BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

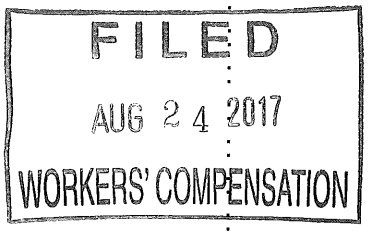
CHRISTINA LLOYD,

Claimant,

vs.

TYSON FOODS, INC.,

Employer,
Self-Insured,
Defendant.



File No. 5055583

ARBITRATION

DECISION

Head Note Nos.: 1402.40; 1403.30; 1803

STATEMENT OF THE CASE

Claimant Christina Lloyd filed a petition in arbitration on February 18, 2016, alleging she sustained a cumulative injury to her bilateral hands, wrists, and arms while working for the defendant, Tyson Foods, Inc. ("Tyson"). Tyson filed an answer on March 4, 2016.

An arbitration hearing was held on March 23, 2017, at the Iowa Workforce Center in Waterloo, Iowa. Attorneys Casey Steadman and Gary Nelson represented Lloyd. Lloyd appeared and testified. Attorney Deanne Townley represented Tyson. Mary Jones appeared and testified on behalf of Tyson. Exhibits 1 through 7 and A through D were admitted into the record. The record was left open through April 27, 2017, for the receipt of post-hearing briefs. At that time the record was closed. After receiving the post-hearing briefs, I discovered the pages in Exhibit 4 were not in chronological order and were undated. The record was re-opened for the receipt of a corrected copy of Exhibit 4, which was received on May 18, 2017. At that time the record was closed.

Before the hearing the parties prepared a hearing report listing stipulations and issues to be decided. Tyson raised the affirmative defense of lack of timely notice under Iowa Code section 85.23, but waived all other affirmative defenses.

STIPULATIONS

1. An employer-employee relationship existed between Lloyd and Tyson at the time of the alleged injury.

2. Temporary benefits are no longer in dispute.

3. If the injury is found to be a cause of permanent disability, the disability is a scheduled member disability to the right fourth digit.

4. If the injury is found to be a cause of permanent disability, the commencement date for permanent partial disability benefits, if any are awarded, is October 26, 2015.

5. At the time of the alleged injury the claimant was single and entitled to one exemption, and the parties believe Lloyd's weekly rate to be $335.23.[1]

ISSUES

1. Whether Lloyd sustained an injury on October 26, 2015, which arose out of and in the course of her employment with Tyson.

2. Is the alleged injury a cause of permanent disability?

3. Is Lloyd entitled to an award of penalty benefits?

4. Is Lloyd entitled to recover the cost of an independent medical examination?

5. Should costs be assessed against either party?

FINDINGS OF FACT

Lloyd is single and lives in Chicago, Illinois. (Transcript, pages 8-9) Lloyd graduated from high school in Chicago in 2014. (Tr., p. 8; Exhibit 6, p. 2) At the time of the hearing she was twenty. (Tr., p. 8)

After graduating from high school Lloyd performed seasonal work as a recreational leader for the Chicago Park District, where she assisted children with games and activities, and for UPS where she sorted lightweight boxes weighing eight to ten pounds. (Tr., p. 9-10; Ex. 6, p. 3) Lloyd worked for Covenant Healthcare for one month in June 2015, providing homemaker services for elderly individuals, including laundry, cooking, sweeping, and mopping. (Tr., pp. 10-11)

In late July 2015, Tyson hired Lloyd to trim shoulder ends with a knife. (Exs. 1, pp. 1-2; 6, p. 3; Tr., pp. 11, 13) Lloyd grabbed pieces of meat with her left hand from a conveyor belt, cut the meat with a knife using her right hand, and placed the meat back on the conveyor belt. (Tr., p. 13) Lloyd testified as she worked her knife would become dull, she would notify her supervisor the knife was dull, and she would receive a new knife. (Tr., p. 14) If the knife was not replaced within ten minutes after she reported it was dull, Lloyd was instructed to stop cutting the meat. (Tr., p. 14) Lloyd reported her knife would become dull approximately three times per week. (Tr., p. 14)

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[1] The parties initially disagreed on Lloyd's weekly rate. In her post-hearing brief, Lloyd reported, "[c]laimant will accept Defendant's rate calculation in light of clarifying documents provided on the day of hearing." (Claimant's Brief at 6)

On October 15, 2015, Lloyd attended an appointment with Sarah Kane, ARNP, at Peoples Community Health Clinic, complaining of back pain, numbness in her hands, and pain in her lower left abdomen. (Ex. 4, pp. 1-3) Kane assessed Lloyd with bilateral hand pain, prescribed thumb spica splints and Meloxicam, and referred Lloyd for an orthopedic evaluation of "triggering of right 4th finger" and for occupational therapy. (Ex. 4, p. 4)

Lloyd underwent a post-offer health assessment with Tyson on July 23, 2015. (Ex. 1, p. 3) Lloyd reported that she has a history of asthma, heart problems, chest pain, and eczema. (Ex. 1, p. 3) Lloyd did not report she had any problems with her wrists or hands. (Ex. 1, p. 3) Tyson did not document any problems with Lloyd's hands during the physical assessment. (Ex. 1, p. 5) Lloyd denied she had any problems with her hands before she began working for Tyson. (Tr., p. 12)

Lloyd avers she injured her right fingers while working for Tyson. Lloyd testified that she noted the pain had started becoming severe on October 26, 2015. (Tr., pp. 19-20) Lloyd testified that she informed her supervisors, Ryan Hunt and Rick Adleman, she had injured her hands at work, and Hunt told her to go to health services. [2] (Tr., pp. 20-21) Ryan Hunt and Adleman did not testify at hearing.

Lloyd reported she went to the nurses' office at Tyson with hand complaints four times during her employment. (Tr., pp. 20-22, 31) Lloyd testified she requested to see a physician, but the nursing staff told her they would not send her to a physician, so she sought treatment from Kane and later from Richard Naylor, D.O., for trigger finger issues. (Tr., p. 22)

Lloyd reported when she went to medical services, she treated with "Teresa – I don't know her last name or I would treat with Renee Brown." (Tr., p. 31) Lloyd reported she was on light duty for a period of time and her supervisor had her use a hook, she would cut pieces of meat, and slide the meat down to the next person. (Tr., p. 31) Theresa Meyer, RN, documented in Lloyd's medical file on November 6, 2015,

> [t]eam member here to OHS, trainer Karl gave permission to be seen. Job Title: Trim Shoulder Ends/Dept: 927. Team member stated, "my right ring finger and the lower part of thumb feels stiff and hurts. It has been going on for over a month and I haven't taken anything, just wondering if you can help me." Rates pain 4/10. Denies allergies. No objective findings. Pain/Acute.

(Ex. 1, p. 7) Meyer marked "y" the condition was work-related, described the encounter as an "[o]ccupational Illness – Initial" and ordered Lloyd to return to full-duty. (Ex. 1, p. 7)

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[2] In her deposition, Lloyd refers to Ryan Lund as her supervisor. (Ex. 6, pp. 6-7) At hearing, she referred to a Ryan Hunt as her supervisor. (Tr., pp. 20-21) It is unclear which name is correct.

During her deposition, Lloyd testified that she asked Hunt to,

> be taken off because the pain was getting so bad, and they weren't really doing anything to improve it. And so, they had – the last time – maybe the third time I went to Health Services, they put me on light duty. This is the second time they put my [sic] on light duty, and they never told me how long I was supposed to go on light duty so I just went on light duty for about a week and I told him that following Monday I would try back my job to see how I feel. So the following Monday by first break, which was at 5:45 when we started at three, I told him I couldn't do it anymore because the pain was just - - it was so bad.

(Ex. 6, p. 7) Lloyd testified her regular supervisor was not present, so she told Raymond, a supervisor, and he told her to go back to what she was doing when she was on light duty, "which was I had a hook and the pieces I was supposed to cut, I would just slide them down on the conveyor belt instead of cutting them." (Ex. 6, p. 7)

Jones, the nurse manager for Tyson, is familiar with Lloyd because Lloyd kept a nebulizer for her asthma in health services. (Tr., pp. 38, 40) Jones reported that if an employee seeks treatment for either an occupational or nonoccupational injury, the Tyson nursing staff makes an entry regarding the complaint and treatment in the employee's medical record. (Tr., pp. 38-39) Jones testified Lloyd's medical record does not show that she went to health services on four occasions complaining about her hands. (Tr., p. 4) Jones relayed, if Lloyd had come into health services on four occasions to seek treatment, the visits would have been entered into her medical record. (Tr., p. 40)

Jones testified that when an employee comes to health services complaining of a work injury the staff makes an injury assessment, treats the employee, and if the employee asks to see a physician, Tyson refers the employee to a physician. (Tr., p. 42) If an employee is removed from their position and placed on light duty Tyson completes an incident report. (Tr., p. 42) Jones denied that Lloyd ever came to health services and reported a work injury, and relayed the only encounter Lloyd had was with Teresa on November 6, 2015. (Tr., p. 43) Jones admitted Lloyd's Tyson medical record from November 6, 2015, documents the injury was "work-related." (Tr., p. 44)

Lloyd returned to Kane on January 4, 2016, complaining of bilateral hand pain, with numbness, pain over the palmar surface of both hands, and locking of the fourth finger on her right hand. (Ex. 4, p. 8) Kane assessed Lloyd with left shoulder pain, scapular pain, and right hand pain. (Ex. 4, pp. 10-12) Kane continued Lloyd's Meloxicam prescription and ordered Lloyd to use left and right thumb spica splints as needed. (Ex. 4, pp. 11, 13)

On January 26, 2016, Lloyd attended an appointment with Dr. Naylor, an orthopedic surgeon. (Ex. 3, p. 1) Dr. Naylor examined Lloyd, reviewed x-rays of her

right hand, assessed Lloyd with early trigger finger, and discussed the options of surgery and injections. (Ex. 3, p. 2) Lloyd testified she told Tyson that she had seen Kane regarding her hands, but she did not inform anyone at Tyson she treated with Dr. Naylor. (Tr., p. 30) Lloyd reported she never asked anyone at Tyson to fill out an incident report nor did she provide Tyson with her medical records from Kane or Dr. Naylor. (Tr., p. 32)

Lloyd's physical therapy ended on February 6, 2016. (Tr., p. 25) During the time she worked for Tyson Lloyd received Iowa Medicaid, which paid for her medical treatment. (Tr., pp. 25-26)

In February 2016, Lloyd used another employee's identification number to purchase a piece of pizza in the cafeteria at Tyson. (Tr., pp. 14, 34; Ex. C, p. 73) Lloyd reported she used the other employee's card because she did not want to be charged for the pizza. (Tr., p. 15) Tyson terminated Lloyd's employment on February 19, 2016 for gross misconduct, theft. (Tr., pp. 11, 26; Ex. C, p. 73)

On March 3, 2016, Remedy Intelligent Staffing ("Remedy"), a temporary employment agency, hired Lloyd. (Tr., p. 15; Ex. 6, p. 3) Remedy's application for employment asked "[h]ave you ever been reprimanded, suspended with or without pay, or terminated for fighting on the job, whether or not it was you fault?" (Ex. A, p. 3) Lloyd responded, "no." (Ex. A, p. 3) Lloyd also reported she left Tyson because of an "illness, non-job related." (Tr., pp. 17-18; Ex. A, p. 4) Lloyd testified she was not honest when completing her application because she was afraid Remedy would not hire her. (Tr., p. 17)

Remedy placed Lloyd with Omega Cabinetry, as a parts sander, sanding cabinet doors. (Tr., p. 26; Ex. 6, pp. 3-4) Lloyd testified she started having problems with her asthma due to the sanding work, and her employment ended on July 8, 2016. (Tr., p. 15) Lloyd testified the electrical equipment she used at Omega Cabinetry to sand the boards bothered her hands, but she quit due to dust issues that affected her asthma. (Tr., pp. 16, 28) Lloyd did not disclose her work injury from Tyson to Omega Cabinetry, or to Remedy application. (Tr., p. 28)

After Lloyd's employment with Remedy ended she worked for another temporary agency bagging and boxing pretzels. (Tr., p. 27) Lloyd did not inform her employer about her right hand and finger injury at Tyson. (Tr., p. 32) After her temporary assignment ended, Lloyd quit and Harmony House hired her as a developmental aide. (Tr., pp. 27-28) Lloyd worked one-on-one with a resident, bathed the resident, put on her clothes, took her to school, brought her home from school, assisted her with eating, and put her to bed. (Tr., p. 18) Lloyd worked for Harmony House for three months until she returned to Chicago and started working for Covenant Healthcare. (Tr., pp. 18-19) Lloyd reported that when she returned to Covenant Healthcare she did not inform Covenant Healthcare about her right hand injury at Tyson. (Tr., p. 32)

While she lived in Iowa, Lloyd had medical insurance through Iowa Medicaid. (Tr., pp. 23-24) Lloyd testified after she moved to Chicago she sought emergency treatment for a non-work related condition and her health insurance was not accepted for the out-of-state visit. (Tr., pp. 23-24) Lloyd applied for Medicaid in Illinois, which was approved in January 2017. (Tr., p. 24)

Lloyd has not received any medical treatment for her right hand or right finger since February 2016. (Tr., p. 36) Lloyd has received medical treatment for other conditions since February 2016. (Tr., p. 36)

On November 11, 2016, Farid Manshadi, M.D., a physiatrist, conducted an independent medical examination of Lloyd. (Ex. 2) Dr. Manshadi reviewed Lloyd's medical records from Tyson and from Peoples Community Health Clinic and examined her. (Ex. 2, p. 1) Dr. Manshadi was aware Dr. Naylor had examined Lloyd, but he was not provided with any records from Dr. Naylor. (Ex. 2, p. 2) Lloyd informed Dr. Manshadi she did not have any issues with either of her hands before she commenced her employment with Tyson. (Ex. 2, p. 1) Lloyd relayed that after working for Tyson for approximately four and one-half months she started experiencing swelling in her right hand, stiffness along the knuckles in her palm, and tingling throughout both hands when cutting meat, which was worse on the right. (Ex. 2, p. 2)

Dr. Manshadi opined Lloyd had sustained injuries to her right hand at Tyson resulting in right thumb adductor tendonitis and right fourth digit tenosynovitis, mild in nature. (Ex. 2, p. 3) Using the Guides to the Evaluation of Permanent Impairment (AMA Press, 5th Ed. 2001) ("AMA Guides"), Dr. Manshadi assigned a twenty percent impairment to the right fourth digit using Table 16-29, which translates to a two percent impairment of the right hand under Table 16-1. (Ex. 2, p. 3) Dr. Manshadi recommended Lloyd avoid any activity that requires repetitious gripping activities with the right hand. (Ex. 2, p. 3)

Lloyd testified she continues to experience pain in her right hand, which has become worse over time. (Tr., pp. 24-25) Lloyd reported her hands hurt when she opens a bottle or tries to pick up items, and the pain wakes her up at night. (Tr., p. 24)

CONCLUSIONS OF LAW

I. Notice of the Injury

Lloyd contends she sustained a cumulative injury to her right upper extremity while working for Tyson on October 26, 2015. Tyson contends Lloyd failed to provide timely notice of her October 26, 2015 injury to Tyson within ninety days. Iowa Code section 85.23 provides:

> Unless the employer or the employer's representative shall have actual knowledge of the occurrence of an injury received within ninety days from the date of the occurrence of the injury, or unless the employee or

> someone on the employee's behalf or a dependent or someone on the dependent's behalf shall give notice thereof to the employer within ninety days from the date of the alleged occurrence of the injury, no compensation shall be allowed.

The purpose of the notice provision is to afford the employer the opportunity to investigate the circumstances of the injury when the information is fresh. Johnson v. Int'l Paper Co., 530 N.W.2d 475, 477 (Iowa Ct. App. 1995). "Actual knowledge must include information that the injury might be work related." Id. The employer bears the burden of proving the affirmative defense. DeLong v. Iowa State Highway Comm'n, 299 Iowa 700, 703, 295 N.W.2d 91, 92 (1940).

Lloyd went to medical services at Tyson on November 6, 2015. (Ex. 1, p. 7) Meyer, a Tyson nurse, documented Lloyd was complaining of pain and stiffness in her "right finger and lower part of [her] thumb," which had been going on for more than a month. (Ex. 7, p. 1) Meyer marked "y" the condition was work-related, described the encounter as an "[o]ccupational Illness – Initial" and ordered Lloyd to return to full-duty. (Ex. 1, p. 7) The first medical record documenting pain and numbness in Lloyd's hands is from October 15, 2015, when she told Kane the condition started "a month ago." (Ex. 4, p. 2) The record supports Lloyd provided Tyson timely notice of her work injury within ninety days. Tyson has not proven the affirmative defense.

II. Nature of the Injury

Lloyd contends she sustained a permanent impairment to her right fourth digit while working for Tyson. Tyson denies Lloyd sustained a permanent impairment arising out of and in the course of her employment with Tyson and attacks Lloyd's credibility.

To receive workers' compensation benefits, an injured employee must prove, by a preponderance of the evidence, the employee's injuries arose out of and in the course of the employee's employment with the employer. 2800 Corp. v. Fernandez, 528 N.W.2d 124, 128 (Iowa 1995). An injury arises out of employment when a causal relationship exists between the employment and the injury. Quaker Oats v. Ciha, 552 N.W.2d 143, 151 (Iowa 1996). The injury must be a rational consequence of a hazard connected with the employment, and not merely incidental to the employment. Koehler Elec. v. Willis, 608 N.W.2d 1, 3 (Iowa 2000). The Iowa Supreme Court has held, an injury occurs "in the course of employment" when:

> [i]t is within the period of employment at a place where the employee reasonably may be in performing his duties, and while he is fulfilling those duties or engaged in doing something incidental thereto. An injury in the course of employment embraces all injuries received while employed in furthering the employer's business and injuries received on the employer's premises, provided that the employee's presence must ordinarily be required at the place of the injury, or, if not so required, employee's departure from the usual place of employment must not amount to an

> abandonment of employment or be an act wholly foreign to his usual work. An employee does not cease to be in the course of his employment merely because he is not actually engaged in doing some specifically prescribed task, if, in the course of his employment, he does some act which he deems necessary for the benefit or interest of the employer.

Farmers Elevator Co. v. Manning, 286 N.W.2d 174, 177 (Iowa 1979).

The claimant bears the burden of proving the claimant's work-related injury is a proximate cause of the claimant's disability and need for medical care. Ayers v. D & N Fence Co., Inc., 731 N.W.2d 11, 17 (Iowa 2007); George A. Hormel & Co. v. Jordan, 569 N.W.2d 148, 153 (Iowa 1997). "In order for a cause to be proximate, it must be a 'substantial factor.'" Ayers, 731 N.W.2d at 17. A probability of causation must exist, a mere possibility of causation is insufficient. Frye v. Smith-Doyle Contractors, 569 N.W.2d 154, 156 (Iowa Ct. App. 1997). The cause does not need to be the only cause, [i]t only needs to be one cause." Armstrong Tire & Rubber Co. v. Kubli, 312 N.W.2d 60, 64 (Iowa 1981).

The question of medical causation is "essentially within the domain of expert testimony." Cedar Rapids Cmty. Sch. Dist. v. Pease, 807 N.W.2d 839, 844-45 (Iowa 2011). The deputy commissioner, as the trier of fact, must "weigh the evidence and measure the credibility of witnesses." Id. The trier of fact may accept or reject expert testimony, even if uncontroverted, in whole or in part. Frye, 569 N.W.2d at 156. When considering the weight of an expert opinion, the fact-finder may consider whether the examination occurred shortly after the claimant was injured, the compensation arrangement, the nature and extent of the examination, the expert's education, experience, training, and practice, and "all other factors which bear upon the weight and value" of the opinion. Rockwell Graphic Sys., Inc. v. Prince, 366 N.W.2d 187, 192 (Iowa 1985).

Tyson hired Lloyd in late July 2015. Lloyd alleges she sustained a cumulative injury to her right hand while working for Tyson in October 2015. Cumulative injuries are occupational diseases that develop over time. Baker v. Bridgestone/Firestone, 872 N.W.2d 672, 681 (Iowa 2015). A cumulative injury results from repetitive trauma in the workplace. Larson Mfg. Co., Inc. v. Thorson, 763 N.W.2d 842, 851 (Iowa 2009); McKeever Custom Cabinets v. Smith, 379 N.W.2d 368, 372-74 (Iowa 1985). "A cumulative injury is deemed to have occurred when it manifests – and 'manifestation' is that point in time when 'both the fact of the injury and the causal relationship of the injury to the claimant's employment would have become plainly apparent to a reasonable person.'" Baker, 872 N.W.2d at 681.

Tyson avers Lloyd is not a credible witness. When assessing witness credibility, the trier of fact "may consider whether the testimony is reasonable and consistent with other evidence, whether a witness has made inconsistent statements, the witness's appearance, conduct, memory and knowledge of the facts, and the witness's interest in the [matter]." State v. Frake, 450 N.W.2d 817, 819 (Iowa 1990). Lloyd has engaged in

several acts of dishonesty, including theft at Tyson, and by providing untrue statements on her application for employment with Remedy. Lloyd was forthcoming at hearing that she has been untruthful in the past and stole from a coworker at Tyson. I do not find Lloyd to be a credible witness.

Only one expert witness has provided an opinion regarding causation and extent of disability in this case, Dr. Manshadi. Tyson attacks Dr. Manshadi's opinion because he did not review Dr. Naylor's records, and because of factual inconsistencies in his report concerning Lloyd's alleged lack of insurance, and work history since leaving Tyson. If Tyson disagreed with Dr. Manshadi's opinion, Tyson could have retained its own expert witness to provide an opinion regarding causation. Dr. Manshadi's opinion is unrebutted. The record does not support Lloyd experienced any problems with her hands before working for Tyson. Tyson examined Lloyd when during her pre-employment physical and did not identify any problems with her hands. Dr. Manshadi assigned a twenty percent impairment to the right fourth digit using Table 16-29, which translates to a two percent impairment of the right hand under Table 16-1, and recommended Lloyd avoid any activity that requires repetitious gripping activities with the right hand. (Ex. 2, p. 3) Lloyd has established she sustained cumulative injury, a permanent partial impairment to her right fourth digit arising out of and in the course of her employment with Tyson on October 26, 2015.

Permanent partial disabilities are divided into scheduled and unscheduled losses. Iowa Code § 85.34(2). If the claimant's injury is listed in the specific losses found in Iowa Code section 85.34(2)(a)-(t), the injury is a scheduled injury and is compensated by the number of weeks provided for the injury in the statute. Second Injury Fund v. Bergeson, 526 N.W.2d 543, 547 (Iowa 1995). "The compensation allowed for a scheduled injury 'is definitely fixed according to the loss of use of the particular member.'" Id. (quoting Graves v. Eagle Iron Works, 331 N.W.2d 116, 118 (Iowa 1983)). If the claimant's injury is not listed in the specific losses in the statute, compensation is paid in relation to 500 weeks as the disability bears to the body as a whole. Id.; Iowa Code § 85.34(2)(u). "Functional disability is used to determine a specific scheduled disability; industrial disability is used to determine an unscheduled injury." Bergeson, 526 N.W.2d at 547. The injury Lloyd sustained is to the right fourth digit. The schedule provides a maximum award of twenty weeks of compensation for loss of the fourth finger. Iowa Code § 85.34(2)(e). Considering all of the evidence, including lay testimony and the expert opinions, I find Lloyd is entitled to four weeks of permanent partial disability benefits, at the stipulated rate of $335.23, commencing on October 26, 2015.

III. Penalty

Lloyd alleges she should receive an award of penalty benefits because Tyson denied her claim, and refused to pay permanent partial disability benefits after receiving Dr. Manshadi's opinion. Tyson contends no penalty benefits should be awarded because the claim was fairly debatable and no physician opined there was any

permanent partial disability until January 3, 2017, when Dr. Manshadi issued his opinion.

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)(a). 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 eleventh 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 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.

Tyson denied Lloyd's claim. On January 3, 2017, Dr. Manshadi issued his opinion regarding causation and permanency. Tyson did not seek an expert opinion regarding causation after receiving the opinion before the March 23, 2017 hearing. The evidence presented at hearing demonstrated Lloyd has a history of theft and dishonesty, however, Tyson has not established it had a reasonable basis to contest Lloyd's entitlement to benefits after it received Dr. Manshadi's opinion, which was unrebutted at hearing. Lloyd is awarded penalty benefits of $670.46.

IV. Independent Medical Examination

Lloyd seeks to recover the $1,200.00 cost of Dr. Manshadi's independent medical examination and report. Tyson avers Lloyd is not entitled to recover the cost of the independent medical examination under Iowa Code section 85.39 because it denied the claim.

After receiving an injury, the employee, if requested by the employer is required to submit to examination at a reasonable time and place, as often as reasonably requested to a physician, without cost to the employee. Iowa Code § 85.39. If an evaluation of permanent disability has been made by a physician retained by the employer and the employee believes the evaluation is too low, the employee "shall, upon application to the employer and its insurance carrier, be reimbursed by the employer the reasonable fee for a subsequent examination by a physician of the employee's own choosing." Id. Tyson denied Lloyd's claim and did not send her to be evaluated by a physician. Lloyd is not entitled to recover the cost of Dr. Manshadi's independent medical examination under Iowa Code section 85.39.

V. Costs

Lloyd seeks to recover the $100.00 filing fee, the $14.02 cost for service, the $111.80 cost of Lloyd's deposition transcript, $86.00 for medical records from Peoples Community Clinic and Wheaton Franciscan, and the $1,200.00 cost of Dr. Manshadi's independent medical examination. Rule 876 IAC 4.33(6), provides,

> [c]osts taxed by the workers' compensation commissioner or a deputy commissioner shall be (1) attendance of a certified shorthand reporter or presence of mechanical means at hearings and evidential depositions, (2) transcription costs when appropriate, (3) costs of service of the original notice and subpoenas, (4) witness fees and expenses as provided by

> Iowa Code sections 622.69 and 622.72, (5) the costs of doctors' and practitioners' deposition testimony, provided that said costs do not exceed the amounts provided by Iowa Code sections 622.69 and 622.72, (6) the reasonable costs of obtaining no more than two doctors' or practitioners' reports, (7) filing fees when appropriate, (8) costs of persons reviewing health service disputes.

The rule expressly allows for the recovery of the $100.00 filing fee, the $14.02 service fee, and the $111.80 cost of Lloyd's deposition. The rule does not allow for the recovery of fees paid for medical records.

Lloyd seeks to recover the $1,200.00 cost of Dr. Manshadi's independent medical examination and report. Dr. Manshadi's bill is itemized. Dr. Manshadi charged $300.00 for the examination, and $900.00 for the report. In the case of Des Moines Area Regional Transit Authority v. Young, the Iowa Supreme Court held:

> [w]e conclude section 85.39 is the sole method for reimbursement of an examination by a physician of the employee's choosing and that the expense of the examination is not included in the cost of a report. Further, even if the examination and report were considered to be a single, indivisible fee, the commissioner erred in taxing it as a cost under administrative rule 876-4.33 because the section 86.40 discretion to tax costs is expressly limited by Iowa Code section 85.39.

867 N.W.2d 839, 846-47 (Iowa 2015). As analyzed above, Tyson denied Lloyd's claim. Thus, she is not entitled to recover the cost of Dr. Manshadi's examination under Iowa Code section 85.39. Under rule 876 IAC 4.33(6), Lloyd is entitled to recover the cost of the report only, or $900.00.

ORDER

IT IS THEREFORE ORDERED, THAT:

Defendant shall pay the claimant four (4) weeks of permanent partial disability benefits at the rate of three hundred thirty-five and 23/100 dollars ($335.23), commencing on October 26, 2015.

Defendant shall pay accrued benefits in a lump sum with interest on all received weekly benefits pursuant to Iowa Code section 85.30.

Defendant is entitled to a credit for benefits previously paid.

Defendant shall pay the claimant penalty benefits of six hundred seventy and 46/100 dollars ($670.46).

Defendant shall reimburse the claimant one hundred and 00/100 dollars ($100.00) for the filing fee, fourteen and 02/100 dollars ($14.02) for service costs, one hundred eleven and 80/100 dollars ($111.80) for the deposition transcript, and nine hundred and 00/100 dollars ($900.00) for Dr. Manshadi's report.

Defendant shall file subsequent reports of injury as required by this agency pursuant to rules 876 IAC 3.1(2) and 876 IAC 11.7.

Signed and filed this 24th day of August, 2017.

HEATHER L. PALMER
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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HLP/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.