

## BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

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STEVEN ALMENDINGER,

Claimant,

vs.

CR SIGNS &amp; LIGHTING,

Employer,

and

COLUMBIA MUTUAL INSURANCE  
COMPANY,Insurance Carrier,  
Defendants.

File No. 20007087.01

ARBITRATION DECISION

Head Note Nos.: 1803; 3001; 4000.2

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STATEMENT OF THE CASE

The claimant, Steven Almendinger, filed a petition for arbitration and seeks workers' compensation benefits from CR Signs & Lighting, employer, and Columbia Mutual Insurance Company, insurance carrier. The petition was filed on March 23, 2002. The claimant was represented by Tom Wertz. The defendants were represented by Ronald Frank.

The matter came on for hearing on March 13, 2023, before Deputy Workers' Compensation Commissioner Joe Walsh in Des Moines, Iowa via Zoom video conferencing system. The record in the case consists of Claimant's Exhibits 1 through 3, and Defense Exhibits A through F. The claimant testified at hearing. The matter was recorded electronically on the agency's recording software. By agreement of the parties, no court reporter was utilized, and the digital recording is the only record.

## ISSUES

The parties submitted the following issues for determination:

1. The extent of permanent partial impairment in the claimant's right shoulder. Claimant also contends the commencement date for permanency is incorrect.
2. The correct rate of compensation.

3. Penalty.

4. Costs.

### STIPULATIONS

Through the hearing report, the parties stipulated to the following:

1. The parties had an employer-employee relationship.
2. Claimant sustained an injury which arose out of and in the course of employment on June 17, 2020. The parties have stipulated that this injury is a cause of some temporary and permanent disability in claimant's right shoulder. Claimant is not alleging industrial disability.
3. Temporary disability/healing period and medical benefits are no longer in dispute. The claimant has listed healing period as a dispute, however, claimant has admitted that all temporary disability benefits were actually paid. Claimant is merely alleging benefits were paid at an incorrect lower rate.
4. There is no issue involving credit. Claimant was paid 21 weeks of permanent partial disability benefits at the rate of \$626.21.
5. Claimant is not seeking any further medical expenses.
6. The parties have stipulated that claimant was married and entitled to two (2) exemptions for purposes of rate calculation.
7. Affirmative defenses have been waived.

### FINDINGS OF FACT

Steven Almendinger was 50 years old as of the date of hearing. The parties have stipulated that Mr. Almendinger sustained an injury which arose out of and in the course of his employment on June 17, 2020. The parties have further stipulated that this work injury is a cause of some temporary and permanent disability. The primary question in the case is the extent of permanent impairment as measured by the AMA Guides, Fifth Edition.

Mr. Almendinger testified live and under oath at the video hearing. I found his testimony to be highly credible. His testimony was simple and straightforward. His answers were consistent with other portions of the record. There was nothing about his demeanor which caused me any concern for his truthfulness.

Mr. Almendinger worked for CR Signs & Lighting as an installer. His work involved the installation and repair of various signs. He was paid \$22.00 per hour for his work, and he averaged more than 40 hours per week. He was paid bi-weekly. In calculating his average wages prior to the injury, the employer chose to exclude certain weeks (referred to as "Covid weeks") as non-representative. Instead of going back further to obtain a 13 week average; however, the adjustor simply calculated an average using approximately 10 weeks. (Claimant's Exhibit 2, page 55) This resulted in an average weekly wage (AWW) of \$958.10. The claimant disagreed with this calculation at hearing and went back further, obtaining a full 14-week period for his calculations. (Ex. 2, pp. 54, 56-58) The claimant calculated his AWW at \$1,024.57. I find that the claimant's calculation set forth on Claimant's Exhibit 2, page 54, is the best calculation of his customary earnings in the quarter leading up to his work injury. I further find that the employer's calculation was not unreasonable.

Claimant's counsel raised the rate issue with defendants prior to hearing. In response to counsel's inquiry, defendants further investigated the matter and alleged the rate should actually be lower. (Defense Exhibit F)

Mr. Almendinger testified that on June 17, 2020, while he was placing some cardboard into a dumpster, wind caught the cardboard, jerking his right shoulder in the process. He testified he heard a pop and experienced immediate pain in his right shoulder. He was seen the same day at MercyCare Urgent Care. He had x-rays which showed no fracture. He then followed up with MercyCare Occupational Health and had an MRI, which revealed a labral tear, partial tears of the supraspinatus and infraspinatus, as well as a complete rupture of the long head of the biceps. He was referred to a specialist, Matthew Bollier, M.D., where he underwent surgery on August 4, 2020. The surgery was described as right shoulder arthroscopy, capsular release, extensive debridement, open subpectoral biceps tenodesis, subacromial decompression and distal clavicle excision. (Def. Ex. B, p. 1) He then underwent a fairly routine postoperative course of treatment which included physical therapy.

Dr. Bollier placed Mr. Almendinger at maximum medical improvement on November 9, 2020, and assigned a 4 percent rating of the right upper extremity. The following was documented at that time:

Today, Mr. Almendinger reports significant improvement in pain following surgery. Patient is happy with his overall progress and feels as though he can perform most of his duties at work without restrictions at this time. He has been working in physical therapy to progress his range of motion and strength. Patient reports minor pain in the anterior aspect of the right shoulder when performing pull-ups and lifting overhead however this has significantly improved.

(Ex. B, p. 1) He was released without any formal restrictions. His impairment rating was assigned utilizing range of motion measurements. (Ex. B, pp. 5-6) Mr. Almendinger

testified that Dr. Bollier did not use any type of measuring device to measure his loss of range of motion.

Thereafter, Mr. Almendinger returned to work for CR Signs & Lighting and continued to perform his regular job without any restrictions. He testified that following his release, he continued to have shooting and stabbing pain, limited range of motion, strength loss, and some numbness and pinching at times. He testified that there are certain overhead tasks that he no longer does at work due to his strength loss.

Mr. Almendinger exercised his right to an 85.39 independent medical evaluation in November, 2021. He was evaluated by David Segal, M.D. Dr. Segal performed a thorough evaluation of the medical file, and examined him as well. Dr. Segal prepared an extensive detailed report. He diagnosed the following:

*The diagnoses that are causally related to Mr. Almendinger's work injury of June 17, 2020, are as follows:*

*Right Shoulder Diagnoses:*

1. *Supraspinatus, infraspinatus, and subscapularis partial tear and tendinopathy*
2. *Rupture Long Head Biceps Tendon*
3. *Permanent aggravation of degenerative changes of the acromioclavicular joint.*
4. *Impingement syndrome*
5. *Labral tears SLAP tear*
6. *Subacromial bursitis*
7. *Status post right rotator cuff and labral repair, subacromial decompression with distal clavicle excision, biceps tenodesis, capsule release.*

*Right Upper Extremity Diagnosis:*

1. *Right Ulnar neuropathy*
2. *Right Grip weakness*

(Ex. 9, p. 13)

Dr. Segal then justified these diagnoses in significant detail. (Cl. Ex. 1, pp. 13-24) He then assigned 14 percent impairment to the right shoulder for range of motion loss, 8 percent to the right shoulder for strength deficits, and 10 percent for the distal clavicle excision. (Ex. 1, pp. 26-27) Dr. Segal meticulously documented the ROM losses with his use of goniometer and photographs. (Cl. Ex. 1, p. 26, 41-43) He combined all of these ratings and arrived at a 29 percent impairment for the shoulder. He combined this rating with his rating of Mr. Almendinger's impairment for loss of hand grip strength due to right ulnar neuropathy of 13 percent, for a total impairment of 37 percent to the right upper extremity. (Cl. Ex. 1, p. 28) He also recommended permanent medical restrictions.

I find Dr. Segal's impairment rating to be compelling. It is meticulously documented and well-reasoned.

At some point, Mr. Almendinger testified he asked for further medical evaluation for treatment purposes. He was sent to Matthew White, M.D. at Physicians' Clinic of Iowa. There is no record that Dr. White provided any further treatment recommendations. While his clinical note is not in evidence, Mr. Almendinger testified that Dr. White recommended massage therapy, physical therapy, and acupuncture. Mr. Almendinger further testified that Dr. Bollier did not want to see him again. (Def. Ex. D, Almendinger Depo., p. 20) Dr. White did provide an alternative impairment rating, which was requested by defendants. Dr. White provided the following opinion:

*I recently received correspondence from your office requesting review of Mr. Almendinger's visit in clinic and any permanent partial impairment for his shoulder condition. I last evaluated Steven on 7/13/2022 as a second opinion and recommended no further treatments at that time. Clinical measurements were completed at that visit. In addition, it was noted at the time of his surgery with an outside surgeon, he underwent a distal clavicle excision or by AMA Guides standards a "resection arthroplasty" of the distal clavicle as referenced on page 506 of the guide.*

*Using the AMA Guides to the Evaluation of Permanent Impairment, 5th Edition, and based upon clinical measurements, he has a shoulder impairment of 13% based upon Figures 16-40 (page 476), 16-43 (page 477), 16-46 (page 479) and table 16-27 (page 506) of the guide.*

(Def. Ex. C, p. 1) Mr. Almendinger credibly testified that Dr. White did not use any type of formal measuring device when calculating his loss of range of motion.

The record reflects that Mr. Almendinger's condition worsened since he was released from care by Dr. Bollier. Specifically, he developed ulnar neuropathy down his right arm and his range of motion and strength worsened. Mr. Almendinger testified credibly that he continues to have significant limitations in his shoulder, including weakness, limited range of motion, strength loss, and intermittent numbness. This impacts his activities of daily living as well as his ability to work.

#### CONCLUSIONS OF LAW

The first question submitted is the extent of impairment in the claimant's right shoulder which resulted from the stipulated work injury. The parties have stipulated that his disability is a scheduled member disability to his right shoulder.

Since the parties have stipulated that the disability is a scheduled member evaluated under Section 85.34(2)(n), the issue is to assess the degree of impairment to the claimant's right shoulder.

x. In all cases of permanent partial disability described in paragraphs “a” through “u”, or paragraph “v” when determining functional disability and not loss of earning capacity, the extent of loss or percentage of permanent impairment shall be determined solely by utilizing the guides to the evaluation of permanent impairment, published by the American medical association, as adopted by the workers’ compensation commissioner by rule pursuant to chapter 17A. Lay testimony or agency expertise shall not be utilized in determining loss or percentage of permanent impairment pursuant to paragraphs “a” through “u”, or paragraph “v” when determining functional disability and not loss of earning capacity.

Iowa Code section 85.34(2)(x) (2021).

Thus, the law, as written, is not concerned with an injured worker’s actual loss of use or functional disability as determined by the evidence, but rather the impairment rating as assigned by the adopted version of the AMA Guides to the Evaluation of Permanent Impairment. The only function of the agency is to determine which impairment rating should be utilized. While no explicit guidance is provided in the statute for this analysis, presumably the rating which most closely aligns with the worker’s actual functional disability.

In this case, there are three impairment ratings in the record. All of these ratings were measured under the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition. Dr. Bollier assigned a 4 percent rating. Dr. Segal assigned 29 percent rating for the shoulder and an additional rating for the arm, totaling 37 percent. Dr. White assigned a 13 percent rating.

Dr. Bollier’s rating was assigned a mere four months after the surgery while Mr. Almendinger was undergoing physical therapy. He did not utilize any measuring device to accurately assess Mr. Almendinger’s loss of range of motion. Mr. Almendinger’s physical symptoms actually worsened after this assessment. I therefore reject Dr. Bollier’s rating.

Dr. Segal assessed Mr. Almendinger’s impairment in November 2021, one year after his release from care. Therefore, the timing of his rating is more appropriate. He had an opportunity to review Mr. Almendinger’s condition at a point in time when he had been working full-duty for an extended period of time following his recuperation. His review of the records is meticulously documented. His evaluation was thorough and included photographs of range of motion measurements. He used a goniometer to assess the loss of range of motion. He meticulously evaluated each of Mr. Almendinger’s diagnoses and corresponded those with available medical records. While Dr. Segal’s rating is thorough and well-documented, it is noted that this is a very high impairment rating which is somewhat unusual for a post-surgical shoulder with a decent result.

Dr. White assigned a 13 percent rating. His medical note is not in the record. The only evidence in the record of his assessment is in a letter to defense counsel wherein he

cites to the sections of the Guides he utilized to reach his rating. Mr. Almendinger testified that he did not use any measuring device to measure his loss of range of motion.

Of the three ratings, Dr. Segal's rating is the most thorough and complete. My only function in this matter is to assess the most accurate impairment rating. Prior to the 2017 statutory changes, I would have been allowed to utilize agency expertise to assess Mr. Almendinger's actual functional disability. Based upon this record, I would likely have found that his functional disability is somewhere between 13 and 37 percent. Under the post-2017 statutory changes, this is disallowed. I am forced to choose which rating is the best rating to assess his permanent impairment of his right shoulder. In this record, it is quite clear that Dr. Segal's rating is superior for the reasons stated. I therefore find that the claimant has sustained a 37 percent impairment of his right shoulder. I conclude this entitles him to 37 percent of 400 weeks under subsection (n), or 148 weeks. Benefits should commence on January 5, 2021. See Iowa Code section 85.34(2) (2021).

The next issue is the rate of compensation.

Section 85.36 states the basis of compensation is the weekly earnings of the employee at the time of the injury. The section defines weekly earnings as the gross salary, wages, or earnings to which an employee would have been entitled had the employee worked the customary hours for the full pay period in which the employee was injured as the employer regularly required for the work or employment. The various subsections of section 85.36 set forth methods of computing weekly earnings depending upon the type of earnings and employment.

If the employee is paid on a daily or hourly basis or by output, weekly earnings are computed by dividing by 13 the earnings over the 13-week period immediately preceding the injury. Any week that does not fairly reflect the employee's customary earnings is excluded, however. Section 85.36(6).

In this case, the difference between the calculations of the parties lies in how they handled certain non-representative weeks. The record reflects claimant was paid on a bi-weekly basis. There are two pay periods in the immediate 13-week period prior to the injury, which the parties seem to agree were non-representative. The defendants characterized these weeks as "Covid weeks", as Mr. Almendinger apparently was not allowed to work during these times due to Covid protocols in the workplace. The defendants initially simply excluded these weeks in their initial calculations and utilized a 10-week period instead of obtaining a full quarter's worth of wages. The claimant also excluded those weeks in his calculations, however, instead of just ignoring them, he went back two more pay periods (4 weeks) to obtain a full quarter of wages for his assessment. I find this is a superior method of calculating his customary gross earnings, since he regularly worked more than 40 hours per week in his job. When this was brought to the attention of defendants, their response was to include to the "Covid weeks" in the calculation as though Mr. Almendinger had worked regular 40 hour weeks in those periods. Again, while this is not unreasonable per se, I find it is not the best method for assessing his customary earnings. Therefore, I find that Mr. Almendinger's average

weekly wage prior to his work injury was \$1,024.57 per week. I therefore conclude that the appropriate rate of compensation is \$665.78 per week.

The next issue is penalty.

“Because penalty benefits are a creature of statute, our discussion begins with an examination of the statutory parameters for such benefits.” Keystone Nursing Care Ctr. v. Craddock, 705 N.W.2d 299, 307 (Iowa 2005). Under Iowa Code section 86.13(4)(a):

If a denial, a delay in payment, or a termination of benefits occurs without reasonable or probable cause or excuse known to the employer or insurance carrier at the time of the denial, delay in payment, or termination of benefits, the workers' compensation commissioner shall award benefits in addition to those benefits payable under this chapter, or chapter 85, 85A, or 85B, up to fifty percent of the amount of benefits that were denied, delayed, or terminated without reasonable or probable cause or excuse.

This provision “codifies, in the workers’ compensation insurance context, the common law rule that insurers with good faith disputes over the legal or factual validity of claims can challenge them, if their arguments for doing so present fairly debatable issues.” Covia v. Robinson, 507 N.W.2d 411, 412 (Iowa 1993) (citing Dirks v. Farm Bureau Mut. Ins. Co., 465 N.W.2d 857, 861 (Iowa 1991) and Dolan v. Aid Ins. Co., 431 N.W.2d 790, 794 (Iowa 1988)). “The purpose or goal of the statute is both punishment and deterrence.” Robbennolt v. Snap-On Tools Corp., 555 N.W.2d 229, 237 (Iowa 1996).

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, 746–47 (Iowa App. 2015) as amended (Feb. 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. See Iowa Code § 86.13(4)(b). To do so, the employee must demonstrate 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. See id. at § 86.13(4)(b); see also Pettengill, 875 N.W.2d at 747.

It is noted that I have found that the rate in this case was underpaid. Therefore, the burden shifts to the employer to prove their rate calculation was reasonable. I find that the employer’s rate calculation was, in fact, reasonable. Therefore, I conclude that no penalty is due.

The final issue is costs.



Iowa Code section 86.40 states:

All costs incurred in the hearing before the commissioner shall be taxed in the discretion of the commissioner.

Iowa Administrative Code Rule 876—4.33(86) states:

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, (8) costs of persons reviewing health service disputes. Costs of service of notice and subpoenas shall be paid initially to the serving person or agency by the party utilizing the service. Expenses and fees of witnesses or of obtaining doctors' or practitioners' reports initially shall be paid to the witnesses, doctors or practitioners by the party on whose behalf the witness is called or by whom the report is requested. Witness fees shall be paid in accordance with Iowa Code section 622.74. Proof of payment of any cost shall be filed with the workers' compensation commissioner before it is taxed. The party initially paying the expense shall be reimbursed by the party taxed with the cost. If the expense is unpaid, it shall be paid by the party taxed with the cost. Costs are to be assessed at the discretion of the deputy commissioner or workers' compensation commissioner hearing the case unless otherwise required by the rules of civil procedure governing discovery. This rule is intended to implement Iowa Code section 86.40.

Iowa Administrative Code rule 876—4.17 includes as a practitioner, "persons engaged in physical or vocational rehabilitation or evaluation for rehabilitation..." A report or evaluation from a vocational rehabilitation expert constitutes a practitioner report under our administrative rules. Bohr v. Donaldson Company, File No. 5028959 (Arb. November 23, 2010); Muller v. Crouse Transportation, File No. 5026809 (Arb. December 8, 2010) The entire reasonable costs of doctors' and practitioners' reports may be taxed as costs pursuant to 876 IAC 4.33. Caven v. John Deere Dubuque Works, File Nos. 5023051, 5023052 (App. July 21, 2009).

Claimant seeks the costs set forth in Claimant's Exhibit 3. I find these costs are reasonable.

ORDER

THEREFORE, IT IS ORDERED:

Defendants shall pay the claimant one hundred forty-eight (148) weeks of permanent partial disability benefits at the rate of six hundred sixty-five and 78/100 (\$665.78) per week commencing January 5, 2021.

Defendants are responsible for the rate underpayment on the temporary disability paid from June 18, 2020, through November 8, 2020.

Defendants shall pay accrued weekly benefits in a lump sum.


Defendants shall pay interest on unpaid weekly benefits awarded herein as set forth in Iowa Code section 85.30.

Defendants shall be given credit for the 21 weeks previously paid.

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

Costs are taxed to defendant in the amount of one hundred sixty-four and 57/100 (\$164.57).

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

  
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JOSEPH L. WALSH  
DEPUTY WORKERS'  
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Thomas Wertz (via WCES)

Ronald Frank (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.