BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

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| CHRISTINA GARR-KIME,<br><br>Claimant,<br><br>vs.<br><br>SOUTHERN IOWA ECONOMIC DEVELOPMENT ASSOCIATION,<br><br>Employer,<br><br>and<br><br>UNITED WISCONSIN INSURANCE COMPANY,<br><br>Insurance Carrier,<br>Defendants. | File No. 5054972<br><br>A R B I T R A T I O N<br><br>D E C I S I O N<br><br>Head Note Nos.: 1402.30, 2204<br>1803, 2401, 2501, 2907, 4000.2 |



## STATEMENT OF THE CASE

Christina Garr-Kime, claimant, filed a petition in arbitration and seeks workers' compensation benefits from defendant, Southern Iowa Economic Development Association (SIEDA), as the employer and United Wisconsin Insurance Company, as the insurance carrier. Hearing was held in Des Moines on May 16, 2017.

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.

The evidentiary record includes Joint Exhibits 1 through 18, which were all received into the evidentiary record without objection. Claimant testified on her own behalf. Defendants called Brian Dunn, the employer's executive director, to testify.

At the conclusion of the arbitration hearing, counsel for the parties requested the opportunity to file post-hearing briefs. Their request was granted and the parties filed their briefs simultaneously on May 31, 2017, at which time the case was considered fully submitted.

## ISSUES

The parties submitted the following disputed issues for resolution:

1. Whether claimant sustained a mental-mental injury that arose out of and in the course of her employment on January 24, 2014.

2. Whether claimant's worker's compensation claim is barred for an alleged failure to give timely notice of her injury.

3. Whether the alleged injury caused permanent disability and, if so, the extent of claimant's entitlement to permanent disability benefits.

4. Whether claimant is entitled to an award of past medical expenses contained at Exhibit 17.

5. Whether claimant is entitled to reimbursement of an independent medical evaluation pursuant to Iowa Code section 85.39.

6. Whether claimant is entitled to an award of penalty benefits for unreasonable delay in payment of permanent partial disability benefits.

7. Whether costs should be assessed against either party.

At the commencement of hearing, defendants stipulated that claimant had met the necessary prerequisites of Iowa Code section 85.39 and that she is entitled to reimbursement of her independent medical evaluation fees. Defendants were verbally ordered at the time of hearing to reimburse claimant's independent medical evaluation fees. If they have not already done so, defendants will again be ordered to reimburse claimant's independent medical evaluation fees. No further findings or conclusions will be made with respect to this issue.

## FINDINGS OF FACT

The undersigned, having considered all of the evidence and testimony in the record, finds:

Christina Garr-Kime is a 45-year old woman. (Transcript, page 12) She graduated from high school in 1990. (Tr., p. 12) Ms. Garr-Kime obtained a bachelor's degree in sociology and human services. (Tr., pp. 12-13; Exhibit 14, p. 220) Claimant also obtained an emergency medical technician (EMT) certification, though it is no longer current.

Ms. Garr-Kime's work history is contained at Exhibit 7, pages 129-130. She has worked as a cashier in various different employment settings. She has worked as an editor at a newspaper and as a family advocate for a few different agencies. Claimant has provided in-home services to her mother and opened her own small business since

the alleged injury date. Claimant also works part-time for International Ingredient preparing purchase orders, reports, and bills of lading approximately 20 hours per week. (Tr., pp. 56-57) Between her two part-time jobs, claimant currently earns more per hour than she did at SIEDA in her full-time employment.

Ms. Garr-Kime began working for SIEDA as a Family Development and Self-Sufficiency Specialist (FaDss) in June 2007. As a FaDss, claimant would conduct home visits, consult with, and attempt to assist clients of the agency in obtaining necessary services and attempting to move the clients toward self-sufficiency. This could range from providing parenting classes, identifying and providing relevant information for resources available to low-income individuals, assisting individuals in obtaining substance-abuse counseling or treatment, or any other related issues that may arise.

Claimant would personally interact with clients in their homes and in her office. She would attempt to develop a trust relationship with her clients. However, she was also a mandatory child abuse reporter. Individuals serving as FaDss at SIEDA would encounter child abuse in various forms during their work. Claimant estimated that she would encounter situations that involved child abuse approximately five times per year and she testified that she has made reports to the Department of Human Services (DHS) regarding child abuse. (Ex. 14, p. 222-223)

Ms. Garr-Kime asserts she sustained a mental-mental injury as a result of her work duties on or about January 24, 2014. In the week leading up to January 24, 2014, two of claimant's clients died. One had significant health issues and passed away from complications. Another client passed away suddenly from a heart attack.

During that week, Ms. Garr-Kime met with a mother and her nineteen month old daughter. During that meeting, claimant noted a prior injury to the child involving a cut on the head, which appeared to be healing and the mother advised she was headed to a physician's appointment for that injury. Also during that meeting, the mother indicated that her child had fallen that morning and she was worried about the child's black eye.

Claimant testified that she did not observe a black eye on the child. She testified that she inquired of another worker at SIEDA that had escorted the mother and child to her office. Claimant testified that the other worker did not observe a black eye on the child either. Claimant made no report to DHS of either of these injuries and did not believe that either represented child abuse.

Unfortunately, within 48 hours of the claimant's meeting with this mother and child, the child passed away. It was determined that the child's death was due to a blunt force trauma to the head. The mother was ultimately charged and convicted for this death.

Claimant learned of the child's death on social media after arriving home from work on Friday, January 24, 2014. Claimant testified that she reported this death to her supervisor the following Monday morning and was told to continue providing a three month transition period of assistance to the mother. She checked her cell phone Monday morning and had several messages from the mother. She met with the mother that morning. However, upon returning to the office, she was advised that the mother was immediately terminated from the program and that she was to have no further contact with the mother. (Ex. 14, p. 229)

Following the child's death, the Oskaloosa Police and county attorney began investigating the case, including obtaining a subpoena for claimant's case file on the family. Claimant testified that the Department of Criminal Investigations was also involved in the investigation.

Claimant was subsequently placed on administrative leave while SIEDA conducted an investigation of her actions, including allegations that she may have failed to report child abuse. Claimant testified that Rebecca Falck told her the child would still be alive if she had made the proper DHS report of abuse. Ms. Falck denied ever making such comments. However, claimant testified that Ms. Falck made these comments initially and again upon her reinstatement of employment after the investigation. I am unable to determine and find it unnecessary to determine whether the specific comments asserted were made. I find that claimant believes the comments were made and that the comments, whether real or perceived, were detrimental to claimant's mental health.

Ms. Garr-Kime had a long and ongoing history of mental illness, including significant bouts of depression and anxiety that required ongoing medication management at the time of the work events. Ms. Garr-Kime also had personal events, including marital difficulties, the death of a father, and concerns about her son, that complicated her situation throughout time. However, prior to January 24, 2014, claimant was capable of gainful employment activities. Certainly, according to job performance reviews prepared by the employer, claimant was performing her job satisfactorily at SIEDA prior to January 24, 2014.

Following the child's death, claimant began questioning herself, continually running scenarios through her head. She developed deepening depression, difficulties with sleep, anxiety, and panic attacks. Although the employer asserted a notice defense in this case, the employer was clearly aware that these events had a significant impact upon claimant. In fact, Ms. Falck testified and conceded that claimant appeared to "kind of shut down" during the SIEDA investigation. (Ex. 15, p. 254) SIEDA certainly knew about the facts of the case, conducted a specific investigation, interacted with claimant, and management was clearly aware that claimant was kind of mentally shutting down after the events. I find that the employer had actual knowledge of this alleged mental injury shortly after its occurrence and certainly within 90 days of the occurrence.

Even if the employer were determined not to have actual knowledge, claimant provided an explanation of her mental stress in her resignation letter. Claimant provided additional explanation of the mental stress as part of her unemployment claim. She did not use magic words, such as a "mental-mental" injury, but the employer should have known that she was asserting she sustained mental trauma and injury as a result of these events. I find the employer had actual notice and was provided written notice in the resignation letter and unemployment claims that should have alerted the employer to the mental-mental claims asserted by claimant. The employer had notice of the injury within 90 days of its occurrence.

Claimant asserts that her mental injury occurred both as a result of the trauma of experiencing three client deaths within a week and also as a result of the employer's reaction and lack of support following the death of the child on January 24, 2014. The employer, through Rebecca Falck, conceded that the death of a child is among the most stressful events that a SIEDA caseworker can experience. (Ex. 15, p. 253) Nevertheless, claimant testified that the employer offered no reassurance or support after the death occurred. (Tr, p. ) Ms. Falck conceded that she cannot recall offering any type of reassurance to claimant. (Ex. 15, p. 249)

Three mental health experts offered opinions about the cause of Ms. Garr-Kime's mental health difficulties after January 24, 2014. Christine Hartman is a licensed mental health counselor. She has provided the primary and ongoing mental health counseling for claimant since this incident. Ms. Hartman diagnosed claimant with post-traumatic stress disorder, generalized anxiety, depression, and concurred with another specialist that claimant meets the diagnostic criteria for panic disorder. (Ex. 4, p. 99) Ms. Hartman opined:

> The trigger for Ms. Garr-Kime's PTSD was the death of a client's child, which occurred in January 2014, and her employer and supervisor's allegations that she had not taken enough actions to ensure the child's safety. While she had pre-existing depression, the events in January 2014 contributed to and caused her depression to worsen. Her anxiety and panic disorder are also causally related to the events in January 2014.

(Ex. 4, p. 99)

Ms. Hartman explained her opinions as follows:

> Ms. Garr-Kime worked with clients in situations where she knew that the children were not always safe and that there were limits on her ability to protect them. However, in this situation, the close proximity between the last time she saw the child and the child's death, combined with the employer's actions in assigning blame to Ms. Garr-Kime magnified the degree of mental stress that would normally be associated with the death of a client or a client's child. As a result, Ms. Garr-Kime experienced an

> unusual stress that was of a greater magnitude than would be experienced by other workers in the same or similar jobs.

(Ex. 4, p. 100)

Defendants obtained an independent psychological evaluation performed by Philip L. Ascheman, Ph.D., on August 2, 2016. Dr. Ascheman administered psychological testing, including the Minnesota Multiphasic Personality Inventory-2 (MMPI). He also conducted an interview and reviewed pertinent medical records.

Following his testing and interview, Dr. Ascheman opined that Ms. Garr-Kime meets the diagnosis for Major Depressive Disorder in Partial Remission and Generalized Anxiety Disorder. (Ex. 5, p. 109) However, Dr. Ascheman opined that claimant does not meet the criteria for a diagnosis of post-traumatic stress disorder. (Ex. 5, p. 110)

Dr. Ascheman reported that claimant was not entirely forthcoming with information during his interview. (Ex. 5, p. 109) He also noted that claimant previously took and apparently provided relatively "normal" results on an MMPI before submitting to a bariatric surgery, which occurred after January 2014. Dr. Ascheman concluded:

> It is my opinion that the patient's mental health condition was present prior to the incident at work on 1-24-14. Her symptoms increased while she was on administrative leave and being investigated for failing to report an injury to DHS. She believed that she was mistreated and she disliked being told that she needed to change her interactions with clients and her report writing, so she resigned from the position. While that situation likely resulted in some minimal increased anxiety and depression, it is my opinion that the workplace stress was not of a greater magnitude than the stress experienced by other workers employed in the same or similar occupations. In regard to the situation involving the death of clients, the same situation is true, regarding expected stressors in the workplace, and additionally, the patient was a trained EMT.

(Ex. 5, p. 111)

Ultimately, Dr. Ascheman opined that there may have been a temporary increase in mental health symptoms, but that claimant has returned to her historical baseline for mental health purposes. Essentially, Dr. Ascheman opines that claimant experienced a temporary exacerbation of her mental health symptoms and has now returned to her pre-injury status. (Ex. 5, p. 111) Dr. Ascheman recommended no temporary or permanent work restrictions due to claimant's mental health issues. (Ex. 5, p. 111)

Claimant also obtained an independent psychological evaluation, performed by Eva Christiansen, Ph.D., on December 21, 2016. (Ex. 6) Dr. Christiansen diagnosed claimant with recurrent, moderately severe major depressive disorder, a generalized

anxiety disorder, a panic disorder with panic attacks, and a posttraumatic stress disorder. (Ex. 6, p. 112) Dr. Christiansen acknowledged claimant's long-standing depression and possible anxiety. (Ex. 6, pp. 112-113) However, Dr. Christiansen noted that claimant withdrew from competitive employment after January 2014. Dr. Christiansen noted that claimant became dependent upon others to drive her to appointments after January 24, 2014. She also noted that the symptoms of PTSD developed only after January 24, 2014 and the following events transpired. (Ex. 6, p. 113)

Dr. Christiansen noted that "the kind of trauma Ms. Garr-Kime experienced with the death of a child on her caseload, has been rare in the SIEDA situation, three occurrences in the previous 17 years. This level of trauma is not routinely experienced or expectable for FaDSS workers." (Ex. 6, p. 113) Dr. Christiansen, therefore, attributes claimant's current mental health difficulties to the January 24, 2014 and following events. She also notes that claimant will have difficulties with understanding and remembering instructions, maintaining attention, concentration and pace, and that it will be difficult for claimant to interact with the public, co-workers and peers, and that she may not be able to tolerate a full normal workday or workweek. (Ex. 6, p. 114)

Dr. Christiansen also noted that claimant will not be able to accept criticism or demonstrate resilience and appropriate response to changes in the workplace. (Ex. 6, p. 115) Dr. Christiansen opines that claimant's mental health condition is likely permanent because it has persisted and treatment of PTSD has the best outcome when interventions begin quickly after a traumatic event and certainly most recovery occurs within one year of the event. (Ex. 6, p. 115) Ms. Hartman reviewed and concurs with the restrictions or limits outlined by Dr. Christiansen. (Ex. 4, p. 101)

Defendants counter the opinions of Dr. Christiansen and Ms. Hartman by pointing out that claimant has traveled since the alleged date of injury, including a trip to a St. Louis Cardinals' baseball game and a trip to Las Vegas. Defendants point out that claimant has participated in two local plays that require her to be in public. Defendants also point out that claimant opened her own business and is required to interact with customers in that business setting. Claimant also works part-time for a feed company and interacts with individuals in person and telephonically. However, her brother is the manager of this business and checks in frequently with claimant to ensure that she is not getting too stressed out while performing her duties.

Considering each of the medical opinions, as well as the testimony of the witnesses, I find that Ms. Garr-Kime experienced a sudden, traumatic, and unexpected event or events. Specifically, within a one-week period, she experienced the death of three clients. The third death involved a nineteen month old child with whom she had interacted within the 48-hour period before the child's traumatic death.

Following these events, a criminal investigation was commenced into the death of the child. Claimant's file contents were subpoenaed. She was advised that she may be the subject of the criminal investigation for failing to report child abuse. She was

advised to obtain an attorney. Claimant was placed on administrative leave pending disciplinary investigation, which potentially could result in her termination. Whether perceived or actual, claimant believes she was told by one of her superiors that the child would not have died if she had properly reported the child abuse.

These events, as a whole, within a short time frame had a sudden, traumatic, and unexpected impact on claimant. As Ms. Falck described, claimant "kind of shut down" and developed worsening depression and anxiety. She developed a panic disorder and PTSD. She required increases in medication, and new medications to control her psychiatric conditions. She required ongoing counseling after these events.

I find the explanation of claimant's treating mental health counselor and Dr. Christiansen to be most persuasive in this record. Therefore, I find that claimant has proven that the work-related events immediately preceding, occurring on January 24, 2014 and immediately succeeding January 24, 2014, caused her a mental injury resulting in the above diagnoses.

With respect to the legal standards involved in a mental-mental claim, I find that the events surrounding and occurring on January 24, 2014 were sudden, traumatic, and unexpected. I specifically note and accept the testimony of Ms. Falck demonstrating that the employer's organization had only experienced three similar deaths in the prior 17 years. (Ex. 15, p. 249) As conceded by Ms. Falck, the rarity of this situation, coupled with the two preceding deaths certainly increased the grieving effect on claimant. (Ex. 15, p. 248) In addition, claimant was notified that she faced possible termination and criminal charges as a result of the incident, both of which caused significant additional stress for claimant.

The employer's reaction to this situation was less than supportive. Senior management did not even discuss claimant's mental well-being as part of their investigation of this incident. (Ex. 16, p. 259) Ms. Falck could not recall providing any type of reassurance or support for claimant. (Ex. 15, p. 249) Since this incident, the employer has acknowledged that such situations are extremely stressful and require additional support for their staff. The employer has now set up an informal program that provides the services of a mental health counselor to provide support for caseworkers or groups of individuals affected by the death of a client. This new informal program has been offered and utilized by another caseworker since the January 4, 2014 incident. (Tr., p. 114)

Even if the events surrounding January 24, 2014 were not considered to be sudden, traumatic, and/or unexpected, I still find that the events presented stress of a greater magnitude than the day-to-day mental stresses experienced by other caseworkers or similarly situated workers. It is not typical, or common, for a caseworker to experience the deaths of three clients within a week span. It is uncommon for a caseworker to experience the death of a child within 48 hours of their interaction with that child. It is uncommon for a case worker to experience a criminal investigation and a disciplinary investigation.

As Ms. Falck testified that the death of a client that is a child is among the most stressful situations that a caseworker can face. As the employer has now acknowledged, such a situation causes significant stress beyond what is typically expected by a caseworker such that additional psychological support is needed. In fact, this employer has now set up an informal process by which a caseworker faced with the situation claimant experienced could and would be provided with a mental health counselor's services.

Although caseworkers do expect to deal with and experience child abuse situations and potential deaths of their clients, the whirlwind of events experienced by claimant in this situation is not a typical situation or a level of stress that is faced on a day-to-day basis by case workers at SIEDA or elsewhere. The scenario presented to Ms. Garr-Kime around January 24, 2014 was most certainly rare, stressful, and unexpected. The heightened stress experienced by claimant certainly was from events that caused an unusual strain upon her or any caseworker put in her position. Claimant, unfortunately, succumbed to this unusually high level of stress.

Ultimately, claimant returned to work under a directive she believed to be unethical. Claimant resigned her employment and is not likely to ever work as a caseworker again.

Claimant's estimation of her own abilities and those of Dr. Christiansen are somewhat skeptical and speculative. Claimant has not made a full attempt to return to the full-time, competitive workforce. She did return to her prior position for a limited period of time. She is capable of working part-time at two different positions and operated her own business for a period of time (albeit an unsuccessful business venture).

One of the reasons claimant quit her position was to care for her mother, which she continued to do at the time of hearing. This is certainly not caused by the mental injuries sustained at work. However, claimant's desire to care for her mother does remove claimant from other employment options. Claimant earned $12.00 per hour at SIEDA. I find that she is capable of finding alternate employment, though she may have to accept work at a lower rate given her educational and employment background. While working two part-time positions at the time of the arbitration hearing, claimant was earning more in wages than she earned while employed at SIEDA. She is capable of continued and future employment, but has lost options for employment that were previously available to her.

I find that claimant has proven the January 24, 2014 work injury caused permanent disability. Considering claimant's work history, educational background, inability to return to her job as a caseworker, as well as her age, ability to retrain, and limitations that will be caused by her mental health conditions, as well as all other factors of industrial disability outlined by the Iowa Supreme Court, I find that claimant has proven she sustained a 50 percent loss of future earning capacity as a result of the January 24, 2014 work injury.

Defendants stipulated that the medical expenses claimed would be causally related and owed if the undersigned finds that claimant proved a work-related mental injury. (Tr., p. 9) Therefore, I find that the medical expenses, including the referenced medical mileage, contained in Exhibit 17 are reasonable, necessary, and causally related to the January 24, 2014 work injury. (Hearing Report; Tr., p. 9)

Although I ultimately find that Ms. Garr-Kime has established causation between her alleged mental injuries and the events surrounding January 24, 2014, I also find that there were competing facts and that defendants asserted a reasonable basis for their denial of benefits. For instance, there is competing evidence in this record that case workers experience different types of stressful situations, including child abuse. There is evidence that other case workers have experienced similar situations.

Dr. Ascheman opined that the stress faced by claimant is not of a greater magnitude than the stress faced by similarly situated employees. Dr. Ascheman opined that claimant sustained nothing more than a temporary aggravation and has returned to pre-injury date baseline from a mental standpoint. Dr. Ascheman also opined that claimant requires no permanent work restrictions for her alleged mental injuries.

Defendants asserted a notice defense and presented evidence, which if accepted, would have resulted in a finding that they did not receive notice of the alleged mental injury until more than 90 days after the events transpired.

Although I did not find the evidence presented by defendants to ultimately be the most convincing evidence in this record, their reliance upon that evidence was reasonable. If any of the above evidence had been accepted and found to be accurate, defendants would have prevailed in this case. Therefore, I find that defendants had a reasonable basis for denial of this claim.

Claimant contends that penalty is appropriate because she filed her petition on December 22, 2015. Claimant asserts that defendants filed an answer denying the claim on January 11, 2016 "without explanation." Review of the answer, however, demonstrates that defendants specifically denied the injury occurred. If nothing else, the employer asserted affirmatively in the answer that "Claimant failed to report the alleged mental injury within 90 days of the date of injury alleged." If claimant proclaims to have no idea why the claim was denied, certainly she knew by the date of filing the answer that a notice defense was asserted. I find that the employer had reasonable bases for denial, conveyed at least one of those reasonable bases to claimant within 14 days of being served with the petition. I find no factual basis for award of penalty in this case.

## CONCLUSIONS OF LAW

Ms. Garr-Kime asserts a purely mental injury as a result of stress she incurred while employed at SIEDA. This type of injury is referred to as a mental-mental injury because there are no physical stimuli that precipitate the alleged mental injury. Iowa

has recognized mental-mental injuries as compensable under certain circumstances. Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995).

Mental-mental injuries require factual causation, or medical proof that the mental injury is related to the alleged work incident. However, mental-mental injuries also require that a claimant establish legal causation. Id. at 854-859.

In this case, I found that claimant proved factual causation. Having found the opinions of Dr. Christiansen and claimant's treating mental health counselor to be most credible, I found that the January 24, 2014 event and surrounding events did, in fact, cause claimant's mental injuries.

I made these findings cognizant of claimant's pre-existing mental health treatment and conditions. While a claimant is not entitled to compensation for the results of a preexisting injury or disease, its mere existence at the time of a subsequent injury is not a defense. Rose v. John Deere Ottumwa Works, 247 Iowa 900, 76 N.W.2d 756 (1956). If the claimant had a preexisting condition or disability that is materially aggravated, accelerated, worsened or lighted up so that it results in disability, claimant is entitled to recover. Nicks v. Davenport Produce Co., 254 Iowa 130, 115 N.W.2d 812 (1962); Yeager v. Firestone Tire & Rubber Co., 253 Iowa 369, 112 N.W.2d 299 (1961).

In this instance, claimant clearly had prior mental health conditions and treatment. However, her conditions worsened, she required changes, additions to, and increased dosages of medications to control her mental health conditions after January 24, 2014. Claimant developed PTSD and a panic disorder, which had never been diagnosed prior to the date of injury. Claimant terminated her employment after the injury date, but had been capable of steady, full-time employment prior to the events surrounding January 24, 2014. Therefore, I found that claimant proved her mental health conditions worsened and were caused by the January 24, 2014 events and surrounding events. Having reached these findings, I conclude that claimant has established factual, or medical, causation between the January 24, 2014 injury date and her subsequent mental injuries and treatment.

Concluding that claimant has established factual causation does not end the inquiry in a mental-mental injury case, however. Claimant must also prove legal causation to prevail.

When a mental injury is precipitated by the stress of a sudden, traumatic, and unexpected incident, accident, or event, the mental injury can be compensable without further proof or requirements. Brown v. Quik Trip Corp., 641 N.W.2d 725 (Iowa 2002). In other words, when the incident is of such a nature that it is clearly traumatic and not merely a cumulative effect of stress, the legal causation test is met without further evidence. Id. at 728. The Iowa Supreme Court stated, "[w]e believe the proof of legal causation for recovery under a mental/mental injury does not require evidence of stress experienced by similarly situated workers if the event or events giving rise to the claim are readily identifiable." Id. Instead, the Court held that when an event "of a sudden

traumatic nature from an unexpected cause or unusual strain" occurs, "the legal causation test is met irrespective of the absence of similar stress on other employees." Id. at 729.

The legal causation test for a sudden, traumatic cause from an unexpected incident or unusual strain is demonstrated in the Brown case. In that case, the claimant witnessed a shooting at a convenience store and had to clean up blood after the incident. Six days later, the claimant was again working when he was robbed at another Quik Trip store. Following these two events, Mr. Brown developed PTSD. The Iowa Supreme Court held this type of unusual strain or unexpected cause satisfied the legal causation test.

In this case, I found that the stress experienced by Ms. Garr-Kime was unusual in nature. Certainly, the precipitating event or events are identifiable. I found those events were not common. I also found that the events surrounding the death of a client's child on January 24, 2014 were sudden, traumatic and unexpected.

Despite reaching these factual findings, I hesitate on the issue of legal causation because of a recent Appeal Decision issued by the Iowa Workers' Compensation Commissioner. In Dubinovic v. Des Moines Public Schools, File Nos. 5042677 and 5047783 (Appeal May 25, 2017), the commissioner rejected a mental-mental claim. On rehearing, the commissioner addressed the claimant's theory of a sudden, traumatic or unexpected event. The commissioner noted, "[a]ll Iowa cases finding a mental/mental injury, under the Brown v. Quik Trip analysis, involve instances where an employee is personally physically threatened, witnesses a gruesome injury or the death of another." Dubinovic v. Des Moines Public Schools, File Nos. 5042677 and 5047783 (Rehearing August 3, 2017).

It is not clear from the Dubinovic decision whether the commissioner was attempting to establish a bright-line test that precludes the use of the Brown legal causation standard in all situations other than those involving a personal threat or witnessing of a gruesome injury or death. However, my interpretation of the language used by the Iowa Supreme Court in Brown does not limit the legal causation standard to those scenarios.

In this case, I found that the events surrounding the death of the nineteen month old child and subsequent investigation placed an unusual strain on claimant. The events leading to her mental injury were readily identifiable and were sudden, traumatic and unexpected to claimant prior to their occurrence. The employer even acknowledged such situations to be stressful, conceded that the death of three clients would heighten that stress, and that this type of situation was very unusual for a caseworker. Having reached these findings, I apply the direct language utilized by the Court in Brown and conclude that claimant has satisfied the legal causation standard because her mental injury was the result of events that were sudden, traumatic, unexpected and that placed an unusual strain upon her.

However, acknowledging the commissioner's decision in Dubinovic, I recognize that the commissioner may interpret the legal standard in a manner that is contrary to my conclusions. Therefore, I must consider the situation in which the Brown standard is not applicable.

When legal causation cannot be established under the sudden and traumatic standard established in Brown, the claimant must establish her claim under a more exacting legal causation standard as set forth in Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995). Specifically, when attempting to establish legal causation for a mental-mental injury under this standard, the claimant must establish that the mental stress she endured and that caused her injury "was caused by workplace stress of greater magnitude than the day-to-day mental stresses experienced by other workers employed in the same or similar jobs, regardless of their employer." Id. at 858.

In this case, I found that it was unusual (3 times in 17 years) for an incident similar to this to occur. The employer established an informal process to provide mental health support for similar events after claimant's experience and difficulties. Clearly, the employer believes this type of event to represent a situation that presents stress of greater magnitude than the day-to-day stress typically experienced by a case worker.

Having found that the events leading to Ms. Garr-Kime's mental injury were of a greater magnitude than the day-to-day stress experienced by other similarly situated employees, I conclude that claimant has established legal causation under the Dunlavey standard as well. Therefore, I conclude that claimant has established she sustained a mental-mental injury that arises out of and in the course of her employment at SIEDA as a result of events surrounding the January 24, 2014 death of a client's child.

Defendants assert that this claim should be barred pursuant to Iowa Code section 85.23 for lack of timely notice of the injury. Iowa Code section 85.23 requires an employee to give notice of the occurrence of an injury to the employer within 90 days from the date of the occurrence, unless the employer has actual knowledge of the occurrence of the injury.

The purpose of the 90-day notice or actual knowledge requirement is to give the employer an opportunity to timely investigate the facts surrounding the injury. The actual knowledge alternative to notice is met when the employer, as a reasonably conscientious manager, is alerted to the possibility of a potential compensation claim through information which makes the employer aware that the injury occurred and that it may be work related. Dillinger v. City of Sioux City, 368 N.W.2d 176 (Iowa 1985); Robinson v. Department of Transp., 296 N.W.2d 809 (Iowa 1980).

Failure to give notice is an affirmative defense which the employer must prove by a preponderance of the evidence. DeLong v. Highway Commission, 229 Iowa 700, 295 N.W. 91 (1940).

In this case, defendants argue that they did not receive notice of a mental injury until May 2, 2015. However, Ms. Falck testified that she was aware of the facts surrounding this case and that claimant kind of "shut down" after the events transpired and the investigation was continuing. The employer had actual knowledge of the stressful events as they transpired. The employer's representative made specific observations of the effects of those stressful events on the claimant. Therefore, I found that the employer had actual notice of the injury. Therefore, I find that defendants' notice defense fails.

The parties stipulate that, if claimant proves a compensable injury, it should be compensated as an unscheduled injury with industrial disability pursuant to Iowa Code section 85.34(2)(u). (Hearing Report) Since claimant has an impairment to the body as a whole, an industrial disability has been sustained. Industrial disability was defined in Diederich v. Tri-City R. Co., 219 Iowa 587, 258 N.W. 899 (1935) as follows: "It is therefore plain that the legislature intended the term 'disability' to mean 'industrial disability' or loss of earning capacity and not a mere 'functional disability' to be computed in the terms of percentages of the total physical and mental ability of a normal man."

Functional impairment is an element to be considered in determining industrial disability which is the reduction of earning capacity, but consideration must also be given to the injured employee's age, education, qualifications, experience, motivation, loss of earnings, severity and situs of the injury, work restrictions, inability to engage in employment for which the employee is fitted and the employer's offer of work or failure to so offer. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963); Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961).

Compensation for permanent partial disability shall begin at the termination of the healing period. Compensation shall be paid in relation to 500 weeks as the disability bears to the body as a whole. Section 85.34.

Having considered the relevant industrial disability factors and having found that claimant sustained a 50 percent loss of future earning capacity as a result of the January 24, 2014 work injury, I conclude that claimant is entitled to an award of 250 weeks of permanent partial disability benefits. Iowa Code section 85.34(2)(u). The parties stipulate that the permanent disability benefits should commence on January 25, 2014. (Hearing Report) The parties also stipulate that the benefits should be paid at the rate of three hundred fifty-nine and 31/100 dollars ($359.31) per week. (Hearing Report)

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 1975).

Having found that the medical expenses contained and summarized in Exhibit 17 are reasonable, necessary, and causally related to the January 24, 2014 work injury, I conclude that the employer is obligated to pay outstanding charges directly to the medical providers or to claimant, and to reimburse claimant for all out-of-pocket expenses, including medical mileage. Iowa Code section 85.27.

Ms. Garr-Kime asserts a claim for penalty benefits pursuant to Iowa Code section 86.13 and asserts that the defendants unreasonably delayed or denied benefits to claimant. 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. Robbennolt v. Snap-on Tools Corp., 555 N.W.2d 229 (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 also 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 commissioner shall impose a penalty in an amount up to 50 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.

In this case, I found that the defendants had a reasonable basis for denial of this claim. I conclude that there is not a basis for award of penalty benefits in this case, as it remained fairly debatable throughout the claim. If any of several pieces of evidence offered by defendants were accepted as accurate, claimant would not have prevailed. Therefore, I conclude that the penalty benefit claim should fail.

Finally, Ms. Garr-Kime requests assessment of her costs. Assessing costs is a discretionary function of the agency. Iowa Code section 86.40.

In this case, claimant has prevailed on the majority of the substantive merits. I conclude that it is appropriate to assess costs in this circumstance. First, I ordered the transcript of this arbitration hearing. The cost of the court reporter's attendance and the transcript of these proceedings are assessed to defendants. Rule 876 IAC 4.33(1)-(2).

Exhibit 18 contains claimant's requested costs. The initial cost is for an independent medical evaluation. Defendants already stipulated to that cost and it has already been verbally ordered. Any independent medical evaluation expense will not be separately awarded as a cost.

Claimant seeks assessment of her filing fee ($100.00) and service costs ($13.48) on defendants. Both are reasonable costs and are assessed against defendants pursuant to 876 IAC 4.33(3), (7).

Claimant seeks the cost of her deposition ($174.15). Claimant's deposition transcript was introduced into the evidentiary record. I conclude it is reasonable to assess this as a cost pursuant to 876 IAC 4.33(2).

Finally, claimant seeks witness fees for Rebecca Falck and Brian Dunn to appear at their deposition. Claimant seeks these expenses as witness fees pursuant to 876 IAC 4.33(4). However, the receipt included in Exhibit 18 appears to be for the court reporters services for attendance and transcription of depositions of Ms. Falck and Mr. Dunn, not witness fees for attendance at trial. Claimant's request for assessment of deposition costs as witness fees is not reasonable. Claimant's request for these expenses is denied.

## ORDER

THEREFORE, IT IS ORDERED:

Defendants shall pay claimant two hundred fifty (250) weeks of permanent partial disability benefits commencing on January 25, 2014 at the stipulated rate of three hundred fifty-nine and 31/100 dollars ($359.31) per week.

Defendants shall pay interest pursuant to Iowa Code section 85.30 on all accrued weekly benefits.

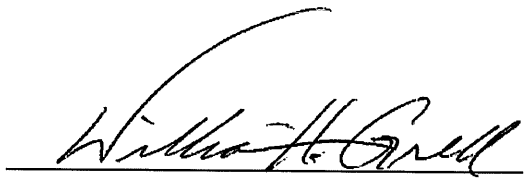
Defendants shall pay, reimburse, or otherwise satisfy and hold claimant harmless for all medical expenses contained in Exhibit 17.

Defendants shall reimburse claimant's independent medical evaluation fees pursuant to their stipulation at the time of trial and the verbal order entered by the undersigned at the time of trial.

Defendants shall bear the cost of the court reporter's attendance and transcription costs for the arbitration hearing and shall reimburse claimant's costs in the amount of two hundred eighty-seven and 63/100 dollars ($287.63).

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 16th day of November, 2017.



WILLIAM H. GRELL
DEPUTY WORKERS'
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WHG/kjw

**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.