BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

MARK J. WEILAND,	:	
Claimant,	:	File No. 1633417.01
vs.	:	
TRINITY HEALTH CORPORATION, d/b/a MERCYONE-DUBUQUE,	:	ARBITRATION DECISION
Employer, Self-Insured, Defendant.	:	Head Note Nos.: 1703, 1803, 3001, 3301

STATEMENT OF THE CASE

Mark J. Weiland, claimant, filed a petition in arbitration seeking workers' compensation benefits from Trinity Health Corporation, d/b/a Mercy-One Dubuque, self-insured defendant. The hearing was held on September 12, 2022. Pursuant to an order from the Iowa Workers' Compensation Commissioner, this case was heard via videoconference using Zoom with all parties and the court reporter appearing remotely.

The parties filed a hearing report at the commencement of the arbitration hearing. On the hearing report, the parties entered into various stipulations. Those stipulations were accepted and are hereby incorporated into this arbitration decision and no factual issues relative to the parties' stipulations will be raised or discussed in this decision. The parties are now bound by their stipulations.

Mark J. Weiland testified on his own behalf at the trial. Chad Darter also testified at the trial on behalf of the defendant. The evidentiary record also includes joint exhibits 1-3,[1] claimant's amended and substituted exhibits 1-10, and defendant's exhibits A-G. All exhibits were received into the record without objection.

The parties submitted post-hearing briefs on November 4, 2022, at which time the case was fully submitted to the undersigned.

[1]On the day of the hearing, claimant withdrew Joint Exhibit 2, pages 41 through 44. Claimant also inserted Joint Exhibit 2, pages 49a through 49h.

ISSUES

The parties identified the following disputed issues on the hearing report:[2]

1. The nature and extent of claimant's entitlement to permanent disability benefits.
2. Claimant's gross earnings and weekly rate
3. Claimant's entitlement to penalty benefits.
4. Assessment of costs.

FINDINGS OF FACT

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

At the time of the hearing the claimant, Mark J. Weiland (hereinafter "Weiland") was 62 years old. (Hearing Tr., p. 11). Weiland did not graduate from high school. (Id. at 21). In 1976, he joined the Army Reserve. (Id.). While in the Army Reserve he trained as a carpenter. (Id. at 50). He later obtained his GED. (Id. at 21). He also has an HVAC license and an electrical maintenance license. (Cl Ex. 4, p. 30; Cl Ex. 7, p. 70; Tr., p. 91).

At the hearing, Weiland testified he "built houses when [he] was younger." (Tr., p. 50). According to his employment application for Trinity Health Corporation (hereinafter "Trinity"), from 1991 to 1993, he worked as a maintenance supervisor for Rainbow Oil. (Cl Ex. 7, p. 71). For the next seven years he was employed at St. Dominic Villa as a building and grounds manager. (Id.). From 2000 to 2002, he was employed by Mediacom, installing broadband cable. (Id.). Weiland also worked for Flexsteel, doing electrical and mechanical maintenance, from 2002 to 2005. (Id.).

In the summer of 2005, Trinity, the defendant employer, hired Weiland to work as an HVAC maintenance mechanic at Mercy Medical Center. (Tr., pp. 54-55). As an HVAC maintenance mechanic, Weiland repairs and maintains the heating, cooling, and ventilation systems within the hospital. (Id. at 41). This includes isolation and exhaust fans, smoke damper units, fan coil units, and individual room air conditioners. (Id.). He is also responsible for radon, carbon monoxide, and isolation room testing within the hospital, as well as evaluating ceiling leaks. (Id. at 41; 68; 78-79).

[2] On the hearing report, the parties also identified claimant's entitlement to recover the cost of an independent medical exam (IME) as a disputed issue. (See Hearing Report). However, in his post-hearing brief, claimant indicated defendant reimbursed him for the cost of his IME after the hearing. Therefore, the undersigned will not address this issue.

Weiland's preventative maintenance duties vary; they are determined by task lists that are handed out weekly, monthly, quarterly, semi-annually, and annually. (Tr., pp. 42-43). Weiland is responsible for timely completing all the tasks on his preventative maintenance list, but he sets his own schedule and determines what order to complete the tasks. (See id. at 43). Most of the work Weiland does is located in the ductwork within the ceiling. (Id.). He spends a lot of time on ladders and working above shoulder height. (Id.). Trinity provided a written job description for Weiland's position. (See Ex. E). It indicates he must be able to climb and work from ladders, grasp and manipulate items, work with his arms above his head for extended periods of time, and occasionally lift 75 pounds. (Id. at 44).

Weiland alleges he suffered injuries to his bilateral shoulders and upper extremities on May 3, 2017. (See Petition). At the hearing, Weiland testified he was changing a HEPA filter in the ceiling ductwork. (Tr., p. 33). This particular filter was located above a Helmer medical refrigerator; Weiland testified that these refrigerators are very expensive to replace. (Id. at 33-34). The filter was between some pipes and difficult to remove. (Id.). To reach the filter, Weiland had to stand on the façade of the refrigerator—an inch and a half wide strip of metal. (Id. at 34; CL Ex. 4, p. 40). Weiland was removing the old HEPA filter when it slipped and started to fall. (Tr., p. 34). Rather than drop the filter on top of the Helmer medical refrigerator and its components, Weiland attempted to hang onto the filter. (Id.). The momentum of the filter falling pulled him up on his tip toes and over a sprinkler line. (Id.). He was able to hang onto the filter, but the jolt of it stopping pulled his arms down and caused a popping sensation in his shoulders. (Id.). Weiland finished changing the HEPA filter and then reported the incident to Merlin Clemens, his supervisor at that time. (Cl Ex. 4, p. 41).

Following the incident, Weiland was sent to Julie Muenster, a nurse practitioner in the Occupational Medicine Department. (See Cl Ex. 1, p. 3). He was diagnosed with acute shoulder pain and prescribed a Medrol Dosepak. (Id.). He continued to complain of bilateral shoulder pain, so Nurse Muenster ordered MRIs of both shoulders. (Id.). The MRIs were taken on May 19, 2017. (Id.). The left shoulder MRI showed a possible, small undersurface tear of the supraspinatus tendon, but no full-thickness tearing, and either degenerative changes or articular cartilaginous disruption along the glenoid labrum. (Id.). The right shoulder MRI showed a glenoid labral tear from the posterior inferior aspect to the posterior superior aspect and mild tendinopathy of the supraspinatus tendon, but no full thickness tears. (Id.). Nurse Muenster referred Weiland to Scott Schemmel, M.D., at Medical Associates Clinic for further treatment. (Id. at 4).

Dr. Schemmel evaluated Weiland on June 5, 2017. (JE 1, p. 1). Dr. Schemmel diagnosed him with pre-existing bilateral shoulder degenerative arthritis with an acute work-related exacerbation. (Id. at 3). Dr. Schemmel indicated Weiland's shoulder condition had not returned to baseline; he recommended surgery. (Id.). On June 15,

2017, Dr. Schemmel performed a right shoulder arthroscopy with labral and rotator cuff debridement, chondroplasty, biceps tenotomy, and lose body removal. (Id. at 5-7). Weiland received follow-up treatment from Dr. Schemmel and attended physical therapy. (See JE 1, pp. 8-20). On October 12, 2017, Dr. Schemmel performed a left shoulder arthroscopy with debridement of a partial thickness rotator cuff tear, biceps tenotomy, labral debridement, and chondroplasty of the glenoid. (JE 1, pp. 21-23). Once again, Weiland received follow-up treatment from Dr. Schemmel and attended physical therapy. (See id. at 24-33). On October 24, 2017, Dr. Schemmel released him to return to work without any restrictions for the right shoulder. (Id. at 24). On January 23, 2018, Dr. Schemmel released Weiland to return to work without restrictions for the left shoulder and placed him at maximum medical improvement (MMI). (Id. at 34). Dr. Schemmel also referred him to Tristate Occupational Medicine for a permanent impairment rating. (Id.).

On March 12, 2018, Erin Kennedy, M.D., evaluated Weiland for the purpose of providing impairment ratings. (JE 2, p. 45-48). Dr. Kennedy assigned him 7 percent whole-body impairment for the right shoulder and 7 percent whole-body impairment for the left shoulder due to loss of range of motion in his shoulder joints, citing to Figures 16-40, 16-43, and 16-46 of the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition. (Id. at 48). Combined, Dr. Kennedy provided a 14 percent whole-body impairment for Weiland's bilateral shoulder injuries. (Id.). Dr. Kennedy did not assign any permanent work restrictions. (Id.).

Weiland continued to experience bilateral shoulder pain, for which he received follow-up care from Dr. Kennedy. On April 13, 2018, he had a left shoulder steroid injection. (JE 2, pp. 49a-50). This helped his pain symptoms for approximately three and a half months. (Id.). On August 29, 2018, Weiland returned to Dr. Kennedy complaining of increased bilateral shoulder pain. (Id.). Dr. Kennedy performed bilateral subacromial steroid injections. (Id. at 51-52). On January 25, 2019, Dr. Kennedy performed another injection to Weiland's left shoulder. (Id. at 55). Dr. Kennedy injected Weiland's right shoulder on March 15, 2019. (Id. at 60). Dr. Kennedy injected his bilateral shoulders again on June 14, 2019 and October 15, 2019. (See id. at 61-66). In October 2019, Weiland inquired about proceeding with bilateral shoulder replacements. (Id. at 65). Dr. Kennedy ordered new MRIs of his shoulders. (Id. at 67). Brian Silvia, M.D, in the Orthopedic Surgery Department reviewed the MRIs. (Id. at 68). He did not feel Weiland's osteoarthritis was advanced enough to proceed with replacement surgeries at that time. (Id.). Dr. Kennedy prescribed a trial of Meloxicam for Weiland's pain complaints. (Id. at 69). Dr. Kennedy's treatment note states that Weiland's overhead work at Mercy Medical Center substantially contributed to the osteoarthritis in his shoulders. (Id. at 69-70).

In June 2020, Trinity sent Weiland for an independent medical examination (IME) with James Nepola, M.D., at the University of Iowa Hospitals and Clinics (UIHC). Dr. Nepola diagnosed him with bilateral shoulder osteoarthritis and shoulder pain. (JE 3, pp. 83-84). Dr. Nepola opined that the May 3, 2017 work incident was a substantial factor causing his current need for shoulder treatment. (Id. at 84). He indicated Weiland may need shoulder replacement surgery in the future, but did not recommend it at that time. (JE 3, p. 84). Instead, he recommended conservative treatment in the form of steroid injections and pain medication. (Id.). Dr. Nepola's report states that Weiland was "able to work . . . with minimal modification of activity. He has difficulty doing strenuous things at full arm elevation, but as he tells me he is able to do most of the activities well enough without help." (Id.). Dr. Nepola did not think Weiland's work at Mercy was going to expedite his need for shoulder replacement surgery. (Id.). He indicated replacement surgery is the "natural occurrence for someone like Mr. Weiland" and its timing depended on his pain tolerance and level of dysfunction. (Id.). Dr. Nepola's report did not address permanent impairment or restrictions. (See id. at 83-99).

Since the evaluation with Dr. Nepola, Weiland has continued to treat with Dr. Kennedy for his bilateral shoulder pain. (See, JE 2, pp. 71-75). She obtained repeat x-rays of his bilateral shoulders in June 2021. (Id. at 76). They showed mild osteoarthritis, but no acute findings. (Id.). Dr. Kennedy continues to prescribe Weiland Meloxicam for pain. (See id. at 71-82).

At the behest of his attorney, Weiland attended an IME with Robin Sassman, M.D., on July 15, 2022. (Cl Ex. 1, p. 1). Prior to the evaluation, Dr. Sassman reviewed treatment records from Dr. Schemmel and Dr. Kennedy, as well as Dr. Nepola's IME report. (Id. at 2). She also reviewed Weiland's treatment records from the Veterans Administration. (Id.). According to those records, Weiland has a disability rating for his right shoulder from his time in the Army Reserve. (Id.). Weiland injured his right shoulder picking up a generator in 2006. (Id.). Dr. Sassman's report indicates that Weiland was diagnosed with shoulder tendinitis after this incident and continued to have occasional pain in the shoulder after receiving treatment, but the report does not provide the exact disability percentage for Weiland's shoulder. (Id.). Dr. Sassman's report also indicates Weiland has undergone two back surgeries for a disc bulge at L4-5, sinus surgery, bilateral bicep surgery in 1998, and gallbladder removal surgery in 2021.

Dr. Sassman diagnosed Weiland with a labral tear in the right shoulder status post arthroscopy with rotator cuff debridement, biceps tenotomy, and chondroplasty with continued pain and limited range of motion, as well as a left shoulder labral tear status post arthroscopy with debridement of a partial thickness rotator cuff tear and biceps tenotomy with continued pain and limited range of motion. (Cl Ex. 1, p. 12). She opined that the work incident on May 3, 2017, was a direct and causal factor in the labral tears found in Weiland's bilateral shoulders and a substantial aggravation to the degenerative changes in his shoulders. (Id.). She recommended further treatment—continued use of

Meloxicam and Nexium, as well as bilateral shoulder replacements at some future date. (Id. at 13). However, if Weiland chose not to move forward with her treatment suggestions, Dr. Sassman opined Weiland reached MMI for his bilateral shoulders on February 3, 2022, the date of his last visit with Dr. Kennedy. (Id.). She assigned 8 percent whole-body impairment for loss of range of motion in the right shoulder joint, and 8 percent whole-body impairment for loss of range of motion in the left shoulder joint, citing to Figures 16-40, 16-43, and 16-46 of the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition. (Cl Ex. 1, pp. 13-14). Combined, Dr. Sassman assigned 15 percent whole-body impairment. (Id.). Her report indicates Weiland was getting along okay at work without formal restrictions, and worried formal restrictions could jeopardize his job, so Dr. Sassman did not assign any formal restrictions. (Id. at 14). Nonetheless, if he ever changed jobs, Dr. Sassman recommended he limit lifting, pushing, pulling, and carrying to 30 pounds from floor to waist occasionally, 20 pounds from waist to shoulder and/or with arms extended away from his body rarely, rare use of vibratory or power tools, and limit using his arms above shoulder height. (Id.).

The impairment ratings provided by Dr. Kennedy and Dr. Sassman are similar. Dr. Kennedy assigned 14 percent whole-body impairment due to loss of range of motion in Weiland's bilateral shoulders, citing to AMA Figures 16-40, 16-43, and 16-46. (JE 2, p. 48). Dr. Sassman assigned 15 percent whole-body impairment due to loss of range of motion in the bilateral shoulders, citing to the same AMA Figures. (Cl Ex., pp. 13-14). A review of the physicians' measurements shows that Dr. Sassman found motion loss beyond those recorded by Dr. Kennedy in every category—flexion, extension, abduction, adduction, external rotation, and internal rotation. (See JE 2, p. 48; Cl Ex. 1, p. 11). Dr. Sassman's measurements, however, were taken more than four years after Dr. Kennedy's measurements. (See id.). During that four year period, Weiland underwent additional treatment in the form of pain medication and steroid injections. (JE 2, pp. 49a-70). During this time, he also complained of reduced rotation in his shoulders. (See id. at 64, 68-70, 72, 76, 80). Given this, it appears Dr. Sassman's additional impairment is supported by Dr. Kennedy's treatment records. In addition, in 2020, Dr. Nepola found increased range of motion loss in Weiland's shoulders. (See JE3, p. 87). For these reasons, I find Dr. Sassman's permanent impairment rating is supported by the evidence and adopt it.

At the time of the hearing, Weiland was still working full time full duty at Mercy Medical Center as an HVAC maintenance mechanic. (See Tr., p. 41. 55). His job duties have not changed since his injury in 2017, however, two years ago Mercy eliminated 45 jobs, so his responsibilities have increased. (See id. at 52, 55). Weiland does not have any work restrictions. (Tr., p. 42). At the hearing, he testified that he is still physically capable of performing his job for Mercy Medical Center. (Id. at 56-57). However, some of his job duties, such as working overhead and heavy lifting, cause him pain, so he paces himself and asks for help when necessary. (Id. at 43; 46-47). As an HVAC maintenance mechanic, Weiland works 40 hours per week with occasional

overtime and earns a higher wage then he earned in May 2017. (Id. at 87-89; Ex. F 46-50). He receives favorable performance evaluations. (Tr., p. 89-90; Ex. F, pp. 51-56; Cl Ex. 4, p. 31). Weiland testified that he would like to transfer to a position that is easier on his body, but he likes his current job and plans to continue working for Mercy Medical Center. (Tr., p. 90). Weiland has given varying responses when asked about retirement plans. During his deposition, he said he was going to work at Mercy until he died. (Cl Ex. 4, p. 31). During the hearing, he stated he planned to work until he was 75. (Tr., p. 53). However, in 2018, Weiland told Dr. Kennedy that he planned to work for about ten more years. (JE 2, p. 51).

At the hearing, Chad Darter also provided testimony about Weiland's job duties and performance. (Tr., pp. 99-110). Mr. Darter (Hereinafter "Darter") is Mercy's regional facilities director for eastern Iowa. (Id. at 99). He has been in this position for approximately seven years. (Id.). Weiland works in Darter's department. (Id.). Darter testified he has a good working relationship with Weiland and that Weiland "does a great job for MercyOne, fulfills the obligations [of] what we need and require." (Id. at 101). He also indicated that Weiland has received favorable performance evaluations since 2017. (Id. at 102). He testified Weiland is working without restrictions and has never asked Mercy for any work accommodations. (Id.). During the hearing, Darter was asked whether Mercy could accommodate the restrictions suggested by Dr. Sassman if Weiland were ever to change jobs. (Id. at 103-107). Darter testified he did not know; he indicated the human resources department at Mercy would need to do a formal job study to determine if the suggested restrictions could be accommodated. (Id. at 106-109). Based upon the hearing testimony, it is clear that Weiland is still physically capable of performing his job at Mercy and is not observing the hypothetical restrictions suggested by Dr. Sassman. (See Tr., pp. 56-57). The hypothetical restrictions do not appear to be necessary at this time; they are not adopted.

On April 15, 2009, Weiland suffered a work-related injury to his back. (Cl Ex. 6). As a result, on October 28, 2009, he underwent a left L4-5 lumbar laminectomy redo surgery with diskectomy with Russell Buchanan, M.D.[3] (Cl Ex. 6, pp. 66-67). Dr. Buchanan placed him at MMI on January 31, 2011 and assigned 12 percent whole-body impairment. (Id. at 68). Dr. Buchanan did not provide him with any permanent work restrictions. (Id.). On August 30, 2011, Weiland attended an IME with Jacqueline Stoken, D.O. (See Ex. A). Following that exam, Dr. Stoken diagnosed Weiland with a work-related right sided L4-L5 disk herniation status post laminectomy, as well as chronic low back pain with right lower extremity radiculopathy. (Id. at 12). She assigned 18 percent whole-body impairment and suggested he avoid repetitive bending and twisting, as well as lifting more than 10 pounds on a constant basis, 25 pounds on a

[3] Weiland also underwent a non-work-related L4-5 laminotomy and diskectomy with Michael Chapman, M.D., on December 23, 2008. (Ex. A, p. 12). Weiland's medical records note that he continued to experience low back pain after this surgery, but there is no evidence he received permanent work restrictions for the injury. (Id. at 6).

frequent basis, and 50 pounds on an occasional basis. (Id. at 13). However, her report indicated the restrictions were merely advisory and not "mandatory in this case as he is able to accommodate his job duties." (Id.).

In 2012, Weiland suffered a second work-related injury to his back. (See Ex. A, p. 14). Following this injury, Weiland received treatment from Dr. Kennedy and Sergio Mendoza, M.D. at UIHC. (Id. at 16). The record does not contain ratings from either of these physicians. (Id.). On October 11, 2013, Weiland attended a second IME with Dr. Stoken. (Ex. A, pp. 14-19). Following the exam, Dr. Stoken diagnosed him with a new lumbar disc herniation at L3-4 with sacroiliac joint dysfunction and chronic low back pain with radiculopathy. (Id. at 18). She assigned him 13 percent whole-body impairment for the new back injury. (Id.). Once again, she suggested he avoid repetitive bending and twisting, as well as lifting more than 10 pounds on a constant basis, 25 pounds on a frequent basis and 50 pounds on an occasional basis, however, she indicated the restrictions were merely advisory and not "mandatory in this case as he is able to accommodate for his job duties." (Id.).

On January 27, 2015, Weiland and Mercy Medical Center entered into a compromise settlement for the May 7, 2012 date of injury. (Cl Ex. 9). Under this agreement, Weiland was paid $2,344.15. (Id. at 75). On January 29, 2015, the parties entered into an Agreement for Settlement for the April 15, 2009 date of injury. (Cl Ex. 6). Under this agreement, Weiland was paid 95 weeks of permanent partial disability benefits, which equates to a 19 percent loss to the body as a whole. (Id. at 62). Weiland continued working as an HVAC maintenance mechanic for Mercy Medical Center full time without restrictions after the 2009 injury. There was no evidence presented that his income decreased as a result of the 2009 back injury. At the hearing, Weiland testified he continues to take muscle relaxers at bedtime for his back complaints. (Tr., p. 30).

Weiland's weekly rate is in dispute. The parties stipulated that Weiland was married and entitled to two exemptions at the time of the injury. (See Hearing Report). Thus, the disputed issue is his average weekly wage on date of injury. (Id.). Weiland alleges an average weekly wage of $990.00, which provides a rate of $628.36. (Id.). Trinity asserts his average weekly wage is actually $931.07, which provides a rate of $595.04. (Id.). As support for this assertion, Trinity submitted a rate calculation with supporting documentation, consisting of copies of Weiland's pay checks from February 5, 2017, through May 13, 2017. (Ex. B). Weiland did not submit a rate calculation at hearing, nor does his post-hearing brief point out the error in defendants' wage calculation. Instead, Weiland argues that Trinity previously paid his benefits at the rate of $628.36 and should be bound by that calculation.[4] (See Claimant's Post-Hearing

[4] In his post-hearing brief, Weiland alleges his wage calculation is supported by evidence contained in Claimant's Exhibit 5. (Claimant's Post-Hearing Brief, p. 23). Claimant's Exhibit 5, however, does not contain a prior

Brief, p. 23). Weiland also suggests that the wage documents submitted by Trinity may not be truthful and/or accurate. (Id.). The hearing record contains no evidence supporting Weiland's claims. Given this, the undersigned adopts Trinity's average weekly wage of $931.07. Weiland's weekly rate is $595.04.

Weiland also asserts entitlement to penalty benefits. In support of this assertion, Weiland makes two separate arguments. The first argument is that Trinity only volunteered Dr. Kennedy's 14 percent whole-body rating without taking into consideration his industrial disability. Weiland asserts he has sustained considerable industrial disability, so Trinity should have made good faith voluntary payments in excess of Dr. Kennedy's functional impairment rating. (Claimant's Post-Hearing Brief, p. 24). Weiland, however, continues to work full duty, full time at Mercy Medical Center, making more than he did at the time of the 2017 injury. (Tr., pp. 41-42, 55). Given this, Weiland's claim of excessive industrial disability was unsettled and debatable. Weiland's second argument is that Trinity underpaid Dr. Kennedy's rating by 14 weeks without reasonable cause or excuse. (Claimant's Post-Hearing Brief, p. 24). According to the evidence, after receiving Dr. Kennedy's 14 percent whole-body impairment rating in March 2018, Trinity sent Weiland a letter indicating he was owed 56 weeks of permanent partial disability benefits, totaling $35,188.16. (Cl Ex. 5, p. 57). However, on March 2, 2022, Trinity's counsel sent Weiland a second letter indicating Dr. Kennedy's rating had been miscalculated; he was entitled to an additional 14 weeks of permanent partial disability benefits. (Id. at 58). On March 21, 2022, Trinity sent Weiland a check for $9,601.31 for the missing permanency benefits and accrued interest on those benefits. (Id. at 60). Weiland's injury occurred on May 3, 2017. Under the law in effect at that time, Weiland was owed 70 weeks of permanent partial benefits for Dr. Kennedy's impairment rating. Given these facts, the undersigned concludes Trinity failed to pay Dr. Kennedy's full rating in a timely manner.

CONCLUSIONS OF LAW

In 2017, the Iowa legislature amended the Iowa Workers' Compensation Act. See 2017 Iowa Acts, ch. 23. The 2017 amendments apply to cases in which the date of an alleged injury is on or after July 1, 2017. Id. at § 24(1); see also Iowa Code § 3.7(1). Because the injury at issue in this case occurred before July 1, 2017, the Iowa Workers' Compensation Act in effect before the 2017 amendments applies. See Smidt v. JKB Restaurants, LC, File No. 5067766 (App. December 11, 2020); but see (holding that the 2017 amendments apply to interest accrued on or after July 1, 2017, regardless of the date of injury).

The parties agree Weiland sustained an injury entitling him to industrial disability, but they dispute the extent. Industrial disability was defined in Diederich v. Tri-City Ry. Co. of Iowa, 219 Iowa 587, 258 N.W. 899 (1935) as follows: "It is therefore plain that

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wage/rate calculation from the defendants. It is only a letter from defendants indicating they would be paying an additional 14 weeks of benefits and the amount of those additional benefits. (Cl Ex. 5, p. 58).

the Legislature intended the term 'disability' to mean 'industrial disability' or loss of earning capacity and not a mere 'functional disability' to be computed in terms of percentages of the total physical and mental ability of a normal man." Functional impairment is an element to be considered in determining industrial disability, which is the reduction of earning capacity, but consideration must also be given to the injured employee's age, education, qualifications, experience, motivation, loss of earnings, severity and situs of the injury, work restrictions, inability to engage in employment for which the employee is fitted, and the employer's offer of work or failure to so offer. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963); Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961). Compensation for permanent partial disability shall begin at the termination of the healing period. Compensation shall be paid in relation to 500 weeks as the disability bears to the body as a whole. Iowa Code § 85.34.

There are no weighting guidelines that indicate how each of the factors is to be considered. Neither does a rating of functional impairment directly correlate to a degree of industrial disability to the body as a whole. In other words, there is no formulae which can be applied and then added up to determine the degree of industrial disability. It therefore becomes necessary for the deputy or commissioner to draw upon prior experience, as well as general and specialized knowledge to make the finding with regard to degree of industrial disability. See Christensen v. Hagen, Inc., Vol. 1 No. 3 Industrial Commissioner Decisions, 529 (App. March 26, 1985); Peterson v. Truck Haven Cafe, Inc., Vol. 1 No. 3 Industrial Commissioner Decisions, 654 (App. February 28, 1985).

This case involves successive disabilities. Iowa Code section 85.34(7) is known as the successive-disability statute. The statute became effective September 7, 2004, and applies to all injuries occurring on or after its effective date. 2004 First Extraordinary Session Iowa Acts ch. 1001, section 18. Iowa Code section 85.34(7)(a) makes defendants responsible for compensating all of an employee's disability that arises out of and in the course of the employee's employment with the employer. Iowa Code section 85.34(7)(b) governs how successive injuries are to be assessed and what credits should be given to the employer for past payments of weekly benefits. At the time of Weiland's injury,[5] Iowa Code section 85.34(7) (2015) stated as follows:

> Successive disabilities.
>
> a. An employer is fully liable for compensating all of an employee's disability that arises out of and in the course of the employee's employment with the employer. An employer is not liable for compensating an employee's preexisting disability that arose out of and in the course of employment with a different employer or from causes unrelated to employment.

[5] This code section was amended in July 2017. See Iowa Acts 2017 (87 G.A.) ch. 23, H.F. 518, §§ 6 to 14, eff. July 1, 2017.

> b. (1) If an injured employee has a preexisting disability that was caused by a prior injury arising out of and in the course of employment with the same employer, and the preexisting disability was compensable under the same paragraph of subsection 2 as the employee's present injury, the employer is liable for the combined disability that is caused by the injuries, measured in relation to the employee's condition immediately prior to the first injury. In this instance, the employer's liability for the combined disability shall be considered to be already partially satisfied to the extent of the percentage of disability for which the employee was previously compensated by the employer.
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> (2) If, however, an employer is liable to an employee for a combined disability that is payable under subsection 2, paragraph "u", and the employee has a preexisting disability that causes the employee's earnings to be less at the time of the present injury than if the prior injury had not occurred, the employer's liability for the combined disability shall be considered to be already partially satisfied to the extent of the percentage of disability for which the employee was previously compensated by the employer minus the percentage that the employee's earnings are less at the time of the present injury than if the prior injury had not occurred.
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> c. A successor employer shall be considered to be the same employer if the employee became part of the successor employer's workforce through a merger, purchase, or other transaction that assumes the employee into the successor employer's workforce without substantially changing the nature of the employee's employment.

Id. There is no evidence that Weiland's income decreased after the 2009 injury. Therefore, section 85.34(7)(b)(1) applies to this case and section 85.34(7)(b)(2) does not.

As found above, Weiland sustained a 15 percent whole-body functional impairment rating as a result of the 2017 injury. However, neither Dr. Sassman, Dr. Nepola, nor Dr. Kennedy assigned him any permanent work restrictions as a result of his shoulder injuries. Additionally, Weiland is not observing Dr. Sassman's hypothetical work restrictions. However, Weiland continues to experience pain in his bilateral shoulders, especially when working overhead and lifting heavy objects. Because of this he must pace himself at work and occasionally ask his co-workers for assistance. Weiland continues to treat with Dr. Kennedy and take pain medication for his shoulders. He does not have any permanent work restrictions for the 2009 back injury. Weiland, however, still takes muscle relaxers for his back complaints.

At the time of the hearing, Weiland was 62 years old. He has a GED, as well as HVAC and electrical maintenance licenses. He received carpentry training in the Army Reserve. His past work experience is in construction; grounds, electrical and

mechanical maintenance; and cable installation.[6] Weiland is still working full time for Mercy Medical Center as an HVAC maintenance mechanic, the same job he had prior to the 2017 injury date, and he is earning a higher wage than he did at the time of the injury.

At the time of the 2009 injury, Weiland was 49 years old. He had undergone a non-work-related laminectomy surgery in December 2008. Medical records indicate he continued to experience low back pain following this surgery, but he was not given any permanent work restrictions for that injury. Weiland experienced occasional right shoulder pain from a 2006 injury he received in the Army Reserve, but there is no evidence that he was receiving ongoing treatment for that injury or that he was given work restrictions for the injury. He did not require surgery for the 2006 injury. In 2009, Weiland was already working full time for Mercy Medical Center as an HVAC maintenance mechanic. There is no evidence that he needed to pace himself at work at that time, and it is likely he was able to finish assignments faster and work overhead for longer periods of time. Weiland's work experience and education have not changed since 2009.

In view of the above and all other appropriate factors for the consideration of industrial disability, I find Weiland has sustained a 45 percent combined industrial disability as a result of the 2009 and 2017 dates of injury. Five hundred weeks multiplied by 45 percent equals 225 weeks. However, according to the language of Iowa Code section 85.34(7)(b)(1), Trinity is entitled to a credit of 19 percent industrial disability for the 2009 injury. This is equal to 95 weeks. The parties have also stipulated that Weiland was already paid 70 weeks of permanent partial disability benefits for the 2017 date of injury, at the rate of $628.36, totaling $43,985.20. Trinity is entitled to a credit for those benefits.

Weiland asserts a claim for penalty benefits. Specifically, he claims that under the facts of this case Trinity should have made good faith voluntary payments in excess of Dr. Kennedy's functional impairment rating. Alternatively, Weiland contends he should receive penalty benefits because Trinity underpaid Dr. Kennedy's functional impairment rating by 14 weeks without reasonable cause or excuse. Trinity argues the oversight was unintentional and immediately remedied, once discovered, thus no penalty is warranted. Trinity also argues no penalty should be awarded because it is entitled a credit for the benefits paid in 2015 for Weiland's 2009 back injury.

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

[6] At the hearing, Weiland testified he could no longer perform any of these jobs because of his shoulder injuries. However, the job descriptions and/or physical requirements for these positions were not placed in evidence.

> 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.
>
> b. The workers' compensation commissioner shall award benefits under this subsection if the commissioner finds both of the following facts:
>
> (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.

Id. The legislature established in Iowa Code section 86.13(4)(b) a burden-shifting framework for determining whether penalty benefits must be awarded in a workers' compensation case. See 2009 Iowa Acts ch. 179, § 110 (codified at Iowa Code § 86.13(4)(b)); see also Pettengill v. Am. Blue Ribbon Holdings, LLC, 875 N.W.2d 740 (Iowa App. 2015) as amended (February 16, 2016) (discussing the burden-shifting required by the two-factor statutory test). The employee bears the burden to establish a prima facie case for penalty benefits by establishing a denial, delay in payment, or termination of workers' compensation benefits. Iowa Code § 86.13(4)(b)(1). If the employee fails to prove a denial, delay, or termination, there can be no award of penalty benefits and the analysis stops. See id. at § 86.13(4)(b); see also Pettengill, 875 N.W.2d at 747. However, if the employee makes the requisite showing, the burden of proof shifts to the employer to prove a reasonable cause or excuse for the delay. See id. at § 86.13(4)(b); see also Pettengill, 875 N.W.2d at 747. In Christensen v. Snap-on Tools Corp., 554 N.W.2d 254 (Iowa 1996), the Iowa Supreme Court declared,

> A reasonable cause or excuse exists if either (1) the delay was necessary for the insurer to investigate the claim or (2) the employer had a reasonable basis to contest the employee's entitlement to benefits. A "reasonable basis" for denial of the claim exists if the claim is "fairly debatable."

Id. at 260. Weekly compensation payments are due at the end of the compensation week. Robbennolt v. Snap-on Tools Corp., 555 N.W.2d 229 (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 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). After the 2017 injury date Weiland continued to work as an HVAC maintenance mechanic for Mercy Medical Center full time full duty. His

entitlement to disability benefits in excess of Dr. Kennedy's functional impairment rating was debatable. Given these circumstances, I do not believe the imposition of a penalty for failure to volunteer excess benefits is appropriate. Weiland has not met his burden under this argument.

Weiland also contends he is entitled to receive penalty benefits because Trinity underpaid Dr. Kennedy's rating by 14 weeks. After receiving Dr. Kennedy's 14 percent whole-body rating on March 12, 2018, Trinity volunteered 56 weeks of permanent partial disability benefits at the rate of $628.36, totaling $35,188.16. However, under the law in effect at the time of Weiland's injury, he was owed 70 weeks of permanent partial disability benefits under Dr. Kennedy's rating. Trinity did not discover the mistake and pay the remaining benefits until March 21, 2022. Weiland has met his burden to prove a delay in payment under Iowa Code section 86.13; the burden now shifts to Trinity to prove there was a reasonable cause or excuse for the delay.

In its post-hearing brief, Trinity argues the oversight was unintentional. (Defendant's Post-Hearing Brief, p. 10). Weiland's injury occurred on May 3, 2017. On July 1, 2017, the Iowa Legislature enacted significant amendments to the Iowa workers' compensation laws. Of particular relevance to this case, the Legislature modified Iowa Code section 85.34 by adding the shoulder to the list of scheduled members. The new subsection states, "For the loss of a shoulder, weekly compensation during four hundred weeks." Iowa Code § 85.34(2)(n)(2017). Four hundred weeks multiplied by 14 percent equals 56 weeks. Trinity paid Weiland's rating under the new law, rather than the law that was in effect in May 2017. The question is whether that was reasonable. While the mistake appears unintentional, it did result in a significant delay.

Additionally, Trinity's credit from the 2009 injury date does not extinguish its statutory responsibility to pay Dr. Kennedy's full functional disability rating for the 2017 date of injury, and defendants have not presented any evidence that they contemporaneously notified claimant they would not be paying Dr. Kennedy's full functional rating because they had a credit from the 2009 injury.

In determining the amount of the penalty, the agency shall consider such factors as 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. Robbennolt, 555 N.W.2d at 238. Given the above, Weiland is entitled to penalty benefits for the delayed payment of Dr. Kennedy's rating. Trinity shall pay Weiland $500.00 for the delayed payment of Dr. Kennedy's full functional impairment rating.

Weiland also seeks an award of costs. Costs are to be assessed at the discretion of the deputy commissioner hearing the case. See 876 Iowa Administrative Rule 4.33; Iowa § Code 86.40. Administrative Rule 4.33(6) provides:

> Costs 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, including convenience fees incurred by using the WCES payment gateway, and (8) costs of persons reviewing health service disputes.

876 IAC 4.33(6).

Weiland incurred costs for the filing fee for his petition. (See Hearing Report). He also seeks reimbursement for the cost of ordering a copy of his deposition transcript. (Cl Ex. 4, pp. 55-56). Weiland was successful in this action; he was awarded additional industrial disability beyond that previously paid by Trinity. Therefore, I conclude that it is reasonable to assess Weiland's filing fee pursuant to 876 IAC 4.33(7) and his deposition transcript charges pursuant to 876 IAC 4.33(2).

Costs are assessed totaling $351.00.

ORDER

THEREFORE, IT IS ORDERED:

Defendants shall pay claimant industrial disability benefits of two hundred twenty-five (225) weeks, beginning on the stipulated commencement date of January 23, 2018, until all benefits are paid in full, less the ninety-five (95) weeks of benefits paid for the April 15, 2009 work injury, and the forty-three thousand nine hundred eighty-five and 20/100 dollars ($43,985.20) Trinity volunteered in permanent partial disability benefits prior to the hearing for the May 3, 2017 date of injury.

All weekly benefits shall be paid at the rate of five hundred ninety-five and 04/1000 dollars ($595.04) per week.

All accrued benefits shall be paid in a lump sum.

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 Technology File No. 5054686 (App. Apr. 24, 2018).

Defendant shall pay penalty benefits in the amount of five hundred dollars ($500.00).

Defendant shall pay costs of three hundred and fifty-one dollars ($351.00).

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

Signed and filed this 15th day of February, 2023.

Amanda Rutherford

AMANDA R. RUTHERFORD
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Arthur Gilloon (via WCES)

Lee Hook (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 filed via Workers' Compensation Electronic System (WCES) unless the filing party has been granted permission by the Division of Workers' Compensation to file documents in paper form. If such permission has been granted, the notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 150 Des Moines Street, Des Moines, Iowa 50309-1836. The notice of appeal must be received by the Division of Workers' Compensation 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 legal holiday.