BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

APRIL HALVERSON, Claimant, vs. DYERSVILLE FOOD BANK, INC., Employer, and DONEGAL MUTUAL INS. CO. d/b/a LEMARS INSURANCE COMPANY, Insurance Carrier, Defendants.	:	File No. 5048905 IOWA CODE SECTION 86.13 DECISION Head Note Nos.: 2970, 4000.1, 4000.2

On December 5, 2018, Claimant April Halverson filed a petition seeking penalty benefits from Defendants Dyersville Food Bank, Inc. ("Dyersville Food Bank") and LeMars Mutual Insurance Company ("LeMars"). Dyersville Food Bank and LeMars filed an answer on December 10, 2018.

A hearing on the penalty petition was held on September 27, 2019, at the Division of Workers' Compensation in Des Moines, Iowa. Attorney Daniel Anderson represented Halverson. Attorney Thomas Read represented Dyersville Food Bank and LeMars. Nicole Jarvis appeared and testified on behalf of Dyersville Food Bank and LeMars. Exhibits 1 through 4 and C, G, K, R through Z, and AA through PP were admitted into the record. The record was held open through October 18, 2019, for the receipt of post-hearing briefs. The briefs were received and the record was closed.

At the start of the hearing the parties submitted a hearing report, listing stipulations and issues to be decided. The parties' stipulations are hereby incorporated into this decision. Dyersville Food Bank and LeMars waived all affirmative defenses.

ISSUES

1. Should penalty benefits be awarded to Halverson?

2. Should costs be assessed against either party?

FINDINGS OF FACT

Halverson sustained an injury while working for the Dyersville Food Bank on June 1, 2013. Following an arbitration hearing, a deputy workers' compensation commissioner issued an arbitration decision on December 1, 2015, awarding Halverson permanent total disability benefits. Dyersville Food Bank and LeMars appealed the decision. Workers' Compensation Commissioner Joseph Cortese, II, issued an appeal decision on June 29, 2017, affirming the award of permanent total disability benefits, reversing the award of temporary benefits, and awarding permanent total disability benefits from the date of injury, June 1, 2013. Dyersville Food Bank and LeMars did not appeal Commissioner Cortese's decision.

Halverson filed a petition for partial commutation and Dyersville Food Bank and LeMars filed a review-reopening action. Both actions were consolidated for hearing.

At hearing Dyersville Food Bank and LeMars stipulated they were not alleging Halverson had sustained a change of "[p]hysical condition or employment condition," and averred Halverson's permanent total disability benefits were suspended or forfeited under Iowa Code sections 85.27 and 85.39. Following the hearing I issued a review-reopening and partial commutation decision on September 25, 2018, denying the review-reopening petition, granting the petition for partial commutation, and assessing costs against Dyersville Food Bank and LeMars. Dyersville Food Bank and LeMars appealed the decision. The appeal is pending before Commissioner Cortese.

On October 16, 2018, Halverson's attorney sent counsel for Dyersville Food Bank and LeMars a letter, which provided:

> I am in receipt of your clients' Notice of Appeal of the Deputy's September 25, 2018 decision. As you know, the Deputy determined Ms. Halverson's decision to decline to see Dr. Chen as previously requested was reasonable and justified. The Deputy found, in part, "It is Dyersville Food Bank and LeMars who have acted unreasonably in this case by refusing to pay permanent total disability benefits awarded by the deputy workers' compensation commissioner and by Commissioner Cortese." In light of the Deputy's determination that the denial of weekly benefits is unreasonable, I am writing to request that your clients reinstate Ms. Halverson's weekly benefits. Please let me know if the carrier intends to re-evaluate its ongoing denial of Ms. Halverson's benefits. I look forward to hearing from you.

(Exhibit 1, page 1) Halverson did not receive a response. On November 5, 2018, her attorney sent a second letter to counsel for Dyersville Food Bank and LeMars inquiring whether his clients were going to pay weekly benefits and whether any reevaluation had occurred. (Ex. 1, p. 2) Halverson then filed a penalty action against Dyersville Food Bank and LeMars.

On December 11, 2018, counsel for Dyersville Food Bank and LeMars sent an e-mail to Halverson's counsel, stating LeMars believed Halverson's "weekly benefits remain suspended for the failure of [Halverson] to attend an 85.39 exam with Dr. Chen in January 2017," and the carrier believed Halverson had forfeited her benefits by her "failure to participate in offered care under 85.27." (Ex. 1, p. 3)

On January 17, 2019, Halverson's counsel sent a letter to counsel for Dyersville Food Bank and LeMars, stating Halverson would attend an independent medical examination with Dr. Chen. (Ex. 1, p. 4) Dyersville Food Bank and LeMars never arranged for an appointment with Dr. Chen or another provider for the purposes of an independent medical examination from January 17, 2019 through the September 2019 penalty hearing. (Transcript, p. 26) After receiving the January 17, 2019 letter Dyersville Food Bank and LeMars did not commence paying weekly permanent total disability payments ordered by Commissioner Cortese, or convey to Halverson why they were refusing to pay her the weekly permanent total disability payments ordered by Commissioner Cortese.

On February 11, 2019, Halverson's counsel sent an e-mail to counsel for Dyersville Food Bank and LeMars asking for a status on the resumption of benefits. (Ex. 1, p. 6) Halverson did not receive a response. On March 4, 2019, and April 2, 2019, Halverson's counsel sent e-mails to counsel for Dyersville Food Bank and LeMars asking for the status on the resumption of benefits. (Ex. 1, p. 7) Halverson did not receive a response from Dyersville Food Bank and LeMars. No weekly benefits were paid to Halverson for January 17, 2019 through September 27, 2019.

Jarvis testified Dyersville Food Bank and LeMars did not commence paying benefits because "[w]e had an appeal." (Tr., p. 37) Jarvis contended filing the appeal of the review-reopening and partial commutation decision was the notice Dyersville Food Bank and LeMars provided to Halverson of the denial of benefits. (Tr., p. 37)

During the September 27, 2019, penalty hearing, Jarvis testified she agreed she believed Halverson is permanently and totally disabled. (Tr., p. 29)

CONCLUSIONS OF LAW

I. Penalty Benefits

Halverson seeks an award of penalty benefits for the period between January 9, 2017 and September 27, 2019, the date of the penalty hearing, for a total of 141.714 weeks of benefits that have been denied at the rate of $185.49 per week, amounting to $26,286.53. Dyersville Food Bank and LeMars aver no penalty benefits should be assessed against them because their reason for refusing to pay the benefits was reasonable and "[t]he doctrine of claim preclusion precludes an award for penalty benefits for conduct predating the Hearing of May 3, 2018." (Defendants' Brief p. 9) Dyersville Food Bank and LeMars last contend their motion for sanctions should have been sustained at hearing in the answer to Interrogatory Number 7. A ruling was made

on the motion for sanctions on the record during the hearing. That matter will not be addressed again.

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 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 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.

A. Separate Evidentiary Hearings and Consolidation of Proceedings

Dyersville Food Bank and LeMars aver Halverson waived her penalty claim by failing to bring her claim in the combined review-reopening and partial commutation hearing in 2018. Iowa Code chapters 17A, 85 and 86 do not require the joinder of claims. Rule 876 IAC 4.2 addresses separate evidentiary hearings and the consolidation of proceedings as follows:

> [a] person presiding over a contested case proceeding in a workers' compensation matter may conduct a separate evidentiary hearing for determination of any issue in the contested case proceeding which goes to the whole or any material part of the case. An order determining the issue presented shall be issued before a hearing is held on the remaining issues. The issue determined in the separate evidentiary hearing shall be precluded at the hearing of the remaining issues. If the order on the separate issue does not dispose of the whole case, it shall be deemed interlocutory for purposes of appeal.
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> When any contested case proceeding shall be filed prior to or subsequent to the filing of an arbitration or review-reopening proceeding and is of such a nature that it is an integral part of the arbitration or review-reopening proceeding, it shall be deemed merged with the arbitration or review-reopening proceeding. No appeal to the commissioner of a deputy commissioner's order in such a merged proceeding shall be had separately from the decision in arbitration or review-reopening unless appeal to the commissioner from the arbitration or review-reopening decision would not provide an adequate remedy.
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> Entitlement to denial or delay benefits provided in Iowa Code section 86.13 shall be pled, and if pled, discovery shall be limited to matters discoverable in the absence of such pleading unless it is bifurcated. The claimant may bifurcate the denial or delay issue by filing and serving a notice of bifurcation at any time before a case is assigned for hearing, in which case discovery on that issue may proceed only after the final decision of the agency on all other issues.
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> This rule is intended to implement Iowa Code sections 86.13, 86.18 and 86.24.

The rule expressly allows for the bifurcation of penalty actions.

During the combined review-reopening and partial commutation action Halverson did not file a petition seeking penalty benefits. 876 IAC 4.2, provides, in part, "[e]ntitlement to denial or delay benefits provided in Iowa Code section 86.13 **shall be pled**, and if pled, discovery shall be limited to materials discoverable in the absence of such pleading unless it is bifurcated." Id. (emphasis added). This issue has been addressed by the Division of Workers' Compensation in the case of Allen v. Tyson Fresh Meats, Inc., File No. 5049025. In Allen, the deputy workers' compensation commissioner found Allen had not pleaded penalty benefits before hearing as required by 876 Iowa Administrative Code 4.2. File No. 5049025 (Arb. Dec. Jan. 23, 2015). Commissioner Cortese affirmed the deputy's decision, finding,

> claimant cannot recover penalty benefits in this matter pursuant to Iowa Code section 86.13(4) because claimant failed to plead entitlement to penalty benefits as required by Iowa Administrative Rule 876-4.2, because no motion to bifurcate the penalty claim was made, and because defendant did not consent to the issue of penalty benefits as an issue to be considered in the arbitration hearing.

File No. 5049025 (App. Dec. July 5, 2016). The Iowa Court of Appeals affirmed, as follows:

> [t]he commissioner interpreted the word "shall" to mean a necessity or a requirement, determining that Allen's failure to plead entitlement to penalty benefits defeated any claim to them. Statutory interpretation supports this—and only this—reading. See Iowa Code § 4.1(3)(1) (providing the word "shall," in statutes enacted after July 1971, "imposes a duty"); In re Det. of Fowler, 784 N.W.2d 184, 187 (Iowa 2010) ("[T]he word 'shall' generally connotes a mandatory duty."); Berent v. City of Iowa City, 738 N.W.2d 193, 209 (Iowa 2007) ("The term 'shall' is mandatory."); State v. Klawonn, 609 N.W.2d 515, 521-22 (Iowa 2000) ("The word 'may' can mean 'shall,' but the word 'shall' does not mean 'may.'"). Allen claims this interpretation is in error because it "is completely at odds with the primary purpose of the workers' compensation statute"—to benefit the worker. But there is no need to consider the purpose of the statute or rule where, as here, the language is unambiguous. See McGill v. Fish, 790 N.W.2d 113, 118 (Iowa 2010) ("We do not search for legislative intent beyond the express language of a statute when that language is plain and the meaning is clear. . . . We only apply the rules of statutory construction when the statutory terms are ambiguous.").
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> Because the commissioner's interpretation of rule 876-4.2(86) is neither an error at law nor irrational, illogical, or wholly unjustifiable, we agree with the district court's conclusion that the interpretation must be affirmed.

Allen v. Tyson Fresh Meats, Inc., No. 17-0313, 2018 WL1099117, at *2 (Iowa Ct. App. Feb. 21, 2018).

In this proceeding Halverson seeks penalty benefits from January 9, 2017 through September 27, 2019. Halverson did not plead penalty benefits during the combined review-reopening and partial commutation action which proceeded to hearing on May 3, 2018. Allen is controlling in this case. Halverson is not entitled to an award of penalty benefits from January 9, 2017 through May 3, 2018.

B. Res Judicata

Halverson also seeks penalty benefits from May 4, 2018 through September 27, 2019, for the refusal to pay benefits following the review-reopening and partial commutation action. Dyersville Food Bank and LeMars aver under the doctrine of res judicata Halverson is barred from raising her penalty claim because Halverson could have sought penalty benefits in an earlier proceeding.

The doctrine of res judicata includes claim and issue preclusion. Pavone v. Kirke, 807 N.W.2d 828, 835 (Iowa 2011). Under issue preclusion or collateral estoppel, if a court has decided an issue of fact or law necessary to the judgment, the same issue cannot be relitigated in a subsequent proceeding. Winnebago Indus., Inc. v. Haverly, 727 N.W.2d 567, 572 (Iowa 2006). The purpose of issue preclusion is to protect litigants from relitigating identical issues with identical parties or with individuals having a significant connected interest to the prior litigation and to "further 'the interest of judicial economy and efficiency by preventing unnecessary litigation.'" Id. Under claim preclusion, "a valid and final judgment on a claim bars a second action on the adjudicated claim or any part thereof." Pavone, 807 N.W.2d at 835. The purpose of claim preclusion is to prevent a party from splitting or trying his or her case piecemeal, thus requiring the party to present his or her entire claim or defense in the case on trial. Lambert v. Iowa Dep't of Transp., 804 N.W.2d 253, 257 (Iowa 2011).

1. Issue Preclusion

Halverson requested penalty benefits in the first arbitration proceeding that proceeded to hearing in 2015. The deputy workers' compensation commissioner denied her request. While Halverson did not appeal the determination, Commissioner Cortese affirmed the deputy workers' compensation commissioner's finding Halverson was not entitled to penalty benefits. No prior adjudication occurred on Halverson's penalty claim for May 4, 2018 through September 27, 2019. Thus, the doctrine of issue preclusion is inapplicable in this proceeding.

2. Claim Preclusion

For the doctrine of claim preclusion to apply, the moving party must establish, "(1) 'the parties in the first and second action were the same'; (2) 'the claim in the second suit could have been fully and fairly adjudicated in the prior case'; and (3) 'there

was a final judgment on the merits in the first action.'" Lambert, 804 N.W.2d at 257. Claim preclusion does not apply to the penalty claim for the period of May 4, 2018 through September 27, 2019. While the parties in the review-reopening and partial commutation proceeding and the 2019 penalty action are the same and a decision was issued in 2018, the penalty claim for the period of May 4, 2018 through September 27, 2019 could not have been fully and fairly adjudicated during the review-reopening and partial communication proceeding because the benefits were not yet due. Iowa Code § 85.30 (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). For these reasons Dyersville Food Bank and LeMars's argument must fail for the period of May 4, 2018 through September 27, 2019.

C. Penalty Claim for May 4, 2018 through September 27, 2019

During the 2015 hearing, a deputy workers' compensation commissioner rejected Halverson's claim for penalty benefits, finding Dyersville Food Bank and LeMars has a reasonable basis for denying the claim because the claim was "fairly debatable." A denial of benefits that if reasonable at one point in time does not automatically immunize all of the accrued benefits from a claim for penalty benefits if the delay continues after that point. Simonson v. Snap-On Tools, 588 N.W.2d 430, 437 (Iowa 1999). An employer has an ongoing duty to evaluate a denial of benefits in order to determine whether a continued denial is reasonable. See, e.g., Squealer Feeds v. Pickering, 530 N.W.2d 678, 683 (Iowa 1995) (". . . a continued delay in payment may be unreasonable even though the original denial was not."). While an employer has the right to appeal a decision awarding benefits, that right does not insulate the employer from a claim for penalty benefits based upon the lack of payments during the appeal period. See, e.g., Simonson v. Snap-On Tools, File No. 851960, (Remand Dec. Aug. 25, 2003); see also, Johnson v. Weitz Co., File No. 5013215 (App. Dec. Mar. 14, 2008); Battani v. EFCO, File No. 5010934 (Arb. Dec. June 12, 2008). To avoid a penalty claim, an employer must demonstrate that it reevaluated the claim as new information became available and paid at least the minimum amount it could have reasonably anticipated being obligated to pay based upon the information available. Schemmel v. City of Dubuque, File No. 5015707 (App. Dec. July 3, 2007).

Commissioner Cortese affirmed the deputy workers' compensation commissioner's award of permanent total disability benefits on June 29, 2017. After receiving the appeal decision, Dyersville Food Bank and LeMars did not commence paying Halverson weekly benefits. I noted in my 2018 decision Halverson's financial struggles with no weekly benefits. Due to a lack of benefits Halverson lived with her daughter and parents and received loans from her family members for her subsistence.

After filing the review-reopening action, Dyersville Food Bank and LeMars never filed a motion to compel Halverson's attendance at an independent medical examination, and, instead, continued to deny her weekly benefits. I have presided over many cases where claimants have refused to attend independent medical examinations with physicians. To compel the attendance to obtain an opinion establishing a change

of medical condition, employers file motions to compel. Dyersville Food Bank and LeMars sought no remedy to establish a change of condition, and instead stopped paying permanent total disability benefits they were ordered to pay by Commissioner Cortese.

During the 2018 review-reopening and partial commutation proceeding, Dyersville Food Bank and LeMars stipulated they were not alleging Halverson had sustained a change of "[p]hysical condition or employment condition," and averred they had properly suspended Halverson's permanent total disability benefits because her benefits were allegedly suspended or forfeited under Iowa Code sections 85.27 and 85.39. I found their arguments were not proper in a review-reopening action, noting "[t]he statute expressly limits the inquiry to whether or not the condition of the employee warrants an end to, diminishment of, or increase in compensation." (2018 Review-Reopening Dec., p. 13) Iowa Code § 86.14; Kohlhaas v. Hog Slat, Inc., 777 N.W.2d 387, 391 (Iowa 2009). I noted Dyersville Food Bank and LeMars could have asserted they believed Halverson had a change in physical condition, and that was why they wanted her to attend an appointment with Dr. Chen and the unnamed orthopedic surgeon for treatment; they did not. Dyersville Food Bank and LeMars did not tailor their argument to fit within the express limits of the statute. I denied their review-reopening petition based on the stipulation Dyersville Food Bank and LeMars were not alleging a change of physical condition or employment condition.

While I found Dyersville Food Bank and LeMars's arguments were not the proper subject of a review-reopening action given they stipulated Halverson had not sustained a change of condition, in the alternative I also rejected the merits of their claim assuming they did allege a change of condition.

In this proceeding, and in the 2018 proceeding Dyersville Food Bank and LeMars argued Halverson's refusals to attend appointments resulted in a forfeiture of benefits. In my September 2018 decision, I found Dyersville Food Bank and LeMars's reliance on the new forfeiture provision in Iowa Code section 85.39(1) (2017) misplaced given this case concerns an injury occurring in 2013. The version of Iowa Code section 85.39(1) that applies to this case provides:

> [a]fter an injury, the employee, if requested by the employer, shall submit for examination at some reasonable time and place and as often as reasonably requested, to a physician or physicians authorized to practice under the laws of this state or another state, without cost to the employee . . . . The refusal of the employee to submit to the examination shall suspend the employee's right to any compensation for the period of the refusal. Compensation shall not be payable for the period of suspension.

Iowa Code § 85.39 (2013).

In the case of McCormick v. N. Star Foods, Inc., 533 N.W.2d 196 (Iowa 1995), the Iowa Supreme Court considered whether a refusal to attend an independent medical examination may result in a forfeiture of benefits. The Iowa Supreme Court rejected this interpretation in 1995, finding suspension may be a sanction imposed, not forfeiture. Id. at 198-99. Dyersville Food Bank and LeMars's continued reliance on the 2017 changes to the statute and refusal to follow the bright line rule in McCormick is inexcusable.

1. Weekly Benefits from May 4, 2018 through to September 27, 2019

With respect to the appointments with Dr. Chen, I found Dyersville Food Bank and LeMars did not establish Halverson violated Iowa Code section 85.39 during the review-reopening proceeding. I rejected their misplaced reliance on Stufflebean v. City of Fort Dodge, 9 N.W.2d 281, 233 Iowa 438 (1943) for the reasons set forth in my decision.

I concluded the October 2016 appointment notice did not provide whether the appointment with Dr. Chen was being made pursuant to Iowa Code section 85.27, for treatment, or Iowa Code section 85.39, for an independent medical examination. I found the notice for the August 25, 2017, appointment with Dr. Chen stated it is being sent pursuant to Iowa Code section 85.27, for treatment, and not for an independent medical examination under Iowa Code section 85.39.

With respect to the November 28, 2016 and January 7, 2017 appointments I noted the Division of Workers' Compensation has examined the reasonableness of the refusal to attend an independent medical examination for many years. See, e.g., Jones v. The Florilli Corp., File No. 5013001 (Arb. Feb. 19, 2007) (claimant's refusal to attend independent medical examination was not unreasonable given the travel distance); Ball v. Fleetguard, File Nos. 1281646-47 (Arb. Feb. 21, 2002) (finding the claimant's refusal to attend because the claimant failed to receive travel instructions to be unreasonable); Ehteshamfar v. UTA Engineered Sys. Div., File No. 989116 (App. Oct. 1994) (holding the claimant admitted to refusing to submit to the examination from July 29, 1993 until September 29, 1993 and provided no valid excuse, warranting suspension of the claimant's weekly benefits during the period of refusal). See also Ruling on Petition for Declaratory Order Concerning Iowa Code § 85.39, File Nos. 5026716-18 (June 14, 2010) (noting "in the unlikely event that a claim goes to hearing during a period of refusal and this agency finds that the refusal was not justified, then this agency could only decide that the employee is not entitled to benefits at that time"). Examining the reasonableness of the refusal is in accord with the express language of the statute. Iowa Code § 85.39 (the employee "shall submit for examination at some reasonable time and place and as often as reasonably requested, to a physician or physicians authorized to practice under the laws of this state or another state").

In applying the reasonableness of the refusal standard, I found:

> Halverson's refusal to attend the appointments with Dr. Chen for independent medical examinations on November 28, 2016, and January 7, 2017 reasonable and justified. It is Dyersville Food Bank and LeMars who have acted unreasonably in this case by refusing to pay permanent total disability benefits awarded by the deputy workers' compensation commissioner and by Commissioner Cortese.
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> On November 18, 2016, Dyersville Food Bank and LeMars notified Halverson an appointment had been scheduled ten days later with Dr. Chen on November 28, 2016, shortly after the Thanksgiving holiday. The notice provided was not reasonable under the circumstances given the holiday. In addition, Halverson's refusals to attend the independent medical examinations on November 28, 2016, and January 7, 2017 were also reasonable given she had previously been evaluated and treated by Dr. Chen, who released her without providing any additional treatment recommendations.
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> Halverson attended Dr. Chen's two-week Spine Rehabilitation Program in February 2014, while she was living in North Liberty, Iowa. (Tr., p. 31) Dr. Chen discharged Halverson in April 2014, and recommended she continue with the exercises she learned during the program. (Tr., p. 32; Ex. R, p. 2) When she returned to Dr. Chen in September 2014, he had no further treatment recommendations for her. (Tr., p. 33) Halverson testified she has continued to perform the exercises with the DVD she received from Dr. Chen thirty to forty minutes per day, three to five days per week. (Tr., p. 42)
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> In September 2017, Dr. Chen prepared a letter discussing the benefits of the Spine Rehabilitation Program. (Ex. R) Dr. Chen's letter does not indicate he received or reviewed any additional medical records sent by Dyersville Food Bank and LeMars, whether he was recommending any additional evaluation of or treatment for Halverson, or whether he believes Halverson, or any other patient could benefit from attending the Spine Rehabilitation Program a second time. (Ex. R) Halverson's refusals to attend the November 28, 2016 and January 9, 2017 independent medical examinations were reasonable. The remaining appointments with Dr. Chen for October 2016 and August 25, 2017 were not expressly for independent medical examinations. Even assuming the appointments were for independent medical examinations, for the reasons stated above, Halverson's refusals to attend the appointments were reasonable.

(Arb. Dec. Sept. 25, 2018, pp. 17-18)

In their post-hearing brief during the 2018 proceeding Dyersville Food Bank and LeMars alleged Halverson's benefits should be "terminated completely for refusal to seek medical treatment." I again found the review-reopening petition should be denied

based on Dyersville Food Bank and LeMars's stipulation they were not alleging a change of condition. Moreover, Iowa Code section 85.27 does not provide a forfeiture or suspension of benefits option for noncompliance. An independent medical examination is not treatment. I again found the evidence presented at hearing did not support Halverson's refusals to attend treatment with Dr. Chen and an unnamed orthopedic surgeon were unreasonable. The evidence presented at hearing supported Halverson continued to receive treatment and she followed Dr. Chen's recommendations after he discharged her with no further treatment recommendations.

Contrary to the defendants' contention, Halverson participated in additional treatment after Dyersville Food Bank and LeMars accepted liability for her mental health condition. (Arb. Dec. Sept. 25, 2018, pp. 20-21) Before the defendants' accepted the condition Halverson treated on her own with Sara King, NP. Halverson attended an appointment with Abdur Rahim, M.D., a psychiatrist selected by Dyersville Food Bank and LeMars in August 2016. (Arb. Dec. Sept. 25, 2018, pp. 20-21) Dr. Rahim examined Halverson and recommended she continue to treat with King, her psychiatric provider. (Arb. Dec. Sept. 25, 2018, pp. 20-21) Dr. Rahim did not recommend Halverson be examined by a physiatrist, orthopedist, or any other specialist. (Arb. Dec. Sept. 25, 2018, p. 21) Dyersville Food Bank and LeMars refused to pay for any treatment with King after she saw Dr. Rahim, the treating psychiatrist they selected, examined Halverson and recommended she continue treating with King. (Arb. Dec. Sept. 25, 2018, p. 21) I found,

> [a]gain, it is Dyersville Food Bank and LeMars who have acted unreasonably, by failing to provide treatment recommended by their treating physician, Dr. Rahim. Halverson has also continued to receive treatment from her personal physician. Dyersville Food Bank and LeMars have failed to establish Halverson's refusals to attend appointments with Dr. Chen and the unnamed orthopedic surgeon are unreasonable.

(Arb. Dec. Sept. 25, 2018, p. 21)

I expressly found Halverson's refusals were reasonable and that Dyersville Food Bank and LeMars were acting unreasonably in their suspension and claimed forfeiture of weekly benefits. I did not find the claim "fairly debatable." Simply filing a review-reopening petition and an appeal does not make their behavior reasonable. Whether or not Dyersville Food Bank and LeMars had contrary evidence, they were required to pay permanent total disability benefits previously ordered by Commissioner Cortese until they received a contrary decision. Their repeated, lengthy denials mandate an award of penalty benefits to deter Dyersville Food Bank and LeMars and other employers and insurance carriers from engaging in similar conduct in the future. Permanent total disability benefits provide sustenance to injured workers who are incapable of working as a result of their work-related disabilities. Dyersville Food Bank and LeMars have acted unreasonably in this case to the detriment of Halverson, a low wage earner who has had to rely on family members for food and shelter. Halverson's weekly rate is

$185.49. For these reasons I find Halverson is entitled to an award of $6,770.00 in penalty benefits for the period of May 4, 2018 through September 27, 2019.

2. Weekly Benefits from January 17, 2019 to September 27, 2019

Even if Dyersville Food Bank and LeMars had a reasonable basis for suspending Halverson's benefits from May 4, 2018 and continuing during the period of refusal, that argument ceased to have any validity on January 17, 2019.

During the 2018 hearing, and during the 2019 hearing Dyersville Food Bank and LeMars alleged Halverson forfeited her right to benefits or at a minimum that her benefits should be suspended for failing to attend appointments with Dr. Chen and an unnamed orthopedic surgeon.

On January 17, 2019, Halverson's counsel sent a letter to counsel for Dyersville Food Bank and LeMars, stating that Halverson would attend the independent medical examination with Dr. Chen. (Ex. 1, p. 4) Dyersville Food Bank and LeMars never arranged for an appointment with Dr. Chen or another provider for the purposes of an independent medical examination from January 17, 2019 through the September 2019 penalty hearing. (Tr., p. 26) After receiving the July 17, 2019 letter, Dyersville Food Bank and LeMars did not commence paying weekly permanent total disability payments ordered by Commissioner Cortese, or convey to Halverson why they were refusing to pay weekly permanent total disability payments ordered by Commissioner Cortese.

On February 11, 2019, Halverson's counsel sent an e-mail to counsel for Dyersville Food Bank and LeMars asking for a status on the resumption of benefits. (Ex. 1, p. 6) Halverson did not receive a response. On March 4, 2019 and April 2, 2019, Halverson's counsel sent e-mails to counsel for Dyersville Food Bank and LeMars asking for a status on the resumption of benefits. (Ex. 1, p. 7) Halverson did not receive a response from Dyersville Food Bank and LeMars. No weekly benefits were paid to Halverson for January 17, 2019 through September 27, 2019.

As analyzed in the September 2018 decision and above, the forfeiture provision enacted in 2017 for failure to attend an independent medical examination does not apply in this case. The law that applies to this claim predates the 2017 changes. Iowa Code section 85.27 does not contain a forfeiture of benefits provision. Dyersville Food Bank and LeMars's continued reliance on the 2017 changes is unreasonable. Under the version of Iowa Code section 85.39 that applies to this case, even if suspension were proper for the period of refusal before January 17, 2019, Halverson agreed to attend the independent medical examination on January 17, 2019. Dyersville Food Bank and LeMars had an obligation at least by this date to commence paying the permanent total disability benefits ordered by Commissioner Cortese. And Dyersville Food Bank and LeMars failed to communicate the basis for the continued denial after receiving the January 17, 2019 communication. An award of penalty benefits from January 17, 2019 through September 27, 2019, for the period of nonpayment is appropriate.

For these reasons, alternatively, I find Halverson is further entitled to an award of $3,338.00 in penalty benefits for the period of January 17, 2019 through September 27, 2019.

II. Costs

Halverson seeks to recover the $100.00 filing fee. Iowa Code section 86.40, provides, "[a]ll costs incurred in the hearing before the commissioner shall be taxed in the discretion of the commissioner." 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.

Halverson was successful in proving her claim. The $100.00 filing fee is assessed against Dyersville Food Bank and LeMars.

ORDER

IT IS HEREBY ORDERED THAT:

Defendants shall pay the claimant six thousand seven hundred seventy and 00/100 dollars ($6,770.00) in penalty benefits.

Defendants are assessed one hundred and 00/100 dollars ($100.00) for the filing fee.

Defendants 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 _____13th_____ day of November, 2019.

HEATHER L. PALMER
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Daniel Anderson (via WCES)
Thomas B. Read (via WCES)

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.