needs. This affected the residents safety and mental well-being. Several other resident have voiced complaints that Yourn has had visitors on the unit and did not meet there needs appropriately.

(Cl. Ex. 3, p. 20)

Thus, the Notice consists largely of conclusory assertions without many factual specifics. It does not expressly identify what resident need was left unassisted or how the alleged lack of assistance affected the resident's safety and wellbeing. The Notice also contains no additional information regarding the allegations Rifas had visitors to the workplace or how she failed to appropriately meet the needs of other residents. While the defendants provided a copy of the Rehab Center guest policy Rifas allegedly violated, they provided no policy or work rule regarding the standard for responding to patient needs or information relating to an investigation (such as statements from the patient, the patient's family, other employees during the shift in question, or Rifas). For these reasons, a reasonable person would not rely on the conclusory substance contained in the Notice when conducting everyday affairs. The substance of this hearsay evidence is therefore given less weight than Rifas's sworn hearing testimony.

Section 4 of the Notice is labeled, "Supervisor's Signature." (Cl. Ex. 3, p. 20) It states above the signature space, "I have investigated the circumstances surrounding this notice and have verified to the best of my knowledge and belief that the action taken is within Company policy, and that the information is factual." (Cl. Ex. 3, p. 20) The evidentiary record is devoid of evidence relating to any possible investigation or what company policy may have been violated with respect to Rifas's allegedly inadequate response to patient needs. It is a conclusory assertion without any specifics to support the truth of the matter it asserts. Like the allegations in Section 2, it is not the type of hearsay on which a reasonable person would rely. The undersigned declines to do so here.

At hearing, no one testified to provide information supporting the validity of the conclusory assertions contained in the Notice. Rehab Center policies are not in evidence. While the defendants argue that Rehab Center's acquisition by another entity left them without any knowledge of subsequent personnel decisions, the ownership change did not prevent the defendants from conducting their own investigation of Rifas's discharge or from putting on evidence of what it found pursuant to such an investigation.

On the Notice, Rifas expressly denied ever having visitors to work. (Cl. Ex. 3, p. 20) She reiterated this during her sworn testimony. (Cl. Ex. 3, p. 20) Rifas's denials are more credible than the hearsay contained in the written documents.

Rifas also credibly testified that on the date in question, she made her rounds distributing medications to residents, as her certified medication aide job duties dictated. (Hrg. Tr. p. 18) The weight of the evidence establishes Rehab Center required Rifas, as a certified medication aide, to distribute medication as needed to residents. After giving one resident medication, she left a resident's door partially open while completing paperwork and the resident did not request any assistance. (Hrg. Tr. p. 18) Rifas's testimony that she does not understand why Rehab Center would terminate her employment for leaving a patient's door halfway open while completing paperwork before continuing to perform her medication aide duties is compelling. (Hrg. Tr. p. 18)

The motivation behind Rehab Center's decision to discharge Rifas becomes clearer due to other evidence. Through other Rehab Center employees and Himes's text messages, Rifas learned Rehab Center management had an ulterior motive for discharging her. Himes believed Rifas was costing Rehab Center money because of the company's accommodation of the permanent work restrictions necessitated by the stipulated work injury.

Ryan Hoffman, a medical staff coordinator, participated in Rehab Center staffing meetings, which included discussion of employees on work restrictions due to injuries arising out of and in the course of their employment. (Hrg. Tr. p. 19–20; Cl. Ex. 4, p. 21) Because Rifas needed permanent work restrictions due to her work injury, Rehab Center management discussed her at these meetings. (Hrg. Tr. p. 20; Cl. Ex. 4, p. 21) Hoffman informed Rifas management would regularly talk about how Rehab Center needed to get rid of her because her work restrictions were costing the company money. (Hrg. Tr. p. 21; Cl. Ex. 4, p. 21)

Sheena Cunconan, an assistant director of nursing at Rehab Center, also reached out to Rifas about her discharge. (Hrg. Tr. p. 21; Cl. Ex. 4, p. 22) Like Hoffman, Cunconan was present in management meetings about issues at the facility. (Hrg. Tr. p. 21; Cl. Ex. 4, p. 22) Cunconan shared Rehab Center management discussed workers on light duty due to workers' compensation injuries and singled Rifas out for discharge because of the belief her continued employment and the company's accommodation of her work restrictions was costing the company money. (Hrg. Tr. p. 21; Cl. Ex. 4, p. 22) In Cunconan's email to Rifas, she identified Ellie Snodgrass and Himes as the individuals who believed Rehab Center should discharge Rifas because of the work restrictions she needed due to her work injury. (Cl. Ex. 4, p. 22; Hrg. Tr. p. 22)

Rifas exchanged text messages with Himes after Rehab Center fired Rifas. (Hrg. Tr. p. 21–22; Cl. Ex. 4, pp. 23–24) It is more likely than not that Rifas texted Himes about karma after learning of the end of the employment relationship between the Rehab Center and Himes. (Cl. Ex. 4, p. 24) Himes texted in reply (sic):

> You were a liability on the building that was a business choice so go ahead and look up your ED for that one and then maybe grab you a lawyer for unlawful termination which you should have done as soon as it happened.

(Cl. Ex. 4, p. 24)

It is rare for the manager who signed a former employee's notice of termination alleging violation of company policies to later advise the former employee to retain an attorney to pursue an action for "unlawful termination," as Himes did to Rifas. Likewise, it is uncommon for two members of management who participate in regular staffing meetings such as Hoffman and Cunconan to contact an employee about the employee's discharge because of management discussions during these meetings. Taken together with Rifas's credible testimony, this hearsay evidence is more compelling than the hearsay evidence of the Notice of Termination. The weight of the evidence shows the reasons in the Notice are pretense and a motivating factor in Rehab Center's discharge of Rifas was the permanent work restrictions necessitated by the stipulated work injury.

After Rehab Center discharged Rifas, she earnestly looked for work. (Cl. Ex. 5, pp. 25–40; Hrg. Tr. pp. 22–23) She kept track of her job search as instructed by the Division of Unemployment Insurance Services at Iowa Workforce Development (IWD) after she filed a claim for unemployment insurance benefits. (Hrg. Tr. p. 22) Rifas applied for work at dozens of employers. (Cl. Ex. 5, pp. 25–40) Rifas did not disclose her permanent work restrictions on the applications she submitted. (Hrg. Tr. p. 23) She credibly testified she would have informed an employer of her work restrictions during the interview process. (Hrg. Tr. p. 23)

Rifas conceded at hearing that she did not think she could physically perform the duties of all the jobs for which she applied, but she was willing to try. (Hrg. Tr. p. 23) Despite Rifas's good faith efforts, she had not received a job offer and had not worked between Rehab Center's termination of her and the date of hearing. (Hrg. Tr. p. 23) She testified she planned to apply for disability benefits with the federal Social Security Administration in the near future due to the permanent work restrictions necessitated by her work injury and her unsuccessful endeavors to find a new job. (Hrg. Tr. p. 31)

Rifas has always wanted to be a nurse. (Hrg. Tr. p. 29) Before the stipulated work injury, she began to pursue her nursing degree. (Hrg. Tr. p. 31) However, as of the time of hearing, Rifas had been unable to obtain it in part because of the work injury. (Hrg. Tr. 31) Rifas testified at hearing that she had tried continue the process of getting her registered nurse degree twice but had "to quit each time because the driving, sitting in a car for so many, you know, hours hurts my back. My back gets stiff. And then my leg hurts and I can't walk. But I'm still trying." (Hrg. Tr. p. 29) She conceded she would likely not be able to become a nurse because of the physical demands of the job even if she achieved her goal of earning her nursing degree. (Hrg. Tr. p. 29) The evidence establishes it is more likely than not Rifas would not be able to physically perform the duties of a registered nurse if she is able to obtain her nursing degree.

The first arbitration decision ordered: "Broadlawns Medical Center is the authorized provider of medical care effective the date of this order until such time as defendants authorize a medical provider that is willing to treat claimant for ongoing

complaints of pain." (Cl. Ex. 11, pp. 80–81) At the time of hearing, Rifas continued to ongoing care for pain management at Broadlawns Medical Center. (Hrg. Tr. p. 24; Jt. Ex. 1, pp. 1–101) Rifas sees Mohammed Iqbal, M.D., at Broadlawns approximately once every three months. (Hrg. Tr. p. 24) Dr. Iqbal prescribes pain medication and administers injections to Rifas's back. (Hrg. Tr. p. 24–25) Because the defendants did not pay for all of Rifas's care at Broadlawns relating to the stipulated work injury, Medicaid paid four thousand two hundred thirty-three and 30/100 dollars ($4,233.30). (Cl. Ex. 9, p. 56–66)

In 2019, Rifas injured her right wrist in a fall at Rehab Center. (Hrg. Tr. p. 30; Jt. Ex. 2, pp. 102–03) She broke her wrist and was ultimately also diagnosed with carpal tunnel syndrome, which required surgery. (Hrg. Tr. p. 30; Jt. Ex. 2, pp. 102–03; Jt. Ex. 3, pp. 104–35) She received a one percent impairment rating as a result of the injury. (Hrg. Tr. p. 30) There is an insufficient basis in the evidence from which to conclude Rifas's wrist injury resulted in permanent work restrictions in excess of those identified in the first arbitration decision.

On March 30, 2020, Rifas participated in a functional capacity evaluation (FCE) arranged by her attorney at Short Physical Therapy in order to "help determine at what functional level Ms. Rifas is at currently." (Cl. Ex. 1, p. 3) Daryl Short, DPT, performed the FCE. (Cl. Ex. 1, p. 5) He found her effort valid. (Cl. Ex. 1, p. 5)

The FCE showed Rifas required work restrictions when working a 40-hour week with eight-hour days. (Cl. Ex. 1, p. 4) She needs slight limitations to sitting, slight to some limitations (up to 50 percent of the work day) for standing work and walking, and some limitations for elevated work, forward bent standing, crouching, kneeling, and half-kneeling. (Cl. Ex. 1, p. 4) It also demonstrated Rifas needed the following lifting restrictions:

- Lifting waist to/from floor up to 20 pounds;
- Lifting waist to/from crown up to 15 pounds; and
- Front carry up to 20 pounds for up to 50 feet.

(Cl. Ex. 1, p. 4)

On March 31, 2020, Rifas's attorney sent Dr. Iqbal a check-box letter regarding Rifas. (Cl. Ex. 1, p. 1–2) In the letter, counsel asked Dr. Iqbal "whether the restrictions and limitations stated in the attached March 30, 2020 FCE report from Short Physical Therapy are appropriate for Yourn Rifas as a result of her June 30, 2014 work injury." (Cl. Ex. 1, p. 1) Dr. Iqbal indicated they were, signed the response, and dated it April 2, 2020. (Cl. Ex. 1, p. 1)

On May 5, 2020, during a telehealth appointment for pain management, Rifas shared that she was attempting to stay busy after her discharge and not just sit around. (Jt. Ex. 1, p. 90) This led her to do some gardening that increased her pain. (Jt. Ex. 1, p.

90) Nonetheless, she stated her pain had "mostly been about the same." (Jt. Ex. 1, p. 90) There is no indication her gardening caused a permanent increase in pain; rather, it is more likely than not it was a temporary exacerbation.

On August 10, 2020, Rifas was in a car crash, which caused her neck pain. (Jt. Ex. 1, p. 95) There is an insufficient basis in the record from which to conclude the crash caused any change in the symptoms relating to her back injury or caused a doctor to assign work restrictions. It is more likely than not the car crash caused Rifas temporary neck pain.

On November 4, 2020, Rifas underwent a second independent medical examination (IME) with Sunil Bansal, M.D. (Cl. Ex. 2, pp. 11–17) As part of the IME, Dr. Bansal reviewed the first arbitration decision, medical records, the FCE report, and performed an in-person examination of Rifas. (Cl. Ex. 2, pp. 11–15) In response to the question of whether Rifas's "work-related back and/or hip issues worsened since August 26, 2016," he opined:

> Yes, Ms. Rifas has worsened low back pain, accompanied by worsened left leg radiculopathy. This is reflected in increased weakness of her left leg, placing her at a sedentary functional level. The increased pain and radiculopathy has led to a postoperative need for interventional pain management, including epidurals and facet-directed injections since August 26, 2016.

(Cl. Ex. 2, p. 16)

Using the Fifth Edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, Dr. Bansal opined the functional impairment relating to Rifas's work injury had increased:

> Rifas'[s] impairment can be classified as having elements fitting into DRE Lumbar Category III. She had a disc herniation at L4-L5, treated with discectomy. She has increased pain. The range for the category is 10 to 13%, based on pain levels. Her permanent impairment is now a 13% whole person impairment.

(Cl. Ex. 2, p. 16) Dr. Bansal also agreed with the restrictions in the FCE, which placed her at a sedentary work level, "a marked change from her prior restrictions" that "reflects her worsened radicular symptomatology from her June 30, 2014 injury." (Cl. Ex. 2, p. 17)

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 injuries at issue in this case occurred before July 1, 2017, the Iowa

Workers' Compensation Act in effect before the 2017 amendments applies except to the accrual of interest on benefits. Smidt v. JKB Restaurants, LC, File No. 5067766 (App. December 11, 2020); Deciga-Sanchez v. Tyson, File No. 5052008 (Ruling on Defendant's Motion to Enlarge, Reconsider, or Amend Appeal Decision Re: Interest Rate Issue, Apr. 23, 2018).

1. Medical Expenses.

For all injuries compensable under the Iowa Workers' Compensation Act, the employer "shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance, and hospital services and supplies therefor and shall allow reasonably necessary transportation expenses incurred for such services." Iowa Code § 85.27(1). This responsibility is coupled with the right to choose care for the employee's work injury. Id. at § 85.27(4). "[A]n employer who authorizes care is responsible for the cost of care up to the time when the employer notifies the employee it is no longer authorizing care." Ramirez-Trujillo v. Quality Egg, L.L.C., 878 N.W.2d 759, 771 (Iowa 2016).

The defendants authorized care with Dr. Nelson for the stipulated work injury. There is no indication the defendants notified Rifas it was terminating the authorization for this care. The defendants are responsible for the outstanding costs relating to it under Iowa Code section 85.27.

The arbitration decision concluded, "Broadlawns Medical Center is the authorized provider of medical care effective the date of this order until such time as defendants authorize a medical provider that is willing to treat claimant for ongoing complaints of pain." There is no indication in the record the defendants authorized an alternative provider for pain management. The defendants are therefore responsible for the costs paid by Medicaid for care relating to pain management for the stipulated work injury under Iowa Code section 85.27. The defendants shall make arrangements with Medicaid to pay those costs.

2. Permanent Disability.

The Iowa Workers' Compensation Act provides parties a mechanism to reopen an agency decision or agreement for settlement under Iowa Code section 86.13 for agency review. See Iowa Code § 85.26(2). "The review-reopening proceeding . . . is a new and distinct proceeding apart from the original arbitration action." Kohlhaas v. Hog Slat, Inc., 777 N.W.2d 387, 395 (Iowa 2009). The agency's inquiry "shall be into whether or not the condition of the employee warrants an end to, diminishment of, or increase of compensation so awarded or agreed upon.'" Iowa Code § 86.14.

Because "principles of res judicata . . . apply," the agency does not "'re-determine the condition of the employee . . . adjudicated by the former award.'" Kohlhaas, 777 N.W.2d at 391–93 (quoting Stice v. Consol. Ind. Coal Co., 291 N.W.2d 452, 456 (Iowa 1940)). Nor does reviewing-reopening "provide an opportunity to relitigate causation

issues that were determined in the initial award or settlement agreement. Id. at 393. Rather, the agency "must . . . evaluate 'the condition of the employee, which is found to exist subsequent to the date of the award being reviewed.'" Id. at 391 (quoting Stice, 291 N.W.2d at 456).

The party petitioning the agency for review-reopening shoulders the burden to prove by a preponderance of the evidence the requisite change in condition. See id. When an employee seeks more compensation, the employee must establish the original work injury is the proximate cause of additional impairment or lessening of earning capacity. E.N.T. Assoc. v. Collentine, 525 N.W.2d 827, 830 (Iowa 1994) (citing Blacksmith v. All-American, Inc., 290 N.W.2d 348, 350 (Iowa 1980)). When an employee's industrial disability is at issue, "[t]he necessary showing in a review-reopening proceeding may be made without proof of change in physical condition." Id. (citing Blacksmith, 290 N.W.2d at 350). The agency must consider the traditional factors when deciding if the requisite change in industrial disability has occurred: functional disability, age, education, qualifications, work experience, inability to engage in similar employment, earnings before and after the injury, motivation to work, personal characteristics, and the employer's inability to accommodate the functional limitations. See id.; Neal v. Annett Holdings, Inc., 814 N.W.2d 512, 526 (Iowa 2012); IBP, Inc. v. Al-Gharib, 604 N.W.2d 621, 632–33 (Iowa 2000); Ehlinger v. State, 237 N.W.2d 784, 792 (Iowa 1976).

The first arbitration decision found:

> Claimant has a CNA certificate and has worked that profession for the majority of her vocational history. Claimant continues to work for this same employer with some accommodation from co-workers. The claimant is bright and employable with high-demand skills.

It also concluded Rifas had "a safe repetitive lifting capacity in the 25-pound range." The decision further concluded Rifas had sustained a 30 percent industrial disability. Her continued employment with Rehab Center weighed against concluding she had sustained a more significant industrial disability than what the decision found.

The evidence establishes Rifas's industrial disability has increased since the date of the first arbitration decision. Rifas's pain has increased. Her physical condition has deteriorated, which has increased her functional limitations. Rehab Center's decision to discharge Rifas has also made the impact of the work injury on her earning capacity more significant.

Dr. Bansal opined Rifas's functional impairment increased from 10 to 13 percent. There is no expert opinion to the contrary in evidence. This is based on Rifas's increased pain levels, a medical conclusion reinforced by the FCE report and Rifas's credible description of her symptoms. Dr. Bansal's opinion is therefore adopted.

Moreover, both Dr. Iqbal and Dr. Bansal adopted the work restrictions in the 2020 FCE report, which found Rifas could perform work in the sedentary category, subject to restrictions that included:

- Lifting waist to/from floor up to 20 pounds;
- Lifting waist to/from crown up to 15 pounds; and
- Front carry up to 20 pounds for up to 50 feet.

These lifting restrictions are more limiting than the 25-pound lifting restriction found appropriate in the first arbitration decision. There is no expert medical opinion in evidence contrary to the opinions of Dr. Iqbal and Dr. Bansal regarding work restrictions identified in the FCE report. The new permanent work restrictions, which are more limiting on the job duties Rifas can perform, support a finding of increased industrial disability.

Agency precedent holds:

> Another important factor in the consideration of permanent and total disability cases is the employer's ability to retain the injured worker with an offer of suitable work. The refusal or inability of the employer to return a claimant to work in any capacity is, by itself, significant evidence of a lack of employability. Clinton v. All-American Homes, File No. 5032603 (App. April 17, 2013); Western v. Putco Inc., File Nos. 5005190/5005191 (App. July 29, 2005); Pierson v. O'Bryan Brothers, File No. 951206 (App. Jan. 20, 1995); Meeks v. Firestone Tire & Rubber Co., File No. 876894 (App. Jan. 22, 1993); see also Larson, Workers' Compensation Law, Section 57.61, pps. 10-164.90-95; Sunbeam Corp. v. Bates, 271 Ark 385, 609 S.W.2d 102 (1980); Army & Air Force Exchange Service v. Neuman, 278 F.Supp. 865 (W.D. La 1967); Leonardo v. Uncas Manufacturing Co., 77 R.I. 245, 75 A.2d 188 (1950). An employer knows the demands that are placed on its workforce. Its determination that the worker is too disabled for it to employ is entitled to considerable weight. If the employer in whose employ the disability occurred is unwilling or unable to accommodate the disability, there is no reason to expect some other employer to have more incentive to do so.

McNitt v. Nordstrom, Inc., File No. 5065697 (Rehrg. July 20, 2020) (aff'd App. August 7, 2020).

The arbitration decision found Rifas's ongoing employment as a CNA for Rehab Center mitigated the extent of her industrial disability. At the time of the review-reopening hearing, that was no longer the case. Rehab Center discharged Rifas between the first arbitration decision and review-reopening hearing. As found above, a motivating factor in that decision was the permanent work restrictions necessitated by

Rifas's work injury. Thus, a factor considered in the first decision to militate against a finding of significant industrial disability has completely changed. Rehab Center's decision to discharge Rifas after the date of the first arbitration decision because of her permanent work restrictions supports a finding of increased industrial disability.

Since her discharge, Rifas has been unable to secure employment despite applying for jobs with dozens of employers. While Rifas admirably expressed optimism about attempting to perform jobs even if their duties are not within the work restrictions necessitated by the stipulated work injury, the reality is that the injury has left her with permanent work restrictions that have become more limiting since the arbitration decision. Consequently, it is unlikely she would be able to perform many of the jobs for which she applied despite her intent to try to do so. And she is unlikely to find another job as a CNA, the position she has held for most of her adult working life. The work injury has caused a significant reduction in her earning capacity.

For these reasons, Rifas has met her burden of proof. Her condition has worsened since the date of the first arbitration decision, which concluded she sustained a thirty percent industrial disability. The evidence shows it is more likely than not Rifas has sustained a seventy-five percent industrial disability due to the stipulated work injury.

3. Rate.

The arbitration decision determined the rate of workers' compensation for the stipulated injury is four hundred seven and 28/100 dollars ($407.28). (Cl. Ex. 11, pp. 76–77, 80; Hrg. Rpt. § 6) Principles of res judicata apply in review-reopening proceedings such as this one. Kohlhaas, 777 N.W.2d at 393. Therefore, the determination of rate in the arbitration decision is binding here.

4. Credit.

The parties stipulated the defendants have paid Rifas permanent partial disability benefits at the weekly rate of four hundred seven and 28/100 dollars ($407.28) for 150 weeks. The defendants are entitled to a credit in this amount.

5. Penalty.

"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. However, if the employee makes the requisite showing, the burden of proof shifts to the employer. 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.'" Craddock, 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." Craddock, 705 N.W.2d at 307–08.

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.

This framework applies to Rifas's claims for penalty due to alleged delays in the payment of benefits by the defendants after the first arbitration decision.

a. Delay in Payment of Permanent Partial Disability Benefits Ordered in the First Arbitration Decision.

Rifas seeks a penalty because of the defendants' delay in paying the permanent partial disability benefits to which she was entitled under the first arbitration decision. Relevant to the penalty issue, that decision ordered the defendants to pay:

1) One thousand and 00/100 dollars ($1,000.00) in penalty for delays in the payment of temporary partial and permanent partial disability benefits; and

2) One hundred fifty (150) weeks of permanent partial disability benefits, commencing on September 3, 2015.

The arbitration decision effectively ordered payment of permanent partial disability benefits from September 3, 2015, through July 19, 2018. The defendants paid Rifas weekly compensation until April 11, 2018. Then the defendants stopped paying permanent partial disability benefits in accordance with the agency's order in the first arbitration decision. They delayed payment for an unknown reason until after Rifas's attorney emailed defense counsel regarding the delay on May 8, 2018. On May 25, 2018, they issued Rifas a check for two thousand forty-six and 40/100 dollars ($2,036.40), without interest for the late payment.

Rifas has proven a delay in the payment of permanent partial disability benefits. The defendants did not articulate a reason for the delay or contemporaneously communicate the reason to Rifas. The defendants previously delayed payment of workers' compensation benefits to Rifas, resulting in the agency ordering a penalty in the first arbitration decision. Consequently, a penalty of fifty percent of the late payment is appropriate.

b. Refusal to Pay Additional Permanent Partial Disability Benefits.

Rehab Center discharged Rifas on November 27, 2019. Because the arbitration decision found Rifas's continued employment with Rehab Center prevented her industrial disability level from rising to significant in its extent, this act triggered the defendants' responsibility to investigate whether Rifas was entitled to additional permanent partial disability benefits. Giving the defendants the benefit of the doubt because of the sale of Rehab Center to another corporate entity, they may not have learned of Rifas's discharge until after she filed a petition in arbitration with the agency on January 7, 2020, seeking additional permanent partial disability benefits and specifically referencing her industrial disability as a disputed issue. But there is no indication the defendants launched an investigation outside the litigation of the case after Rifas filed her petition with the agency on January 7, 2020.

On March 30, 2020, Rifas underwent an FCE that resulted in work restrictions more limiting than those adopted in the first arbitration decision. On April 2, 2020, Dr.

Iqbal adopted the FCE report's work restrictions. Rifas served the FCE report and check-box letter containing Dr. Iqbal's opinion on the defendants on April 16, 2020. There is no indication the defendants conducted any sort of investigation in response to this new medical information or communicated to Rifas why they felt she was not entitled to additional permanent partial disability benefits because of it.

On November 20, 2020, Dr. Bansal adopted the FCE report's more limiting work restrictions. Rifas served the IME report containing Dr. Bansal's opinion as well as the documents containing the information shared by Hoffman, Cunconan, and Himes on the defendants on November 25, 2020. There is no indication any doctor provided a contrary opinion to Dr. Bansal's or any Rehab Center employee with knowledge of the discussions surrounding the decision to discharge Rifas provided information contrary to that contained in the communications from Hoffman, Cunconan, and Himes.

It is possible that the reason for Rehab Center's discharge of Rifas was fairly debatable before November 25, 2020. However, there is no indication the defendants conducted an investigation into the matter, reached such a conclusion based on the information obtained during the investigation, or contemporaneously communicated the reason they were not going to pay additional permanent partial disability benefits to her before or after November 25, 2020. There was no reasonable basis for the defendants to deny additional permanent partial disability benefits to Rifas after November 25, 2020, let alone one communicated to her.

For these reasons, the defendants have failed to meet their burden of proof. A penalty for the defendants' refusal to pay additional permanent partial disability benefits is appropriate. As discussed above, the agency previously ordered the defendants to pay a penalty for delaying payment of temporary and permanent disability benefits before the first arbitration hearing stemming from the stipulating work injury. The defendants' refusal resulted in a delay in payment of benefits to Rifas lasting months. This is the third time the defendants have delayed payment of benefits to Rifas. Under the totality of the circumstances, the defendants must pay to Rifas a penalty equal to fifty percent of the permanent partial disability benefits to which Rifas is entitled under this decision.

6. Costs.

"All costs incurred in the hearing before the commissioner shall be taxed in the discretion of the commission." Iowa Code § 86.40. "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 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)).

a. Filing Fee and Service Costs.

Under the administrative rules governing contested case proceedings before the agency, hearing costs shall include the filing fee and costs of service. 876 IAC 4.33 (3), (7). The record shows Rifas paid a filing fee of one hundred and 00/100 dollars ($100.00) and six and 73/100 dollars ($6.73) for certified service. These costs are taxed to the defendants.

b. IME Report.

Under agency rules, taxable costs include "the reasonable costs of obtaining no more than two doctors' or practitioners' reports." 876 IAC 4.33(6). "[A] physician's report becomes a cost incurred in a hearing because it is used as evidence in lieu of the doctor's testimony. The underlying medical expenses associated with the examination do not become costs of a report needed for a hearing, just as they do not become costs of the testimony or deposition." Young, 867 N.W.2d at 846. Activities such as "research and review of the file are akin to expenses associated with an examination and therefore cannot be taxed" as the cost of a report. Voshell v. Compass Group, USA, Inc./Chartwells d/b/a Au Bon Pain Café, File No. 5056857 (App. September 27, 2019) (citing Young, 867 N.W.2d at 847, and Kirkendall v. Cargill Meat Solutions Corp., File No. 5055494 (App. December 17, 2018)).

Dr. Bansal submitted a bill to Rifas's attorney that itemized the cost of the examination as five hundred fifty-nine and 00/100 dollars ($559.00) and the cost of the report as two thousand twenty-two and 00/100 dollars ($2,022.00). (Cl. Ex. 10, p. 70) Rifas paid for the examination and report in full. (Cl. Ex. 10, p. 71) Rifas is entitled to the taxation of the cost of the report, excluding the cost of the examination. The two thousand twenty-two and 00/100 dollars ($2,022.00) cost of the report is taxed against the defendants.

c. FCE Report.

In order for the cost of an FCE to be assessed as a medical expense under Iowa Code section 85.27, it must be ordered by a treating or evaluating physician. Jasper v. Nordstrom, Inc., File No. 5052714 (October 7, 2020). In the current case, no physician ordered the 2020 FCE. Consequently, Rifas seeks taxation of the cost of the FCE report under rule 876 IAC 4.33 as opposed to reimbursement under section 85.27.

Rule 876 IAC 4.33 does not expressly authorize taxation of the cost of a FCE report. The Commissioner has held that "FCE reports are considered practitioner's reports under rule 4.33(6) and rule 4.17." Jasper, File No. 5052714 (citing Niemeyer v. Ottumwa Good Samaritan, File No. 5020338 (App. July 24, 2013)). With respect to a FCE report, "the only allowable taxable costs are the reports themselves, not the underlying examination." Id. (citing Young, 867 N.W.2d at 846–47).

Short Physical Therapy issued a bill to Rifas's attorney that itemized the cost of the FCE evaluation at five hundred fifty and 00/100 dollars ($550.00) and the cost of the FCE report as three hundred fifty and 00/100 dollars ($350.00). (Cl. Ex. 10, p. 68) Rifas paid the full amount. (Cl. Ex. 10, p. 69) The cost of the FCE itself is a medical expense and cannot be taxed. However, the cost of the report in the amount of three hundred fifty and 00/100 dollars ($350.00) is appropriately taxed against the defendants.

ORDER

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

1) The defendants shall pay to the claimant three hundred seventy-five (375) weeks of permanent partial disability benefits at the rate of four hundred seven and 28/100 dollars ($407.28) per week from the commencement date of September 3, 2015.

2) The 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. Deciga-Sanchez v. Tyson, File No. 5052008 (Ruling on Defendant's Motion to Enlarge, Reconsider, or Amend Appeal Decision Re: Interest Rate Issue, Apr. 23, 2018).

3) The defendants shall be given the credit for permanent partial disability benefits previously paid for one hundred fifty (150) weeks at the weekly rate of four hundred seven and 28/100 dollars ($407.28).

4) The defendants shall pay a penalty of:

    a) One thousand eighteen and 20/100 dollars ($1,018.20) for the delay in payment of permanent partial disability benefits as ordered in the first arbitration decision; and

    b) An amount equal to fifty percent (50%) of the permanent partial disability benefits to which Rifas is entitled under this decision.

5) The defendants shall pay all medical expenses listed in Claimant's Exhibit 9.

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

    a) One hundred dollars and 00/100 ($100.00) for the filing fee;

    b) Six and 73/100 dollars ($6.73) for certified service;

c) Two thousand twenty-two and 00/100 dollars ($2,022.00) cost of the report by Dr. Bansal; and

d) Three hundred fifty and 00/100 dollars ($350.00) for the cost of the FCE report.

7) The defendants shall file subsequent reports of injury as required under rule 876 IAC 3.1(2).

Signed and filed this 7th day of January, 2022.

BENJAMIN G. HUMPHREY
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Joseph Powell (via WCES)

Abigail Wenninghoff (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.