BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

MANUEL ROMO, Claimant, vs. FARMLAND FOODS, Employer, and SAFETY NATIONAL, Insurance Carrier, Defendants.	FILED JUL 27 2018 WORKERS COMPENSATION	File No. 5055485 ARBITRATION DECISION Head Note Nos.: 1803, 2500

STATEMENT OF THE CASE

Manuel Romo filed a petition for arbitration seeking workers' compensation benefits from Smithfield Foods (f/k/a Farmland Foods), as the employer, and Safety National, its insurance carrier.

The matter came on for hearing on November 13, 2017, before Deputy Workers' Compensation Commissioner Joseph L. Walsh in Des Moines, Iowa. The record in the case consists of Joint Exhibits 1 through 12; Claimant's Exhibits 1 through 5; Defense Exhibit A; as well the sworn testimony of claimant, Manuel Romo.

Mr. Romo's primary language is Spanish. Ana Rodriguez was appointed and served as the Spanish language interpreter with the consent of all parties.

Roxann Zuniga was appointed the court reporter for this hearing. The parties briefed this case and the matter was fully submitted on January 8, 2018.

SUMMARY OF ISSUES AND STIPULATIONS

The parties submitted a hearing report stating the stipulations and issues. That hearing report has been accepted by the undersigned and is now an Order. All stipulations contained therein are deemed enforceable.

The parties have asked the agency to determine four disputed issues: (1) the

nature and extent of claimant's industrial disability; claimant contends he is odd-lot permanent total disability, while defendants contend he is capable of working; (2) whether penalty benefits are required for delayed/underpaid benefits; (3) whether medical expenses set forth are owed under section 85.27; (4) whether claimant's vocational report should be taxed as a cost.

FINDINGS OF FACT

Manuel Romo was 42 years old as of the date of hearing. He is married with two children, ages 17 and 13. He was born in California and is an American citizen. He spent time in Mexico as a child as well. His native language is Spanish. Based upon the record before me, it is unclear how much English he is able to speak. He is obviously more comfortable communicating in Spanish. He attended school through the 9th or 10th grade.

Mr. Romo has worked in the meat processing industry for most of his life. Prior to beginning employment in 2005 at Farmland, he had worked for several other meat processing or packing plants, including IBP, Excel, Gibbon Packing, BPI and Premium Foods.

Based upon the record before me, prior to beginning work at Farmland, Mr. Romo was basically a healthy man. His arms and shoulders were unimpaired. He is right handed.

In January 2015, Mr. Romo was working for Farmland as a ham skinner. He lifted hams and placed them into a machine to be skinned. Then he threw them onto a line. On January 16, 2015, Mr. Romo was performing his normal job duties. As he reached for a ham on that date, his co-worker on the line cut his right hand, severing his tendons.

The defendants directed Mr. Romo's medical treatment. He received initial treatment that day at Crawford County Memorial Hospital. The emergency department diagnosed a "4 cm laceration right hand, right 3rd finger extensor tendon laceration and possible nerve injury." (Joint Exhibit 1, page 1) The wound was closed. Mr. Romo was placed in a splint and referred to a specialist. (Jt. Ex. 1, p. 1)

On January 20, 2015, Jack McCarthy, M.D., performed surgery on his injured right hand and finger. (Jt. Ex. 3) A short time later, Dr. McCarthy noted "symptoms of early CRPS." (Jt. Ex. 2, p. 9) Mr. Romo then followed up with aggressive courses of both physical and occupational therapy at St. Anthony Regional Hospital. Dr. McCarthy placed Mr. Romo on Neurontin in May 2015. (Jt. Ex. 2, p. 11) By June, Dr. McCarthy attempted to place Mr. Romo back to regular duty. Unfortunately, in August 2015, the extensor tendons spontaneously "erupted." (Jt. Ex. 2, p. 13) Dr. McCarthy stated claimant still had soreness and a burning pain consistent with "the mild residual from his CRPS." (Jt. Ex. 2, p. 13) Dr. McCarthy released claimant again without restrictions on

September 9, 2015.

Mr. Romo's difficulties, however, continued and worsened. In November 2015, Dr. McCarthy began to note left shoulder pain accompanying the right hand and finger difficulties. (Jt. Ex. 2, p. 19) Mr. Romo believed this was from overuse or overcompensation. In December 2015, his working diagnoses were: (1) Status post right long finger extensor tendon repair zone 5; (2) reflex sympathetic dystrophy right arm; (3) right trigger finger, fifth; and (4) tenosynovitis left arm with humeral and forearm involvement. (Jt. Ex. 2, p. 21) He continued conservative measures and took him off work again for a period to get the symptoms to calm down.

In January 2016, Mr. Romo underwent functional capacity testing which placed him in the medium work classification along with fairly significant restrictions to avoid firm grasping and only occasionally perform simple grasping or pinching. (Jt. Ex. 6) Some lifting restrictions were also imposed. (Jt. Ex. 6, p. 67) On January 28, 2016, Dr. McCarthy placed claimant at maximum medical improvement (MMI) relative to his right hand injury. He assigned a 20 percent rating to his right upper extremity. (Jt. Ex. 2, p. 28) At this point, Mr. Romo was back working for the employer in a position on the line.

On March 4, 2016, Mr. Romo began experiencing left shoulder and chest pain, which he thought were related to his injury. He went to the Crawford County Memorial Hospital on that date and had a full work up for chest pain and hypertension. The medical note documented the following:

> The patient is a 40-year-old Hispanic male who is a smoker presents with a 1-2 hour history of left-sided chest and arm pain. He admits he has had arm pain for some time and it seems to be worse when he is at work [*sic*] Farmland on the line, but he has never had the chest pain like he did this morning. He said it did make him feel short of breath and he went to the plant nurse and was told his blood pressure was way up. They did give him an aspirin and sent him to the ER. He described the pain as a pressure like or a heaviness and not associated with any palpitations, syncope, edema, nausea or vomiting, or diaphoresis. He admits his blood pressure runs high, but he does not take medication for it and he is unsure about any family history for coronary artery disease.

(Jt. Ex. 1, p. 2) He was sent reluctantly to Creighton in Omaha for further evaluation by specialists. A full work up was performed there which ruled out heart attack. (Jt. Ex. 7, pp. 71-78)

Later in March 2016, Dr. McCarthy continued conservative care on his right hand and left arm and shoulder. (Jt. Ex. 2, p. 30) He had an injection on that date. In May 2016, Dr. McCarthy placed Mr. Romo at MMI. He provided a 10 percent disability rating for his left upper extremity. (Jt. Ex. 2, p. 34)

Mr. Romo underwent an independent medical evaluation (IME) by D.M. Gammel, M.D., in June 2016. A report was prepared on July 26, 2016. (Jt. Ex. 8) Dr. Gammel reviewed the entire medical history in detail and performed a thorough evaluation resulting in the following diagnoses:

> Diagnoses include laceration extensor aspect right long finger at zone 5 extensor tendon and intraarticular laceration metacarpophalangeal joint right long finger, right hand 5th trigger finger, a modification of reflex sympathetic dystrophy right arm, tenosynovitis left arm with humeral and forearm involvement, progressive left lateral epicondylitis, anxiety, and depression.

(Jt. Ex. 8, p. 97) Dr. Gammel causally connected all these conditions to the work injury, January 16, 2015. Dr. Gammel also specifically found that the treatment Mr. Romo received at Crawford County Hospital was connected to the work injury; however, this opinion is unexplained. Dr. Gammel also provided specific impairment ratings for the right and left upper extremities, finding a 20 percent loss on the right side and a 15 percent loss on the left.

Thereafter, Mr. Romo continued to experience fairly severe left shoulder pain and eventually obtained an MRI which showed a tear. In August 2016, Dr. McCarthy noted the following. "Obviously he is a motivated gentleman who has continued to have significant restrictions. We have done extensive evaluation. He hasn't been able to find a position within these duties. With the failure to be able to return to work, he may lose his coverage for his home, car, kids, etc." (Jt. Ex. 2, p. 38) Surgical repair (left subscapularis repair with biceps tenodesis and tenotomy) was performed at the end of August 2016. After surgery, Mr. Romo underwent physical and occupational therapy again, but continued to experience significant pain and limitations. He continued to follow up with Dr. McCarthy after the surgery through February 2017. (Jt. Ex. 2, pp. 40-45) Dr. McCarthy was worried about Mr. Romo's reliance on pain medications.

On March 30, 2017, John Massey, M.D., at the Nebraska Spine + Pain Center, performed a comprehensive medical review for Mr. Romo. He recommended he discontinue Gabapentin and start Lyrica. (Jt. Ex. 10, p. 172) In May 2010, Michael Longley, M.D., from the same clinic, followed up with Mr. Romo after checking his cervical spine (including films). He diagnosed minimal degenerative disease of the cervical spine. (Jt. Ex. 10, pp. 177-78) Mr. Romo underwent a second functional capacity evaluation (FCE) in June 2017, at Integrity Physical Therapy. He was again placed in the medium work classification with various restrictions on his lifting, pushing, pulling and carrying. In particular, he can only reach overhead occasionally. (Jt. Ex. 12, p. 185) The lifting restrictions did not change dramatically between his first FCE (in January 2016). (Jt. Ex. 12, p. 186) The second test did allow him to perform firm grasping and pinching on a constant basis. (Jt. Ex. 12, p. 187)

In August 2017, claimant underwent a defense medical evaluation with Phillip

Essay, M.D., at Nebraska Spine + Pain Center. (Jt. Ex. 10, p. 179) After reviewing the medical history and evaluating Mr. Romo, Dr. Essay ruled out the diagnosis of CRPS. (Jt. Ex. 10, p. 182) He agreed with the June 2017 FCE restrictions. Regarding the right hand injury, Dr. Essay stated, "while I do not doubt that Mr. Romo has some lingering pain into the right hand, the diagnostic EMG exam was within normal limits and his pain complaints do not rise to the level of complex regional pain syndrome. It is my opinion that Mr. Romo has not sustained permanent impairment due to the laceration of the right hand." (Jt. Ex. 10, p. 183) He deferred to Dr. McCarthy on the right shoulder.

Mr. Romo was re-evaluated by Dr. McCarthy on September 13, 2017. Dr. McCarthy reluctantly continued him on his narcotic pain medications. (Jt. Ex. 2, pp. 47-48) He recommended Mr. Romo not perform any overhead work. (Jt. Ex. 2, p. 48)

Mr. Romo underwent a second IME with his chosen provider, WorkFit, in July 2017, and the report was produced on September 28, 2017. (Jt. Ex. 8, p. 123) Mark Shirley, D.O., performed a review of the records and a thorough physical examination, updating the opinions of Dr. Gammel. He made the following diagnoses.

> Diagnoses include status post-surgical repair of right hand 3rd digit extensor mechanism subsequent to laceration of the extensor tendon and intraarticular laceration of the metacarpophalangeal joint on 16 January 2015, status post-surgical repair of the left subscapularis partial (40%) rotator cuff tear and long head of biceps tenodesis and tenotomy on 25 August 2016, chronic pain in the right hand and right hand digits, chronic pain in the left shoulder and upper arm, and depression.

(Jt. Ex. 8, p. 143) He connected all these conditions to Mr. Romo's work injury and placed him at maximum medical improvement. He further recommended pain management treatment for Mr. Romo's ongoing symptoms. For the impairment ratings, he assessed a 13 percent right upper extremity impairment and an 18 percent left upper extremity rating. (Jt. Ex. 8, p. 146) He did not specifically diagnose RSD or CRPS; however, he did include impairment ratings for the pain. Regarding restrictions, Dr. Shirley concurred with the restrictions from the June 2017 FCE, except that he recommended no climbing ladders and "seldom" forceful pinching. (Jt. Ex. 8, p. 144) I find Dr. Shirley's medical opinions to be highly credible.

In addition to the medical evidence submitted at hearing, claimant offered two vocational reports from Ted Stricklett, M.S., of Stricklett & Associates. (Cl. Exs. 1 and 2) In October 2017, Mr. Stricklett provided three different assessments of Mr. Romo's loss of earning capacity.

> In assessing the impact of Mr. Romo's injuries upon his employability and "earning capacity", I have considered several factors that are relevant to a determination of "industrial disability" in a case where an individual has sustained a permanent medical impairment and also has permanent

> restrictions associated with that impairment.
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> As of this report date, Mr. Romo is 42 years of age and does not possess a high school or GED diploma.
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> When formulating my opinions, I will provide three analyses. One analysis will take into consideration the opinion of Michael Longley. A second analysis will take into consideration the restrictions that have been identified in the FCE report and endorsed by Dr. Essay and Dr. Shirley. A third analysis will take into consideration the restrictions that have been identified by Dr. Jack McCarthy.

(Cl. Ex. 2, pp. 3-4) Utilizing only the opinion of Dr. Longley, Mr. Stricklett provided an opinion of no loss of earning capacity. Utilizing the opinions of Dr. Essay and Dr. Shirley, Mr. Stricklett opined that claimant has a loss of earning capacity between 55 and 70 percent. And utilizing the medical opinions of Dr. McCarthy, he opined that Mr. Romo has between a 75 to 100 percent loss of earning capacity. Mr. Stricklett offered a number of specific opinions about Mr. Romo's employability as well. While I find that Mr. Stricklett's opinions do shed some light on his ability to earn wages in the competitive job market, his specific numbers are not of great use.

Throughout most of 2017, Mr. Romo worked light duty for the employer. I find this work was essentially "make work," or not a real position. In September 2017, he signed a permanent restrictions sheet for the employer acknowledging the following permanent restrictions:

- floor to shoulder level- 29# occasionally and 24# frequently.
- Shoulder to overhead lift- 12# occasionally and 9# frequently.
- Pushing no greater than 86# occasionally and pulling no greater than 63# occasionally.

  Occasional overhead reach.

(Cl. Ex. 3) By the terms of this form, Mr. Romo was given 60 days to find a bid job within these restrictions. "I will be allowed 60 days from today [9-6-17] to find such a bid job. If at that time I have not found a job, the company will discontinue "make work" for me." (Cl. Ex. 3) He would be placed on a leave of absence and eventually terminated. At the time of hearing, claimant had not secured employment within this process. I find it highly unlikely that he will.

William Mishnick, the employer's safety manager, testified credibly at hearing. He testified that there were positions within the plant Mr. Romo could perform within the restrictions from his June 2017 FCE. He admitted he did not factor in Dr. McCarthy's restrictions against overhead work, or Dr. Shirley's recommendations.

Claimant testified he has ongoing chronic pain in his right hand and his left shoulder and upper arm. This pain significantly interferes with his activities of daily living. He had not secured a regular bid job at the time of hearing.

CONCLUSIONS OF LAW

The first question is the nature and extent of claimant's industrial disability. The claimant alleges he is an odd-lot worker and is totally disabled. The defendants dispute this and contend claimant has suffered only a minor industrial loss.

Since claimant has an impairment to the body as a whole, an industrial disability has been sustained. Industrial disability was defined in Diederich v. Tri-City R. Co., 219 Iowa 587, 258 N.W. 899 (1935) as follows: "It is therefore plain that 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 the 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. Section 85.34.

Total disability does not mean a state of absolute helplessness. Permanent total disability occurs where the injury wholly disables the employee from performing work that the employee's experience, training, education, intelligence, and physical capacities would otherwise permit the employee to perform. See McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Diederich v. Tri-City R. Co., 219 Iowa 587, 258 N.W. 899 (1935).

A finding that claimant could perform some work despite claimant's physical and educational limitations does not foreclose a finding of permanent total disability, however. See Chamberlin v. Ralston Purina, File No. 661698 (App. October 1987); Eastman v. Westway Trading Corp., II Iowa Industrial Commissioner Report 134 (App. May 1982).

In Guyton v. Irving Jensen Co., 373 N.W.2d 101 (Iowa 1985), the Iowa court formally adopted the "odd-lot doctrine." Under that doctrine a worker becomes an

odd-lot employee when an injury makes the worker incapable of obtaining employment in any well-known branch of the labor market. An odd-lot worker is thus totally disabled if the only services the worker can perform are "so limited in quality, dependability, or quantity that a reasonably stable market for them does not exist." Id., at 105.

Under the odd-lot doctrine, the burden of persuasion on the issue of industrial disability always remains with the worker. Nevertheless, when a worker makes a prima facie case of total disability by producing substantial evidence that the worker is not employable in the competitive labor market, the burden to produce evidence showing availability of suitable employment shifts to the employer. If the employer fails to produce such evidence and the trier of facts finds the worker does fall in the odd-lot category, the worker is entitled to a finding of total disability. Guyton, 373 N.W.2d at 106. Factors to be considered in determining whether a worker is an odd-lot employee include the worker's reasonable but unsuccessful effort to find steady employment, vocational or other expert evidence demonstrating suitable work is not available for the worker, the extent of the worker's physical impairment, intelligence, education, age, training, and potential for retraining. No factor is necessarily dispositive on the issue. Second Injury Fund of Iowa v. Nelson, 544 N.W.2d 258 (Iowa 1995). Even under the odd-lot doctrine, the trier of fact is free to determine the weight and credibility of evidence in determining whether the worker's burden of persuasion has been carried, and only in an exceptional case would evidence be sufficiently strong as to compel a finding of total disability as a matter of law. Guyton, 373 N.W.2d at 106.

At the time of hearing, Mr. Romo was 42 years old. He has no high school diploma or GED. His entire work history has essentially been in the meatpacking industry.

I find that Dr. Shirley has set forth the most credible assessment of Mr. Romo's diagnoses (and permanent impairment):

> Diagnoses include status post-surgical repair of the right hand 3rd digit extensor mechanism subsequent to laceration of the extensor tendon and intraarticular laceration of the metacarpophalangeal joint on 16 January 2015, status post-surgical repair of left subscapularis partial (40%) rotator cuff tear and left long head of biceps tenodesis and tenotomy on 25 August 2016, chronic pain in the right hand and right hand digits, chronic pain in the left shoulder and upper arm, and depression.

(Jt. Ex. 8, p. 143) While he did not diagnose CRPS, he did observe and rate Mr. Romo's ongoing and credible complaints of pain.

The determination of restrictions in this case is quite significant. The employer has chosen to abide only by the June 2017 FCE restrictions, while the claimant points out a number of other recommended restrictions. The June 2017 FCE restrictions are summarized in the restrictions sheet Mr. Romo and the employer signed in September

2017, summarized as follows:

- floor to shoulder level- 29# occasionally and 24# frequently.
- Shoulder to overhead lift- 12# occasionally and 9# frequently.
- Pushing no greater than 86# occasionally and pulling no greater than 63# occasionally.

Occasional overhead reach.

(Cl. Ex. 3) Dr. McCarthy, however, also recommended claimant "avoid reaching and overhead work" in September 2017. Dr. Shirley also recommended claimant avoid ladders completely and seldom engage in "forceful grasping" which was a restriction set forth in the 2016 FCE.

Given this record, I am not entirely certain whether Mr. Romo can perform any overhead work at all. Even the June 2017 FCE recommended claimant should only reach overhead occasionally, but nevertheless allowed him to lift up to 9 pounds overhead constantly. (Jt. Ex. 12, p. 186) This appears contradictory on its face. The clarification used on the same date specified that he can only reach overhead occasionally. (Jt. Ex. 12, p. 185) In the report itself, it is noted that he could only occasionally reach overhead. (Jt. Ex. 12, p. 189) Furthermore, it is noted that Mr. Romo had abnormal "movement pattern" when engaged in overhead reaching. (Jt. Ex. 12, p. 193) In addition, the FCE documented that Mr. Romo required verbal cues to "maintain left hand hand [*sic*] in hand-hold of lifting box" when performing the task. (Jt. Ex. 12, p. 192) In September 2017, Dr. McCarthy specifically recommended Mr. Romo "avoid reaching and overhead work." (Jt. Ex. 2, p. 48) The greater weight of evidence supports a finding that Mr. Romo should not engage in any type of frequent overhead work.

The other question regarding restrictions is whether Mr. Romo should have a restriction on his forceful grasping. The June 2017 FCE allowed forceful grasping, however the January 2016 FCE recommended against it, as did Dr. Shirley. I find that it is unlikely that Mr. Romo will be able to engage in the type of forceful grasping required in a meatpacking environment given the damage to his right hand.

For these reasons, I find that Mr. Romo is highly unlikely to be successful in engaging in competitive employment in the meatpacking industry. Meat processing is the only job the claimant has ever really performed. With no diploma or GED, limited English language skills and a total inability to perform his past work in the competitive job market, the greater weight of evidence supports the finding that the claimant is, in fact, an odd-lot employee. The burden shifts to the employer to provide evidence demonstrating the claimant is employable in the competitive job market.

The safety manager testified there were several jobs at Farmland Mr. Romo

could perform if his restrictions against overhead work, reaching and forceful grasping are not considered. Having found that Mr. Romo should not engage in these activities, I reject this evidence as proof of available work. The claimant had been working a light-duty "make work" type of position for the employer up to the time of hearing. While this position was undoubtedly accommodated, I find that it is evidence of employability in the competitive market and precludes a finding of permanent total disability. He was able to perform some janitorial and cafeteria work. In addition, at the time of hearing, claimant was still attempting to bid permanent jobs in the plant.

In this assessment, I have not considered claimant's cervical spine condition as the evidence at this time does not specifically connect such condition to his work injury. I also note that while claimant has been noted to have depression which is connected to his work injury, there is little evidence as to how this affects his employability. He did take a leave of absence for depression in December 2016; however, this condition has limited applicability to my finding of permanent disability.

Having considered all of the factors of industrial disability, I find the claimant has suffered an 85 percent loss of earning capacity as a result of his work injury at Farmland. This entitles claimant to 425 weeks of permanent partial disability benefits commencing January 28, 2016, as stipulated by the parties.

The next issue is whether the claimant is entitled to medical expenses as attached to the hearing report.

The employer shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance and hospital services and supplies for all conditions compensable under the workers' compensation law. The employer shall also allow reasonable and necessary transportation expenses incurred for those services. The employer has the right to choose the provider of care, except where the employer has denied liability for the injury. Iowa Code section 85.27 (2013).

Claimant seeks expenses for his visit to Crawford County Hospital in the amount of $5,508.90. (See Hearing Report Attached Medical Expenses) He was directed to leave work that day and go to the hospital for left shoulder and left-sided chest pain he subjectively believed was related to his shoulder injury. The employer contends he was directed to leave work because of elevated blood pressure unrelated to his work injury. Dr. Gammel opined these bills were causally connected to his work injury but provided no analysis as to how it was so related. None of the treatment he received at the hospital was connected to his work injury in any way. While it is possible his blood pressure elevated because of pain in his shoulder, no physician has provided an opinion that this is the case. In spite of Dr. Gammel's unexplained conclusion that this bill is causally connected to the work injury, I find that the claimant has not met his burden of proof. The records demonstrate that this type of chest pain and pressure was new. While it may not have been clear to him or anyone what exactly was happening, the greater weight of evidence supports the finding that his evaluation at Crawford

County Hospital is not related to his work injury. I am sympathetic to the claimant's own belief that he was seeking treatment for his shoulder; however, the evidence demonstrates that all of the treatment he actually received was to rule out a heart condition.

The next issue is whether claimant is entitled to penalty benefits.

Claimant also seeks an award of penalty benefits pursuant to Iowa Code section 86.13. 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 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.
>
> c. In order to be considered a reasonable or probable cause or excuse under paragraph "b," an excuse shall satisfy all of the following criteria:
>
> (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.

I have reviewed the evidence of payments to the claimant. This injury began as an injury to claimant's right hand. Over time it developed into a left shoulder injury with elements of depression and possible CRPS. The defendants, however, took appropriate timely steps to continue to investigate the matter as it progressed. The employer paid a total of 10 percent disability; however, the determination of payments was based upon timely medical evidence and reasonable investigation. I find the claimant has failed to meet his burden of proof that he is entitled to any penalty.

The next issue is costs.

Iowa Code section 86.40 states:

Costs. 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. 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).

I find the claimant's costs set forth are reasonable.

ORDER

THEREFORE IT IS ORDERED:

Defendants shall pay the claimant four hundred twenty-five (425) weeks of permanent partial disability benefits at the rate of six hundred nine and 42/100 dollars ($609.42) per week commencing January 28, 2016.

Defendants shall pay accrued weekly benefits in a lump sum.

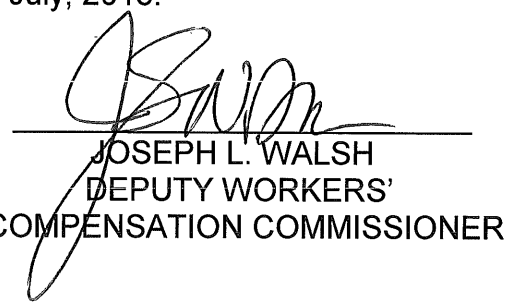
Defendants shall pay interest on unpaid weekly benefits awarded herein as set forth in Iowa Code section 85.30.

Defendants shall be given credit for the fifty (50) 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 defendants.

Signed and filed this 27th day of July, 2018.



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Right to Appeal: This decision shall become final unless you or another interested party appeals within 20 days from the date above, pursuant to rule 876-4.27 (17A, 86) of the Iowa Administrative Code. The notice of appeal must be in writing and received by the commissioner's office within 20 days from the date of the decision. The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday. The notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 1000 E. Grand Avenue, Des Moines, Iowa 50319-0209.