BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

FUADA BECIREVIC,	:	
	:	File No. 5063498
Claimant,	:	
	:	APPEAL
vs.	:	
	:	DECISION
TRINITY HEALTH CORPORATION d/b/a COVENANT MEDICAL CENTER,	:	
Employer, Self-Insured, Defendant.	:	Headnotes: 1402.40; 1803; 1804; 2204; 2501; 2502; 4100;

Claimant Fuada Becirevic appeals from an arbitration decision filed on December 28, 2018. Defendant Trinity Health Corporation, d/b/a Covenant Medical Center, self-insured employer, cross-appeals. The case was heard on September 20, 2018, and it was considered fully submitted in front of the deputy workers' compensation commissioner on October 19, 2018.

The deputy commissioner found claimant established she sustained a permanent mental health sequela as a result of the work injury which occurred on June 4, 2016. The deputy commissioner found claimant sustained a permanent physical injury to her lumbar spine, and reached maximum medical improvement (MMI) on November 1, 2017. The deputy commissioner found claimant sustained 80 percent industrial disability as a result of the work injury. The deputy commissioner found the commencement date for permanent partial disability (PPD) benefits is June 5, 2016. The deputy commissioner found claimant is entitled to receive additional healing period benefits from March 16, 2017, through November 1, 2017. The deputy commissioner found the medical care claimant received for the work injury after February 17, 2017, was reasonable and beneficial, but did not award claimant the medical bills set forth in Exhibit 6, page 5, because there were no medical bills attached to the bill summary. The deputy commissioner also determined claimant is not entitled to receive reimbursement for the $1,000.00 fee charged by Arnold Delbridge, M.D. in Exhibit 6, page 1, as there is no explanation for the charge. The deputy commissioner found defendant is responsible for the remainder of the medical bills found in Exhibit 6, and for all causally related medical bills. The deputy commissioner found claimant is not entitled to receive penalty benefits. The deputy commissioner found claimant is entitled

to recover the $1,000.00 cost of Dr. Delbridge's independent medical evaluation (IME), $528.00 for the first vocational report of Barbara Laughlin, M.A., $360.00 for the report of Catalina Ressler, Ph.D., $100.00 for the filing fee, and $167.20 for claimant's deposition costs.

Claimant asserts on appeal that that deputy commissioner erred in failing to find claimant is permanently and totally disabled as a result of the work injury. Claimant further asserts the deputy commissioner erred in failing to award penalty benefits. Finally, claimant asserts the deputy commissioner erred in failing to order defendant to pay for the medical expenses found in Exhibit 6, page 5.

Defendant asserts on cross-appeal that the deputy commissioner erred in awarding industrial disability benefits in excess of the benefits previously paid, because defendant asserts claimant failed to prove she sustained a mental injury or that she is entitled to additional benefits for her lumbar spine condition. Defendant further asserts the deputy commissioner erred in awarding additional healing period benefits. Defendant asserts the deputy commissioner correctly found claimant is not entitled to receive penalty benefits. Defendant asserts claimant is not entitled to receive reimbursement for any of the medical expenses contained in claimant's exhibit 6, nor reimbursement for Dr. Delbridge's $1,000.00 IME fee. Finally, defendant asserts the deputy erred in awarding costs related to Barbara Laughlin's vocational report.

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

I have performed a de novo review of the evidentiary record and the detailed arguments of the parties. Pursuant to Iowa Code section 86.24 and 17A.15, those portions of the proposed arbitration decision filed on December 28, 2018 that relate to issues properly raised on intra-agency appeal and cross-appeal are affirmed in part without additional comment and reversed in part.

I affirm the deputy commissioner's finding that claimant established she sustained a permanent mental health sequela as a result of the work injury. I affirm the deputy commissioner's finding that claimant sustained a permanent physical injury to her lumbar spine, and reached MMI on November 1, 2017. I affirm the deputy commissioner's finding that claimant sustained 80 percent industrial disability as a result of the work related injury. I affirm the deputy commissioner's finding that the commencement date for permanent partial disability benefits is June 5, 2016. I affirm the deputy commissioner's finding that claimant is entitled to receive additional healing period benefits from March 16, 2017, through November 1, 2017. I affirm the deputy commissioner's finding that the medical care claimant received for the work injury after February 17, 2017, was reasonable and beneficial. I affirm the deputy commissioner's finding that claimant is not entitled to receive reimbursement for the $1,000.00 fee charged by Dr. Delbridge in Exhibit 6, page 1 as a medical bill, because there is no explanation for the charge, and it appears to be duplicative. I affirm the deputy

commissioner's finding that claimant is entitled to recover the $1,000.00 cost of Dr. Delbridge's IME, $528.00 for the first vocational report of Barbara Laughlin, M.A., $360.00 for the report of Catalina Ressler, Ph.D., $100.00 for the filing fee, and $167.20 for claimant's deposition costs.

I find the deputy commissioner provided a well-reasoned analysis of the issues noted above and I affirm the deputy commissioner's findings of fact and conclusions of law pertaining to those issues.

For the reasons that follow, the portions of the deputy commissioner's decision regarding the medical expenses found in Exhibit 6, page 5, and the deputy commissioner's determination regarding penalty benefits are respectfully reversed with the following additional analysis and conclusions:

With respect to the medical bills from University of Iowa Health Clinics (UIHC), found in Exhibit 6 at page 5, the deputy commissioner determined claimant is not entitled to recover those costs as the exhibit is a summary of the bills, and does not include the actual bills from the providers. (Arbitration Decision, p. 27) Claimant asserts the document in evidence is the actual document received from the UIHC billing office pursuant to a request for medical and billing records. (Claimant's Brief, p. 7) Defendant provides no evidence to the contrary, but argues the document is "without apparent supporting documentation," and that claimant's treatment at UIHC was not authorized. (Defendant's Brief, p. 36)

As the deputy commissioner correctly noted, while the employer retains the right to choose the employee's medical care under the statute, the employee is not prohibited from seeking her own care when the employer denies compensability for the injury or the employee "abandons the protections of section 85.27 or otherwise obtains his or her own medical care independent of the statutory scheme." Brewer Strong v. HNI Corp., 913 N.W.2d 235, 248 (Iowa 2018) (quoting Bell Bros. Heating & Air Conditioning v. Gwinn, 779 N.W.2d 193, 204 (Iowa 2010). In Brewer-Strong and Gwinn, the court held the employer's duty to furnish reasonable medical care includes unauthorized care if the employee is able to prove "by a preponderance of the evidence that such care was reasonable and beneficial" under the totality of the circumstances. Id. (quoting Gwinn, 779 N.W.2d at 206). The court further held "unauthorized medical care is beneficial if it provides a more favorable medical outcome than would likely have been achieved by the care authorized by the employer." Id.

I agree with the deputy commissioner's finding that the care claimant received for the work injury after February 14, 2017, was reasonable and beneficial. After that point, defendant offered no additional care related to claimant's physical complaints, and denied the mental health claim. As such, the defendant lost the right to choose the provider of care, and the authorization defense is no longer available. Gwinn, 779 N.W.2d at 204) However, I disagree with the deputy commissioner's finding that the billing summary found in Exhibit 6, page 5, is not supported in the record. The medical

records from UIHC found at joint exhibit 10 correspond with the dates reflected in Exhibit 6, page 5. (See Ex. 10) There is no evidence in the record that this billing summary, provided by UIHC, is inaccurate or otherwise unreliable. As such, the deputy commissioner's decision with respect to Exhibit 6, page 5 is respectfully reversed. I find defendant is responsible for all medical bills in Exhibit 6, with the exception of the $1,000.00 charge for Dr. Delbridge's report found on page 1, as that charge is to be reimbursed separately as the cost of the IME.

With respect to penalty benefits, David Kirkle, D.O., the authorized treating physician chosen by defendant to provide claimant's medical care, opined claimant reached MMI for "failure to progress" on February 10, 2017, and provided a five percent impairment rating on February 14, 2017. (Joint Exhibit 4, p. 54) Dr. Kirkle further imposed permanent restrictions of "no lifting over 35 pounds from floor to waist, 40 pounds from waist to crown, pushing and pulling limited to pushing 38 pounds and pulling 35 pounds." Id. These restrictions did not comport with the requirements of claimant's position, and she was given approximately 90 days to apply for other positions with defendant. When no suitable position was found, claimant was formally terminated from employment effective May 30, 2017. (Ex. D, p. 22)

Despite the fact that defendant's authorized treating physician imposed permanent restrictions that precluded claimant from returning to her job, defendant only paid the five percent rating. It is undisputed defendant knew from the moment it received Dr. Kirkle's permanent restrictions that claimant would be unable to continue in her position at Covenant. Further, after claimant was unable to find another suitable position at Covenant, she was formally terminated. While defendant argues there were two part-time positions claimant would have been able to perform, it is undisputed claimant would have earned substantially less in those positions than she did as a full-time employee.

Iowa Code section 86.13(4) provides:

> 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.
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> b. The workers' compensation commissioner shall award benefits under this subsection if the commissioner finds both of the following facts:
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> (1) The employee has demonstrated a denial, delay in payment, or termination in benefits.

(2) The employer has failed to prove a reasonable or probable cause or excuse for the denial, delay in payment, or termination of benefits.

c. In order to be considered a reasonable or probable cause or excuse under paragraph "b", an excuse shall satisfy all of the following criteria:

(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.

Iowa Code § 86.13(4)(b)-(c).

The Iowa Supreme Court has stated:

(1) If the employer has a reason for the delay and conveys that reason to the employee contemporaneously with the beginning of the delay, no penalty will be imposed if the reason is of such character that a reasonable fact-finder could conclude that it is a "reasonable or probable cause or excuse" under Iowa Code section 86.13. In that case, we will defer to the decision of the commissioner. See Christensen v. Snap-On Tools Corp., 554 N.W.2d 254, 260 (Iowa 1996) (substantial evidence found to support commissioner's finding of legitimate reason for delay pending receipt of medical report); Robbennolt v. Snap-On Tools Corp., 555 N.W.2d 229, 236 (Iowa 1996).

(2) If no reason is given for the delay or if the "reason" is not one that a reasonable fact-finder could accept, we will hold that no such cause or excuse exists and remand to the commissioner for the sole purpose of assessing penalties under section 86.13. See Christensen, 554 N.W.2d at 261.

(3) Reasonable causes or excuses include (a) a delay for the employer to investigate the claim, Christensen, 554 N.W.2d at 260;

> Kiesecker v. Webster City Meats. Inc., 528 N.W.2d at 109, 111 (Iowa 1995); or (b) the employer had a reasonable basis to contest the claim—the "fairly debatable" basis for delay. See Christensen, 554 N.W.2d at 260 (holding two-month delay to obtain employer's own medical report reasonable under the circumstances).
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> (4) For the purpose of applying section 86.13, the benefits that are underpaid as well as late-paid benefits are subject to penalties, unless the employer establishes reasonable and probable cause or excuse. Robbennolt, 555 N.W.2d at 237 (underpayment resulting from application of wrong wage base; in absence of excuse, commissioner required to apply penalty).
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> (5) For purposes of determining whether there has been a delay, payments are "made" when (a) the check addressed to a claimant is mailed (Robbennolt. 555 N.W.2d at 236; Kiesecker, 528 N.W.2d at 112), or (b) the check is delivered personally to the claimant by the employer or its workers' compensation insurer. Robbennolt, 555 N.W.2d at 235.
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> (6) In determining the amount of penalty, the commissioner is to consider factors such as the length of the delay, the number of delays, the information available to the employer regarding the employee's injury and wages, and the employer's past record of penalties. Robbennolt, 555 N.W.2d at 238.
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> (7) An employer's bare assertion that a claim is "fairly debatable" does not make it so. A fair reading of Christensen and Robbennolt, makes it clear that the employer must assert facts upon which the commissioner could reasonably find that the claim was "fairly debatable." See Christensen, 554 N.W.2d at 260.
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> Meyers v. Holiday Express Corp., 557 N.W.2d 502 (Iowa 1996).

When an employee's claim for benefits is fairly debatable based on a good faith dispute over the employee's factual or legal entitlement to benefits, an award of penalty benefits is not appropriate under the statute. Whether the issue was fairly debatable turns on whether there was a disputed factual dispute that, if resolved in favor of the employer, would have supported the employer's denial of compensability. Gilbert v. USF Holland. Inc., 637 N.W.2d 194 (Iowa 2001). Pursuant to Iowa Code section 86.13(4)(c), the employer bears the burden to establish that the reasonable cause or excuse for the delay in benefits was preceded by a reasonable investigation, that the results of that investigation are the actual basis for denial, and that the employer contemporaneously conveyed the basis to the claimant at the time of the delay or denial.

In this case, I respectfully disagree with the deputy commissioner regarding the basis for defendant's denial of additional industrial disability benefits. There is no dispute that due to claimant's accepted low back injury, she was left with restrictions that precluded her from returning to work at defendant. Those restrictions were imposed by defendant's authorized treating physician, Dr. Kirkle. Defendant did not provide any evidence to establish that a reasonable investigation was conducted into the extent of claimant's industrial disability upon receipt of those restrictions. Defendant also produced no evidence that any additional investigation was made at the conclusion of claimant's job search within defendant, when claimant was formally terminated. Rather, defendant based its payment of permanent partial disability benefits on one factor of industrial disability alone, the impairment rating. Further, defendant provided no evidence to establish that they contemporaneously conveyed the basis for the denial of additional benefits to claimant at the time of the denial.

While causation of the mental health aspect of the claim may have been fairly debatable, the basis for the award of penalty benefits is defendant's failure to properly investigate or provide a reasonable excuse for the denial of additional permanency benefits upon receipt of claimant's permanent restrictions for her physical injury. I find defendant did not offer evidence of a reasonable investigation into the extent of industrial disability, despite the imposition of permanent restrictions that resulted in the loss of claimant's job. Nor did defendant provide a reasonable excuse for the denial of additional permanency benefits. Iowa Code section 86.13(4)(c)(1)-(2). Rather, defendant unreasonably based its assessment of disability on one factor alone, the impairment rating, without any explanation or investigation into the other factors that are to be considered. I find defendant further did not contemporaneously convey the bases for denial of benefits. Iowa Code section 86.13(4)(c)(3). Defendant bore the burden to establish a reasonable basis, or excuse, and to prove the contemporaneous conveyance of those bases to claimant. Defendant failed to carry its burden of proof on the penalty issues, and a penalty award is appropriate. Iowa Code section 86.13.

The purpose of Iowa Code section 86.13 is both punishment for unreasonable conduct but also deterrence for future cases. Robbennolt, 555 N.W.2d at 237. In this regard, this agency is given discretion to determine the amount of the penalty imposed with a maximum penalty of 50 percent of the amount of the delayed, or denied, benefits. Christensen v. Snap-On Tools Corp., 554 N.W.2d 254, 261 (Iowa 1996). In exercising its discretion, the agency must consider factors such as the length of the delays, the number of delays, the information available to the employer regarding the employee's injury and wages, and the employer's past record of penalties. Meyers v. Holiday Express Corp., 557 N.W.2d 502, 505 (Iowa 1996).

Given the permanent restrictions and loss of claimant's job, it would have been reasonable for defendant to pay at least 20 percent industrial disability voluntarily. There is no evidence of prior penalty on behalf of this self-insured employer. Having considered the relevant factors and the purposes of the penalty statute, I conclude that

a section 86.13 penalty equal to 25 percent of the amount of benefits unreasonably denied is appropriate to punish the employer for its unreasonable denial of additional benefits under these facts and should serve as a deterrent against such future conduct.

20 percent industrial disability is equal to 100 weeks of benefits. Defendant voluntarily paid 25 weeks of permanency benefits, meaning an additional 75 weeks of benefits were unreasonably denied. At claimant's weekly rate of $388.63, 75 weeks is equal to $29,147.25. 25 percent of that amount is approximately $7,285.00. Therefore, I find claimant is entitled to receive penalty benefits from defendant in the amount of $7,285.00.

ORDER

IT IS THEREFORE ORDERED that the arbitration decision filed on December 28, 2018, is affirmed in part and reversed in part.

Defendant shall pay claimant healing period benefits from March 16, 2017, through November 1, 2017, at the stipulated weekly rate of three hundred eighty-eight and 63/100 dollars ($388.63).

Defendant shall pay claimant four hundred (400) weeks of permanent partial disability benefits at the stipulated weekly rate of three hundred eighty-eight and 63/100 dollars ($388.63), commencing on June 5, 2016.

Defendant shall receive credit for all benefits paid.

Defendant 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. See Gamble v. AG Leader Tech., File No. 5054686 (App. Apr. 24, 2018).

Defendant shall pay claimant penalty benefits in the amount of seven thousand two hundred eighty-five and no/100 dollars ($7,285.00).

Defendant shall pay all medical bills as set forth in this decision, and all causally related ongoing medical bills.

Pursuant to Iowa Code section 85.39, defendant shall reimburse claimant in the amount of one thousand and no/100 dollars ($1,000.00) for Dr. Delbridge's IME.

Pursuant to rule 876 IAC 4.33, defendant shall pay claimant's costs of the arbitration proceeding in the amount of one thousand one hundred fifty-five and 20/100

dollars ($1,155.20), and the parties shall split the costs of the appeal, including the cost of the hearing transcript.

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

Signed and filed on this 24th day of March, 2020.

Joseph S. Cortese II

JOSEPH S. CORTESE II
WORKERS' COMPENSATION
COMMISSIONER

The parties have been served as follows:

Adnan Mahmutagic

Lee P. Hook

Tyler Smith