

## BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

CINDY FREIBURGER,

Claimant,

vs.

JOHN DEERE DUBUQUE WORKS OF  
DEERE & COMPANY,Employer,  
Self-Insured,  
Defendant.

File No: 5066626.01

A P P E A L

D E C I S I O N

Head Notes: 1402.20; 1402.40; 1803;  
1803.1; 2204; 2502; 2907;  
4000.02

Claimant Cindy Freiburger appeals from an arbitration decision filed on July 15, 2021. Defendant John Deere Dubuque Works of Deere & Company, self-insured employer, cross-appeals. The case was heard on November 24, 2020, and it was considered fully submitted in front of the deputy workers' compensation commissioner on December 21, 2020.

In the arbitration decision, the deputy commissioner found claimant sustained post-traumatic stress disorder (PTSD) as a sequela of the stipulated April 1, 2015, work injury, but the deputy commissioner found claimant failed to carry her burden of proof to establish her PTSD is a permanent condition. The deputy commissioner found claimant sustained no permanent impairment of her left lower extremity from the work injury. The deputy commissioner found claimant sustained five percent permanent impairment of her right lower extremity from the work injury and awarded claimant eleven weeks of permanent partial disability (PPD) benefits at the weekly rate of \$473.65, commencing on January 7, 2017. The deputy commissioner found defendant unreasonably delayed payment of PPD benefits and awarded claimant \$1,042.03 in penalty benefits. The deputy commissioner found defendant failed to raise the issue of costs at hearing, and the deputy commissioner found that even if defendant did not waive the issue of costs, claimant should be reimbursed for the cost of the independent medical examination (IME) performed by Arnold Delbridge, M.D. pursuant to Iowa Code section 85.39.

Claimant asserts on appeal that the deputy commissioner erred in finding claimant did not sustain permanent disability from her PTSD, and in finding claimant is not entitled to receive industrial disability benefits. Claimant asserts the deputy commissioner erred in finding claimant did not sustain permanent impairment of her left lower extremity. Claimant asserts the deputy commissioner erred in finding claimant sustained only five percent permanent impairment of her right lower extremity. Claimant

asserts she is entitled to additional penalty benefits for late paid temporary and permanent disability benefits.

Defendant asserts on cross-appeal that the deputy commissioner erred in finding claimant sustained PTSD as a sequela of the work injury, and defendant asserts if claimant has proven she did sustain PTSD, she has not proven she sustained functional permanent impairment or industrial disability. Defendant asserts the deputy commissioner's findings that claimant did not sustain permanent impairment of her left lower extremity and that claimant sustained five percent permanent impairment of her right lower extremity should be affirmed. Defendant asserts the deputy commissioner erred in awarding penalty benefits. Defendant asserts the deputy commissioner erred in finding defendant waived the issue of costs at hearing, and defendant asserts the deputy commissioner erred in finding claimant should be reimbursed for the entire cost of Dr. Delbridge's IME. Defendant asserts claimant is only entitled to recover the cost of the IME report and claimant's \$100.00 filing fee.

I performed a de novo review of the evidentiary record and the detailed arguments of the parties. Pursuant to Iowa Code sections 86.24 and 17A.15, the arbitration decision filed on July 15, 2021, is affirmed in part, modified in part, and reversed in part.

I affirm the deputy commissioner's finding that claimant proved she sustained PTSD as a sequela of the work injury. I affirm the deputy commissioner's finding that claimant failed to prove her PTSD is a permanent condition. I affirm, in part, modify in part, and reverse in part, the deputy commissioner's award of penalty benefits and costs. I affirm in part, modify in part, and reverse in part, the deputy commissioner's decision with the following analysis:

Treating providers, Laura Rank, LMHC, and Mark Mittauer, M.D., a psychiatrist, opined claimant's PTSD is chronic. (JE 4; JE 5; Ex. 2) The deputy commissioner found no medical provider opined claimant's mental health condition is permanent. In a letter to Rank dated October 5, 2020, claimant's counsel asked, "[i]n the event your opinion is a diagnosis of a psychiatric disorder causally related to the work injuries at John Deere Dubuque Works and the work injury related psycho-social stressors are not resolved, is the condition(s) you have diagnosed likely to be chronic/permanent?" (Ex. 2, p. 2) Rank sent a response letter on October 24, 2020, as follows:

I first met with Ms. Freiburger on 06/04/2019 at Hillcrest Family Services for an initial therapy evaluation and made a formal diagnosis of F43.10, post-traumatic stress disorder. On 09/02/2020, meeting with Ms. Frieburger at A Mindful Journey, I conducted an updated diagnostic evaluation and made a formal diagnosis of F43.12, post-traumatic stress disorder, chronic.

As you are aware, Ms. Freiburger sustained a traumatic, work-related injury on April 01, 2015. It is my clinical opinion that the PTSD symptoms stem from the traumatic, work-related accident. I have been providing Ms. Freiburger with outpatient mental health therapy services since June 2019. It is my clinical opinion that this mental health condition is chronic. My current clinical recommendation is that she continue to receive outpatient services as part of her ongoing treatment.

(Ex. 2, p. 4)

The letter provides Rank believes claimant's condition is chronic. Word choice matters in determining whether a condition is permanent, entitling a claimant to permanent partial disability benefits under Iowa Code section 85.34. Claimant did not follow up with Rank, Dr. Mittauer, the treating psychiatrist, or any other medical provider to ask whether claimant's PTSD is, in fact, permanent. Based on my de novo review, I do not find any medical provider has opined claimant's PTSD is permanent. I affirm the deputy commissioner's finding claimant failed to meet her burden of proof that she sustained a permanent mental health condition caused by the work injury.

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.

The deputy commissioner found most of the temporary total and temporary partial disability benefits were made within 10 days after the end of the week when due and the deputy commissioner declined to award penalty benefits. The record reflects defendant made 77 weekly payments of temporary disability benefits to claimant, the majority of which were paid within 10 days. The record also reflects three payments were made within 17 days. Defendant did not offer a reason for the delays. Based on my de novo review, I find an award of \$200.00 in penalty benefits is appropriate in this case.

The deputy commissioner found Dr. Field issued his permanent impairment rating on July 5, 2017, defendant was aware of the rating by at least July 10, 2017, and defendant did not issue a check to claimant until August 15, 2017. The deputy commissioner found a penalty award of \$1,042.03 was appropriate.

The record reflects defendant made the payment of \$5,210.15 for 11 weeks of permanent partial disability benefits at the weekly rate of \$473.65 on August 21, 2017. Defendant did not offer an excuse for the delay in payment. Based on my de novo review, I find an award of \$1,100.00 in penalty benefits is appropriate.

The deputy commissioner found defendant waived the issue of costs at hearing, and even if defendant did not waive the issue of costs, the deputy commissioner found that under Iowa Code section 85.39, claimant should be reimbursed for the full cost of Dr. Delbridge's IME. Based on my de novo review I find defendant did not waive the issue of costs. Pursuant to Iowa Code section 85.39, I affirm the deputy commissioner's award in the amount of \$1,750.00 for the cost of Dr. Delbridge's IME. I also award claimant \$100.00 for the filing fee. Iowa Code § 86.40; 876 IAC 4.33(6).

ORDER

IT IS THEREFORE ORDERED that the arbitration decision filed on July 15, 2021, is affirmed in part, modified in part, and reversed in part, with the above-stated additional analysis.

Defendant shall pay claimant 11 weeks of permanent partial disability benefits, at the stipulated weekly rate of four hundred seventy-three and 65/100 dollars (\$473.65), commencing on January 7, 2017.

Defendant shall receive credit for all benefits previously 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. Gamble v. AG Leader Tech., File No. 5054686 (App. Apr. 24, 2018).

Defendant shall pay claimant one thousand three hundred and 00/100 dollars (\$1,300.00) in penalty benefits.

Pursuant to Iowa Code section 85.39, defendant shall reimburse claimant in the amount of one thousand seven hundred fifty and 00/100 dollars (\$1,750.00) for the cost of 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 hundred and 00/100 dollars (\$100.00), 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 7<sup>th</sup> day of February, 2022.

*Joseph S. Cortese II*

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JOSEPH S. CORTESE II  
WORKERS' COMPENSATION  
COMMISSIONER

The parties have been served as follows:

Thomas Wertz (via WCES)

Arthur Gilloon (via WCES)