BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

DEREK FRIEDOW, Claimant, vs. OSAGE EXPRESS, INC., Employer, and SAGAMORE INSURANCE COMPANY, Insurance Carrier, Defendants.	File No. 5060483 ARBITRATION DECISION Head Note No.: 1803

STATEMENT OF THE CASE

Friedow seeks workers' compensation benefits from the defendants, employer Osage Express, Inc. (Osage Express) and insurance carrier Sagamore Insurance Co. (Sagamore) for an alleged injury on August 18, 2017. The undersigned presided over an arbitration hearing on January 10, 2020. Friedow participated personally and through attorney Richard R. Schmidt. The defendants participated by and through Kent M. Smith.

ISSUES

Under rule 876 IAC 4.149(3)(*f*), the parties jointly submitted a hearing report defining the claims, defenses, and issues submitted to the presiding deputy commissioner. The hearing report was approved and entered into the record via an order because it is a correct representation of the disputed issues and stipulations in this case. The parties identified the following disputed issues in the hearing report:

1) What is the nature and extent of permanent disability caused by the stipulated injury?

2) What is the commencement date for permanent partial disability benefits, if any are awarded?

3) Is Friedow entitled to the additional mileage reimbursement?

4) Is Friedow entitled to a penalty under Iowa Code section 86.13.

5) Is Friedow entitled to taxation of the costs listed in Claimant's Exhibit 5 against the defendants?

STIPULATIONS

In the hearing report, the parties entered into the following stipulations:

1) An employer-employee relationship existed between Friedow and Osage Express at the time of the stipulated work injury.

2) Friedow sustained an injury on August 18, 2017, which arose out of and in the course of his employment with Osage Express.

3) The stipulated injury is a cause of temporary disability during a period of recovery, but Friedow's entitlement to temporary or healing period benefits is no longer in dispute.

4) The stipulated injury is a cause of permanent disability.

5) The commencement date for permanent partial disability (PPD) benefits, if any are awarded, is July 10, 2018.

6) At the time of the stipulated injury:

   a) Friedow's gross earnings were seven hundred fifty and 00/100 dollars ($750.00) per week.

   b) Friedow was single.

   c) Friedow was entitled to one exemption.

7) Prior to hearing, the defendants paid to Friedow thirty-two (32) weeks of compensation at the rate of four hundred fifty-nine and 78/100 dollars ($459.78) per week.

The parties' stipulations in the hearing report are accepted and incorporated into this arbitration decision. The parties are bound by their stipulations. This decision contains no discussion of any factual or legal issues relative to the parties' stipulations except as necessary for clarity with respect to disputed factual and legal issues.

FINDINGS OF FACTS

The evidentiary record in this case consists of the following:

- Joint Exhibits (Jt. Ex.) 1 through 3;
- Claimant's Exhibits (Cl. Ex.) 1 through 5;
- Defendants' Exhibits (Def. Ex.) A through B; and

- Hearing testimony by Friedow.

After careful consideration of the evidence and the parties' post-hearing briefs, the undersigned enters the following findings of fact.

Friedow was driving a delivery truck down a gravel road while working for Osage Express on August 18, 2017, when a deer came out of a cornfield. (Hrg. Tr. p. 24) Friedow was unable to stop the truck before it struck the deer. (Hrg. Tr. p. 24) He was driving with his right hand at the twelve o'clock position on the steering wheel at the time of impact. (Hrg. Tr. p. 25) After the collision, Friedow noticed a burning sensation in the outside part of his shoulder, which he believed might be a pulled muscle. (Hrg. Tr. pp. 25–26)

Friedow pulled the truck over to the side of the gravel road to inspect it. (Hrg. Tr. p. 24) The collision had killed the deer and damaged the truck. (Hrg. Tr. p. 24) Friedow telephoned his boss to inform him of the collision and the damage it caused to the truck. (Hrg. Tr. p. 25)

Friedow did not immediately seek care for his shoulder. (Hrg. Tr. p. 27–28) After his shoulder symptoms continued for a couple of weeks, he notified his boss. (Hrg. Tr. p. 29) The defendants accepted the injury for workers' compensation purposes and provided care at HealthWorks with Samuel Hunt, M.D., and Howard Kimm, M.D. (Hrg. Tr. pp. 28–29; Jt. Ex. 1) After magnetic resonance imaging (MRI), Dr. Kimm referred Friedow to an orthopedist. (Jt. Ex. 1, p. 5)

Richard Rattay, M.D., diagnosed Friedow with right shoulder subacromial impingement syndrome with AC joint pain, glenohumeral labral and biceps wear, and a full thickness rotator cuff tear. (Jt. Ex. 2, p. 15) On January 26, 2018, he performed right shoulder arthroscopic subacromial decompression, rotator cuff repair, and distal clavicle resection, labral, biceps and glenohumeral wear and tear debridement. (Jt. Ex. 2, p. 15) With respect to the subacromial decompression, Dr. Ratty noted:

> There was a type 3 acromion noted and significant wear of the acromioclavicular joint with inferior prominence and spurring of the clavicle and acromion at the joint level. A standard anterolateral acromioplasty and distal clavicle resection were performed with a bur. Care was taken to assure adequate decompression between the clavicle and acromion of at least 1 to 1.5 cm. After decompression, rotator cuff was evaluated through all portals and there was a full-thickness tear of the entire supraspinatus noted with retraction.

(Jt. Ex. 2, p. 16)

Friedow was able to return to light-duty work on March 21, 2018, but Dr. Rattay took him off work entirely on April 19, 2018, after a fall he sustained at the office of his physical therapy provider. (Jt. Ex. 3, pp. 29–31; Def. Ex. B, p. 8; Hrg. Tr. pp. 37–38) On May 23, 2018, Dr. Rattay released Friedow to return to work with the restriction of not

using his right arm. (Jt. Ex. 3, p. 32) On July 10, 2018, Dr. Rattay again released Friedow to return to work without any restrictions. (Jt. Ex. 3, p. 33)

The defendants paid Friedow temporary total disability (TTD)/healing period (HP) benefits while he was off work due to his injury and recovery, beginning on January 23, 2018, through July 10, 2018. (Cl. Ex. 3; Def. Ex. A, p. 2) While the defendants paid most of the benefits to which Friedow was entitled when they were due, some were late. (Cl. Ex. 3; Def. Ex. A, p. 2) Based on pages 28 through 33 of Claimant's Exhibit 3, the following table contains weeks during which he was eligible for such benefits and the date on which the defendants issued the check to pay him.

Benefits Week		Benefits Check		
From	**Through**	**Date of Check**	**Date Mailed**	**Amount**
Mar. 20, 2018	Mar. 26, 2018	Mar. 30, 2018	Mar. 30, 2018	$459.78
Apr. 24, 2018	May 7, 2018	May 7, 2018	May 7, 2018	$919.56
Jun. 19, 2018	Jul. 2, 2018	Jul. 2, 2018	Jul. 2, 2018	$919.56
Jul. 10, 2018	Jul. 23, 2018	Jul. 25, 2018	Jul. 25, 2018	$919.56
Aug. 14, 2018	Aug. 27, 2018	Aug. 31, 2018	Aug. 31, 2018	$919.56
Aug. 28, 2018	Sept. 3, 2018	Aug. 31, 2018	Aug. 31, 2018	$459.78
Sep. 18, 2018	Sep. 24, 2018	Sep. 27, 2018	Sep. 27, 2018	$459.78

The defendants did not provide a reason for the delays listed in the table, except for one payment. The check for benefits from April 24, 2018, through May 7, 2018, was late because the claims adjuster was awaiting an update from Friedow's care provider regarding work restrictions. (Cl. Ex. 2, p. 27) The claims adjuster sent Friedow's attorney this information in an email on May 7, 2018, after the payment was late and the day on which the insurance carrier issued the check to Friedow and mailed it. (Cl. Ex. 2, p. 27)

On September 2, 2018, Dr. Rattay used the Fifth Edition of the American Medical Association (AMA) Guides to the Evaluation of Permanent Impairment (Guides) to issue an opinion on the permanent impairment caused by Friedow's injury:

> Using page 476, Figure 16-4, there is a 1% loss for forward flexion. Using page 477, Figure 16-43, there is a 1% loss for abduction. Using page 479, Figure 16-46, there is a 1% loss for external rotation and 1% loss for internal rotation. The combined loss for range of motion deficit is 4%.
>
> Using page 484, Table 16-11, and page 492, Table 16-15, there is a 4% deficit for loss of strength. The combined permanent partial disability of the right upper extremity due to his shoulder and proximal humerus injuries is an 8% disability of the right upper extremity.

(Def. Ex. B, p 19.)

Because Friedow disagreed with Dr. Rattay's impairment rating, he underwent an independent medical examination (IME) with Stanley Mathew, M.D. (Cl. Ex. 1, pp. 1–6) Dr. Mathew reviewed the medical records relating to Friedow's care and performed a physical examination of him. (Cl. Ex. 1, pp. 3–5) Using only Table 16-18 of the Guides, he concluded Friedow sustained a whole person impairment of 20 percent. (Cl. Ex. 1, p. 5) He also assigned Friedow permanent work restrictions including lifting no more than 25 pounds overhead and no repetitive overhead pushing or pulling. (Cl. Ex. 1, p. 5)

In Section 16.7, the Guides provide an introduction on the use of Table 16-18, "Maximum Impairment Values for the Digits, Hand, Wrist, Elbow, and Shoulder Due to Disorders of Specific Joints or Units":

> Conditions not previously described that can contribute to impairments of the hand and upper extremity include bone and joint disorders (Section 16.7a), presence of resection or implant arthroplasty (Section 16.7b), musculotendinous disorders (Section 16.7c), and tendinitis (Section 16.7d), and loss of strength (Section 16.8). The severity of impairment due to these disorders is rated separately according to Tables 16-19 through 16-30 and then multiplied by the relative maximum value of the unit involved as specified in Table 16-18. Appropriate impairment percents are combined with other impairment percents by means of the Combined Values Chart (p. 604).

Guides, § 16.7, p. 498. The Guides further explain:

> Impairments from the disorders considered in this section under the category of "other disorders" are usually estimated by using other impairment evaluation criteria. *The criteria described in this section should be used only when the other criteria have not adequately encompassed the extent of impairment.* Some of the conditions described in this section can be concurrent with each other and with decreased motion because they share overlapping pathomechanics. The evaluator must have good understanding of pathomechanics of deformities and apply proper judgment to avoid duplication of impairment ratings.

Id. at p. 499 (emphasis in original).

Unlike in Dr. Rattay's opinion, there is no discussion in Dr. Mathew's report of the figures the Guides provide specifically for measuring impairment to the shoulder. There is also no indication Dr. Mathew used the Combined Values Chart on page 604. Dr. Mathew did not state his reasoning for using only Table 16-18 of the Guides. Dr. Mathew did not identify which of the "other disorders" Friedow had that required use of Table 16-18 or why other methods of measuring impairment to the shoulder were inadequate in Friedow's case.

For these reasons, Friedow has not met his burden of proof on the question of permanent disability. Dr. Mathew's opinion on permanent impairment is less persuasive

than Dr. Rattay's opinion. Dr. Rattay's opinion on permanent impairment is therefore adopted.

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 after July 1, 2017, the Iowa Workers' Compensation Act, as amended in 2017, applies. Smidt v. JKB Restaurants, LC, File No. 5067766 (App. December 11, 2020).

1. Mileage.

Friedow addressed the issue of unpaid mileage in his post-hearing brief, asserting he was still owed one hundred fifty-four and 60/100 dollars ($154.60). In the defendants' post-hearing brief, they conceded Friedow is entitled to that amount in additional mileage reimbursement. Based on the defendants' brief, this issue is no longer in dispute. If the defendants have not yet paid Friedow additional mileage in the amount of one hundred fifty-four and 60/100 dollars ($154.60), they must do so.

2. Penalty.

As found above, the defendants paid Friedow workers' compensation to which he was entitled after it was due. Friedow is seeking penalty for these late payments. The defendants dispute his entitlement to a 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.

To avoid an award of penalty benefits, the employer must "prove a reasonable or probable cause or excuse for the denial, delay in payment, or termination of benefits." Iowa Code§ 86.13(4)(*b*)(2). An excuse must meet all of the following criteria to be "a reasonable or probable cause or excuse" under the statute:

> (1) The excuse was preceded by a reasonable investigation and evaluation by the employer or insurance carrier into whether benefits were owed to the employee.
>
> (2) The results of the reasonable investigation and evaluation were the actual basis upon which the employer or insurance carrier contemporaneously relied to deny, delay payment of, or terminate benefits.
>
> (3) The employer or insurance carrier contemporaneously conveyed the basis for the denial, delay in payment, or termination of benefits to the employee at the time of the denial, delay, or termination of benefits.

Id. § 86.13(4)(c).

> This paragraph creates a mandatory timeline for the employer to follow in showing it had a "reasonable or probable cause or excuse" for the termination of benefits. Iowa Code § 86.13(4)(c)(1)-(3). First, the employer's excuse for the termination must have been *preceded* by an investigation. *Id.* § 86.13(4)(c)(1). Second, the results of the investigation were "*the actual basis ... contemporaneously*" relied on by the employer in terminating the benefits. Third, the employer "*contemporaneously* conveyed the basis for the ... termination of benefits to the employee *at the time of the ... termination.*" *Id.* § 86.13(4)(c)(3)

Pettengill, 875 N.W.2d at 747 (emphasis in original). "An employer cannot unilaterally decide to terminate an employee's benefits without adhering to Iowa Code section 86.13; to allow otherwise would contradict the language of that section." Id.

"A 'reasonable basis' for denial of the claim exists if the claim is 'fairly debatable.'" Craddock, 705 N.W.2d at 307 (quoting Christensen v. Snap-On Tools Corp., 554 N.W.2d 254, 260 (Iowa 1996)). A claim may be fairly debatable because of a good faith legal or factual dispute. See Covia, 507 N.W.2d at 416 (finding a jurisdictional issue fairly debatable because there were "viable arguments in favor of either party"). "[T]he reasonableness of the employer's denial or termination of benefits does not turn on whether the employer was right. The issue is whether there was a reasonable basis for the employer's position that no benefits were owing." Craddock, 705 N.W.2d at 307–08.

If the employee establishes a "reasonable or probable cause or excuse," no penalty benefits are awarded. However, if the employer fails to meet its burden of proof, penalty benefits must be awarded. The following factors are used in determining the amount of penalty benefits:

- 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.

Friedow has established a prima facie case for penalty by showing the defendants did not pay him benefits to which he was entitled under the Iowa Workers' Compensation Act when they were due. The defendants did not identify a reason for the delay of any of these payments except for one: In that instance, the claims adjuster was waiting for an update on Friedow's work restrictions from his doctor's office. This is a reasonable basis for a delay. However, the claims adjuster did not convey the reason for the delay until after the payment was late.

The delays in this case are relatively short. But the Iowa Supreme Court has made clear, "The application of the penalty provision does not turn on the length of the delay in making the correct compensation payment. Any delay without reasonable excuse entitles the employee to benefits in some amount." Id., at 555 N.W.2d at 236. Therefore, Friedow is entitled to a penalty even though the delays were relatively short.

There were multiple delays in the payment of Friedow's benefits. The defendants did not have an identified reason for all but one of the delays and that reason was conveyed after the payment was late, on the date the defendants issued Friedow's benefits check. Friedow has not identified any prior penalties against Osage. For these reasons, a penalty of one thousand dollars ($1,000.00) is appropriate.

3. Permanent Disability.

"In this state, the right to workers' compensation is purely statutory." Downs v. A & H Const., Ltd., 481 N.W.2d 520, 527 (Iowa 1992) (citing Caylor v. Employers Mut. Casualty Co., 337 N.W.2d 890, 893 (Iowa App. 1983)). The "broad purpose of workers' compensation" is "to award compensation (apart from medical benefits), not for the injury itself, but the disability produced by a physical injury." Bell Bros. Heating and Air Conditioning v. Gwinn, 779 N.W.2d 193, (Iowa 2010) (citing 4 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law § 80.02, at 80–2 (2009)). With the 2017 amendments, the legislature altered how this is done under the Iowa Workers' Compensation Act. Some of these legislative changes are at issue in the current case.

The Iowa Workers' Compensation Act contains a schedule of body parts. See Iowa Code §§ 85.34(2). Compensation for work injuries to body parts listed in the schedule are limited to functional disability over a number of weeks set by the statute. Injuries to body parts not included in the statutory list are considered unscheduled. Disability caused by such injuries is deemed to the whole body and compensation is based on industrial disability, the impact on the injured worker's earning capacity.

Consequently, the maximum amount of compensation to which an injured worker is entitled under the statute can "differ radically" depending on whether the worker's injury is to a scheduled member or the body as a whole. Mortimer, 502 N.W.2d at 15. "'The very purpose of the schedule is to make certain the amount of compensation in the case of specific injuries and to avoid controversies . . . .'" Gilleland v. Armstrong Rubber Co., 524 N.W.2d 404, 407 (Iowa 1994) (quoting Dailey v. Pooley Lumber Co., 10 N.W.2d 569, 571 (Iowa 1943)). "'The schedule brings a windfall to the worker in some cases and gross hardship to the worker in others.'" Id. at 409 (Lavarto, J., concurring specially) (quoting Graves v. Eagle Iron Works, 331 N.W.2d 116, 119–20 (Iowa 1983 (McCormick, J., concurring specially)). Thus, the legislative purpose of the statutorily prescribed schedule is not so much beneficence to the worker, though that sometimes is the result, as cost certainty and limiting controversies resolved by litigation. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181, 188 (Iowa 1980) (citing Cedar Rapids Cmty. Sch. Dist. v. Cady, 278 N.W.2d 298, 299 (Iowa 1979); Wetzel v. Wilson, 276 N.W.2d 410, 411-12 (Iowa 1979); and Hoenig v. Mason & Hanger, Inc., 162 N.W.2d 188, 190 (Iowa 1968)) ("The primary purpose of the workers' compensation statute is to benefit the worker and his or her dependents, insofar as statutory requirements permit.").

Before 2017, the shoulder was not included in the statutory list of scheduled members. See Second Injury Fund v. Nelson, 544 N.W.2d 258, 269 (Iowa 1995) (citing Lauhoff Grain Co. McIntosh, 395 N.W.2d 834, 837–39 (Iowa 1986) and Alm v. Morris Barick Cattle Co., 38 N.W.2d 161, 163 (Iowa 1949)). Instead, shoulder injuries such as the one at issue in this case were considered unscheduled injuries under Iowa law. Alm, 38 N.W.2d at 163; Westling v. Hormel Foods Corp., 810 N.W.2d at 252 (Iowa 2012). Permanent partial disability caused by shoulder injuries that occurred before July 1, 2017, was considered industrial. Id.; Westling, 810 N.W.2d at 252. Compensation

was therefore based on the loss of earning capacity the worker suffered due to the work-related shoulder injury. Id.; Westling, 810 N.W.2d at 252.

In 2017, the legislature enacted a bill that made multiple changes to the statutory framework governing workers' compensation in Iowa. See 2017 Iowa Acts ch. 23. As part of the 2017 amendments, the legislature expanded the schedule by adding the shoulder to the codified list of scheduled members. 2017 Iowa Acts ch. 23, § 7 (now codified at Iowa Code § 85.34(2)(*n*)). Under the statute, as amended, work injuries to the shoulder that occur on or after July 1, 2017, are treated as scheduled member injuries and the award of benefits is consequently limited in the interest of cost certainty and limiting controversies to the injured employee's functional impairment.

The legislature did not define the term "shoulder" when it amended section 85.34(2). See 2017 Iowa Acts ch. 23, § 7. The Commissioner has found the "shoulder" is not limited to the glenohumeral joint. Deng v. Farmland Foods, File No. 5061883 (App. Sep. 29, 2020); Chavez v. MS Tech., LLC, File No. 5066270 (App. Sep. 30, 2020). The test is whether the affected body part is entwined with the glenohumeral joint and is important to the shoulder's function. Id.; Chavez, File No. 5066270. Under agency precedent, injuries to the rotator cuff and labrum, as well as those that result in a subacromial decompression, constitute injuries to the shoulder under the statute. Id.; Chavez, File No. 5066270. Therefore, Friedow's injury in the current case constitutes one to the shoulder and is therefore treated as a scheduled member under applicable Iowa law.

Another requirement the legislature added to the Iowa Workers' Compensation Act in 2017 governs the determination of functional disability. Before the 2017 amendments, the agency could use all evidence in the administrative record, as well as agency expertise, when determining the permanent disability of an injured worker. See, e.g., Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417, 421 (Iowa 1994). Under agency rules before the 2017 amendments, the Guides were considered a "useful tool in evaluating disability." Seaman v. City of Des Moines, File Nos. 5053418, 5057973, 5057974 (App. Oct. 11, 2019) (quoting Bisenius v. Mercy Med. Ctr., File No. 5036055 (App. Apr. 1, 2013)); see also Westling, 810 N.W.2d at 252. However, in cases involving injuries on or after July 1, 2017, the Guides are now more than a tool; they are the sole means by which impairment may be determined.

> [W]hen 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 § 85.34(2)(*x*).

Thus, the Iowa Workers' Compensation Act now limits the determination of what, if any, permanent disability Friedow has sustained to only his functional impairment. In making that determination, the agency is prohibited from using lay testimony or agency expertise by Iowa Code section 85.34(2)(*x*). Under the statute, that determination must be made "solely by utilizing" the Fifth Edition of the Guides.

In Friedow's post-hearing brief, he contends Dr. Mathew's opinion on permanent impairment is more persuasive than Dr. Rattay's because Friedow underwent a distal clavicle resection, which the Guides state results in a ten percent impairment rating to the upper extremity under Table 16-27 on page 506 of the Guides. While Dr. Mathew's report notes under its "Impression" header, "Status post right shoulder arthroscopic surgery with subacromial decompression distal clavicle, resection and debridement," the report contains no discussion of this part of the procedure when opining on impairment. Nor does the report contain citation to or discussion of Table 16-27. Friedow effectively advocates interpreting Dr. Mathew's report to include something that the report's text does not contain in its permanent impairment assessment.

That being said, a deputy may, in at least one circumstance, assign a minimum, compulsory impairment rating for a surgical procedure using the Guides despite the prohibition on use of agency expertise in Iowa Code section 85.34(2)(*x*). In the context of determining whether the Second Injury Fund of Iowa is entitled to a credit, the Commissioner has held:

> In this case, it is undisputed claimant underwent a left total knee replacement prior to his April 23, 2018, work injury. The AMA Guides, Fifth Edition provides a minimum, compulsory impairment rating of 37 percent for a total knee replacement. It is unnecessary for a deputy commissioner to utilize lay testimony or agency expertise in this scenario. The deputy commissioner is not acting as a medical professional and determining the appropriate impairment rating to assign based on any physical findings. Rather, the deputy commissioner is utilizing the AMA Guides, Fifth Edition to locate a minimum, compulsory rating for purposes of a credit. Such a finding does not require "physical evaluations, a medical history review, consideration of past and subsequent injuries, apportionment issues, etc." as asserted by claimant. A deputy commissioner does not act as a medical professional or utilize agency expertise when converting impairment ratings or locating a minimum, compulsory impairment rating as provided for in The Guides.

Harrell v. Denver Findley & Sons, Inc., File No. 5066742 (App. Oct. 6, 2020).

The question presented here is different. The claimant has the burden of proof and his expert's opinion is unpersuasive on permanent impairment. Under these circumstances, is it appropriate for the agency to:

1) Reject the impairment rating made by the claimant's treating physician based solely on the Guides, with express citation to the parts of the Guides used and discussion of the claimant's limitations; and

2) Use the Guides to assess an impairment rating based on the surgical procedure used when neither the claimant's nor the defendants' expert witness has expressly done so; and

3) Adopt that impairment rating.

Unlike in Harrell, this involves rejecting a doctor's expert opinion and at least augmenting the claimant's IME report with additional reasoning not contained in the IME report issued by the claimant's expert. Doing as Friedow advocates requires substituting the agency's judgment for the judgment of experts as reflected in their express opinions, which are in evidence. While this might be done "solely by utilizing" the Guides, as section 85.34(2)(*x*) requires, it necessarily requires use of agency expertise, which the statute prohibits. It is therefore a step too far under the law.

For the reasons discussed above, Friedow has not met his burden of proof on the question of permanent disability. Dr. Rattay's opinion on permanent impairment is more persuasive than Dr. Mathew's opinion. Friedow is not entitled to any permanent partial disability (PPD) benefits in excess of those which the defendants have voluntarily paid based on Dr. Rattay's opinion.

4. Costs.

"All costs incurred in the hearing before the commissioner shall be taxed in the discretion of the commission." Iowa Code § 86.40. "Fee-shifting statutes using 'all costs' language have been construed 'to limit reimbursement for litigation expenses to those allowed as taxable court costs.'" Des Moines Area Reg'l Transit Auth. v. Young, 867 N.W.2d 839, 846 (Iowa 2015) (quoting Riverdale v. Diercks, 806 N.W.2d 643, 660 (Iowa 2011)). Statutes and administrative rules providing for recovery of costs are strictly construed. Id. (quoting Hughes v. Burlington N. R.R., 545 N.W.2d 318, 321 (Iowa 1996)).

Friedow seeks taxation of the cost of his attorney's conference with a doctor. (Cl. Ex. 5) Rule 876 IAC 4.33 allows the agency to tax "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." Agency rules do not authorize taxation of the cost of a conference call with a treating physician. As an administrative rule that provides for recovery of costs, Rule 876 IAC 4.33 is strictly construed. Young, 867 N.W.2d at 846 (quoting Hughes v. Burlington N. R.R., 545 N.W.2d 318, 321 (Iowa 1996)). Therefore, this cost is not taxable.

The filing fee is a different story. Under agency rules, hearing costs shall include filing fees when appropriate, including convenience fees incurred by using the payment gateway on the Workers' Compensation Electronic System (WCES). 876 IAC 4.33. "The

filing fee may be taxed as a cost to the losing party in the case. If the filing fee would impose an undue hardship or be unjust in the circumstances for the losing party, the filing fee may be taxed as costs to the winning party in the case." 876 IAC 4.8(2)(f), 4.33. Therefore, it is appropriate to tax the filing fee to the defendants in this case because Friedow was owed mileage reimbursement (which the defendants ultimately conceded in their brief) and entitled to a penalty, even if he did not prevail on the disputed issue of permanent disability.

ORDER

Based on the above findings of fact and conclusions of law, it is ordered:

1) If the defendants have not yet paid Friedow additional mileage in the amount of one hundred fifty-four and 60/100 dollars ($154.60), they shall do so.

2) The defendants shall pay to Friedow a penalty of one thousand and 00/100 dollars ($1,000.00).

3) Friedow shall take nothing more in permanent partial disability benefits.

4) The defendants shall file subsequent reports of injury as required by rule 876 IAC 3.1(2).

5) The one hundred and 00/100 dollars ($100.00) Friedow paid as a filing fee is taxed against the defendants.

Signed and filed this 3rd day of January, 2022.

BENJAMIN G. HUMPHREY
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Richard Schmidt (via WCES)

Kent Smith (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.