

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

MARISSA RICHARDSON,

Claimant,

vs.

HY-VEE, INC.,

Employer,

and

EMC PROPERTY & CASUALTY CO.,

Insurance Carrier,

Defendants.

File No. 5067948

A P P E A L

D E C I S I O N

Head Notes: 1402.20; 1402.40; 1403.20;
1802; 2204; 2907; 4000.2;
5-9999

Defendants Hy-Vee, Inc., employer, and its insurer, EMC Property & Casualty Co., appeal from an arbitration decision filed on June 10, 2022. Claimant Marissa Richardson responds to the appeal. The case was heard on December 2, 2021, and it was considered fully submitted in front of the deputy workers' compensation commissioner on January 18, 2022.

In the arbitration decision, the deputy commissioner found that based on the un rebutted opinion of Amanda Burgod, LISW, claimant met her burden of proof to establish that the stipulated February 23, 2019, work injury lit up and materially aggravated claimant's underlying mental health conditions, thus rendering claimant unable to work, which entitles claimant to receive a running award of healing period benefits from February 23, 2019. The deputy commissioner found claimant failed to prove her physical conditions are causally related to the work injury. The deputy commissioner found claimant is entitled to receive a penalty award of 50 percent of all weekly benefits owed to claimant from February 23, 2019, through April 21, 2020, because defendants' delay in paying temporary disability benefits was unreasonable. The deputy commissioner ordered defendants to pay claimant's costs of the arbitration proceeding.

Defendants assert on appeal that the deputy commissioner erred in finding claimant proved she sustained a mental injury caused by the February 23, 2019, incident because defendants assert claimant is not a credible witness, defendants assert the hair tug and other inappropriate touching in the presence of a customer by claimant's co-worker which claimant was subjected to was minor, and defendants assert claimant's providers gave causation opinions without seeing the video of the incident in

question. Defendants assert the deputy commissioner erred in awarding a penalty of 50 percent of all weekly benefits owed to claimant from February 23, 2019, through April 21, 2020. Defendants assert the remainder of the decision should be affirmed.

Claimant asserts on appeal that the arbitration decision should be affirmed in its entirety.

Those portions of the proposed arbitration decision pertaining to issues not raised on appeal are adopted as part of this appeal decision.

Some of the findings by the deputy commissioner in the arbitration decision were based on the deputy commissioner's findings regarding claimant's credibility. The deputy commissioner found claimant was a credible witness. Defendants assert the deputy commissioner erred in finding claimant was credible. I find the deputy commissioner correctly assessed claimant's credibility. While I performed a de novo review on appeal, I give considerable deference to findings of fact which are impacted by the credibility findings, expressly or impliedly made, regarding claimant by the deputy commissioner who presided at the arbitration hearing. I find nothing in the record in this matter which would cause me to reverse the deputy commissioner's findings regarding claimant's credibility.

I performed a de novo review of the evidentiary record and the detailed arguments of the parties. Pursuant to Iowa Code sections 17A.15 and 86.24, the arbitration decision filed on June 10, 2022, is affirmed with my additional analysis.

Defendants assert the deputy commissioner erred in finding claimant proved she sustained a mental injury resulting from the February 23, 2019, incident because defendants assert the hair tug and the other inappropriate touching by claimant's co-worker which claimant was subjected to in the presence of a customer was minor, and defendants assert claimant's providers gave causation opinions without seeing the video of the incident. This case was scheduled for hearing at the start of the COVID-19 Pandemic in 2020. Defendants requested a continuance, which was originally denied. Following a hearing on defendants' motion for reconsideration, claimant agreed to the continuance and the parties agreed to lock the evidence as of April 21, 2020. At that time defendants had denied claimant's claim based on defendant employer's investigation and review of certain video evidence. Shortly before the rescheduled arbitration hearing defendant employer located Exhibit D, a video which depicts the incident in question. Defendants produced the video to claimant and admitted claimant sustained a work injury when claimant's coworker tugged claimant's ponytail and touched claimant on February 23, 2019.

The video, Exhibit D, while brief, depicts claimant's coworker, Janet Edwards, tugging claimant's ponytail and physically touching claimant multiple times in the presence of a customer. The deputy commissioner found the video shows an odd interaction between Edwards and claimant. The deputy commissioner found defendants provided no explanation for the video at hearing and did not call as witnesses the coworkers who were present at the time of the incident. I find the video is

more than odd. The video depicts Edwards engaging in strange and inappropriate touching of claimant in addition to the strange and inappropriate hair tug in the presence of a customer. I do not find the incident to be minor, as asserted by defendants. Instead, I find the incident was very strange and quite upsetting from claimant's perspective.

Defendants were in possession of the video and did not produce it until shortly before the hearing, after claimant produced her expert opinions, and after the record was closed to additional evidence. Defendants' assertion that the expert reports should be rejected because the expert witnesses did not review the video lacks merit. Defendants were in possession of the video from the date of the work injury but did not produce it in a timely fashion.

The deputy commissioner found claimant is entitled to a penalty award of 50 percent of all weekly benefits owed from February 23, 2019, through April 21, 2020, because defendants' delay in paying temporary disability benefits was unreasonable. Defendants assert the deputy commissioner erred in awarding claimant penalty benefits.

Iowa Code section 86.13 governs compensation payments. Under the statute's plain language, if there is a delay in payment absent "a reasonable or probable cause or excuse," the employee is entitled to penalty benefits, of up to fifty percent of the amount of benefits that were denied, delayed, or terminated without reasonable or probable cause or excuse. Iowa Code § 86.13(4); see also Christensen v. Snap-On Tools Corp., 554 N.W.2d 254, 260 (Iowa 1996) (citing earlier version of the statute). "The application of the penalty provision does not turn on the length of the delay in making the correct compensation payment." Robbennolt v. Snap-On Tools Corp., 555 N.W.2d 229, 236 (Iowa 1996). If a delay occurs without a reasonable excuse, the commissioner is required to award penalty benefits in some amount to the employee. Id.

The statute requires the employer or insurance company to conduct a "reasonable investigation and evaluation" into whether benefits are owed to the employee, the results of the investigation and evaluation must be the "actual basis" relied on by the employer or insurance company to deny, delay, or terminate benefits, and the employer or insurance company must contemporaneously convey the basis for the denial, delay, or termination of benefits to the employee at the time of the denial, delay, or termination of benefits. Iowa Code § 86.13(4). An employer may establish a "reasonable cause or excuse" if "the delay was necessary for the insurer to investigate the claim," or if "the employer had a reasonable basis to contest the employee's entitlement to benefits." Christensen, 554 N.W.2d at 260. "A 'reasonable basis' for denial of the claim exists if the claim is 'fairly debatable.'" Burton v. Hilltop Care Ctr., 813 N.W.2d 250, 267 (Iowa 2012). "Whether a claim is 'fairly debatable' can generally be determined by the court as a matter of law." Id. The issue is whether the employer had a reasonable basis to believe no benefits were owed to the claimant. Id. "If there was no reasonable basis for the employer to have denied the employee's benefits, then the court must 'determine if the defendant knew, or should have known, that the basis for denying the employee's claim was unreasonable.'" Id.

Benefits must be paid beginning on the 11th day after the injury, and “each week thereafter during the period for which compensation is payable, and if not paid when due,” interest will be imposed. Iowa Code § 85.30. In Robbennolt, the Iowa Supreme Court noted, “[i]f the required weekly compensation is timely paid at the end of the compensation week, no interest will be imposed As an example, if Monday is the first day of the compensation week, full payment of the weekly compensation is due the following Monday.” Robbennolt, 555 N.W.2d at 235. A payment is “made” when the check addressed to the claimant is mailed, or personally delivered to the claimant. Meyers v. Holiday Express Corp., 557 N.W.2d 502, 505 (Iowa 1996) (abrogated by Keystone Nursing Care Ctr. v. Craddock, 705 N.W.2d 299 (Iowa 2005) (concluding the employer’s failure to explain to the claimant why it would not pay permanent benefits upon the termination of healing period benefits did not support the commissioner’s award of penalty benefits)).

When considering an award of penalty benefits, the commissioner considers “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.” Schadendorf v. Snap-On Tools Corp., 757 N.W.2d 330, 336 (Iowa 2008). The purposes of the statute are to punish the employer and insurance company and to deter employers and insurance companies from delaying payments. Robbennolt, 555 N.W.2d at 237.

Defendants issued claimant a check in the amount of \$31,203.85 on November 3, 2021, for temporary benefits from February 24, 2019, through November 5, 2021, with interest. (Ex. 5) I affirm the deputy commissioner’s finding that the delay was unreasonable. With my additional analysis, I also find defendants failed to contemporaneously convey the basis for the denial. Attached to the check is a statement with a comment, “140.857 weeks of vol pay plus interest, not admission of liability.” (Ex. 5) The record is void of any evidence defendants ever conveyed the basis for their refusal to pay claimant temporary benefits. Imposition of a 50 percent penalty for all weekly benefits owed from February 23, 2019, through April 21, 2020, is warranted to deter defendants and other employers and insurance carriers from engaging in similar conduct in the future.

ORDER

IT IS THEREFORE ORDERED that the arbitration decision filed on June 10, 2022, is affirmed with my additional analysis.

Defendants shall pay claimant a running award of healing period benefits from February 23, 2019, at the stipulated weekly rate of two hundred eight and 78/100 dollars (\$208.78) until such time as benefits shall cease pursuant to Iowa Code section 85.33.

Defendants shall receive credit for all benefits previously paid.

Defendants shall pay accrued weekly benefits in a lump sum together with interest 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.

Defendants shall pay claimant a 50 percent penalty for all weekly benefits owed from February 23, 2019, through April 21, 2020.

Pursuant to rule 876 IAC 4.33, defendants shall pay claimant's costs of the arbitration proceeding, and defendants shall pay the costs of the appeal, including the cost of the hearing transcript.

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

Signed and filed on this 7th day of November, 2022.



JOSEPH S. CORTESE II
WORKERS' COMPENSATION
COMMISSIONER

The parties have been served as follows:

Randall Schueller (via WCES)

M. Anne McAtee (via WCES)