BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

KEVIN KOELLER, Claimant, vs. CARDINAL LOGISTICS MGMT. CORP., Employer, and ACE AMERICAN INSURANCE CO., Insurance Carrier, Defendants.	File No. 5068062 ARBITRATION DECISION Head Notes: 1402.20, 1402.40, 1803, 2907, 4000.2

STATEMENT OF THE CASE

Kevin Koeller, claimant, filed a petition in arbitration seeking workers' compensation benefits from Cardinal Logistics Management Corporation, employer, and Ace American Insurance Company, insurance carrier, as defendants. This case was scheduled to be an in-person hearing occurring in Des Moines. However, due to the outbreak of a pandemic in Iowa, the Iowa Workers' Compensation Commissioner ordered all hearings to occur via video means, using CourtCall. Accordingly, this case proceeded to a live video hearing via CourtCall with all parties and the court reporter appearing remotely.

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

Kevin Koeller was the only witness to testify live at trial. The evidentiary record also includes Joint Exhibits 1-5, Claimant's Exhibits 1-9, and Defendants' Exhibits A-F. Defendants filed an objection to claimant's exhibit 7 as untimely; the objection was overruled and claimant's exhibit 7 was admitted into evidence. Claimant's exhibit 7 was a rate calculation. The record was left open at the end of the hearing for 30 days to allow defendants to submit their own rate calculation. All other exhibits were received without objection. On January 8, 2021, defendants advised the undersigned that they

would not be submitting any additional evidence; the evidentiary record closed at that time.

The parties submitted post-hearing briefs on January 25, 2021, at which time the case was fully submitted to the undersigned.

ISSUES

The parties submitted the following issues for resolution:

1. The appropriate date of injury for the stipulated work injury.

2. The amount of permanent partial disability claimant is entitled to as the result of his work-related shoulder injury.

3. The appropriate weekly workers' compensation rate.

4. Whether penalty benefits are appropriate in this case.

5. Whether claimant is entitled to reimbursement for Independent Medical Examinations.

6. Assessment of costs.

FINDINGS OF FACT

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

Claimant, Kevin Koeller, works for Cardinal Logistics Management Corporation ("Cardinal") as an over-the-road truck driver. Cardinal provides transportation services for Nordstrom Distribution in Dubuque, Iowa. Mr. Koeller's duties included driving loaded trucks from the Nordstrom Distribution Center in Dubuque, Iowa to make deliveries to Nordstrom stores in Texas. He unloads the truck and then drives the empty truck back to Iowa, picks up a new loaded truck, and returns to Texas to repeat the process. Mr. Koeller works as a team driver with one other driver. Each driver drives for 12 hours while the other driver sleeps in the truck; this allows the truck to keep moving 24 hours per day. He does this for six days per week. (Testimony)

On October 13, 2017, Mr. Koeller was in Texas making a delivery. He was moving a pallet of products off the truck. The pallet started to collapse, he put his right arm out and the boxes came down on his right shoulder. He reported his injury to Adam Ruden, his boss at that time. Mr. Koeller was able to finish the delivery and was back in Iowa approximately 24 hours later. Once back in Dubuque, Mr. Koeller again discussed his condition with Mr. Ruden, completed an injury report, and returned to work. Mr.

Koeller waited approximately two weeks before he sought treatment because he was hoping his shoulder would get better. (Testimony)

Cardinal sent Mr. Koeller to what he described as the DOT doctor. The records reflect that Mr. Koeller was seen at Finley Occupational Health by Peggy L. Barton, ARNP, on November 2, 2017. The records state that the date of injury was approximately the first week in October. He reported that he was driving and boxes were falling down, he put his right hand up to keep the boxes from falling. He has pain at the top of his arm and near his elbow. ARNP Barton's impression was right upper arm pain. She did not place any restrictions on Mr. Koeller. He was to ice or heat and use ibuprofen. (Testimony; JE1, p. 1)

There is a dispute in this case about the correct date of injury. Claimant filed his petition in April 2019 and alleged his injury occurred as the result of boxes falling on him on November 2, 2017. Shortly before the arbitration hearing, claimant filed a motion to amend his petition to change the date of injury to October 13, 2017. Defendants filed a resistance to the motion. The motion was granted at the start of the arbitration hearing.

Claimant contends the correct date of injury is October 13, 2017, while defendants contend the correct date of injury is November 2, 2017. Mr. Koeller testified his injury occurred in the middle of October. It was approximately two weeks from the time of the injury until the time he first sought medical treatment. The first record of medical treatment is dated November 2, 2017 from Finley Occupational Health which is located in Dubuque, Iowa. Mr. Koeller believes the October 13, 2017 date of injury is correct. He was injured in Texas, he returned to Iowa within 24 hours. Once back in Iowa, he completed some paperwork about the injury. Mr. Koeller advised his boss that he wanted to wait to see if his shoulder improved before he sought treatment. He waited a couple weeks, the shoulder did not improve, and he received his first treatment on November 2, 2017. Mr. Koeller testified that his injury could not have occurred on November 2, 2017 because he received treatment on that date and he knows the injury happened weeks before his first treatment. (Testimony; JE1, p. 1)

There are several references in evidence to support the October 13, 2017 date of injury. Dr. Bollier's note dated March 1, 2019 notes the injury occurred on October 13, 2017. (JE5, p. 31) On May 25, 2018 the defendants issued an indemnity check to Mr. Koeller which lists the date of loss as October 13, 2017. (Cl. Ex. 6, p. 49) On May 30, 2018, defendants sent Dr. Field a letter seeking his opinion regarding maximum medical improvement (MMI) and permanent functional disability. The letter lists the date of injury as October 13, 2017. (JE3, p. 19) On June 11, 2019, defendants sent Mr. Koeller an offer of work letter and listed the date of injury as October 13, 2017. (Cl. Ex. 6, p. 48) On October 16, 2019, defendants issued another indemnity check and listed the date of injury as October 13, 2017. (Cl. Ex. 6, p. 50) Additionally, there are numerous medical records which state the injury occurred in October of 2017. For example, on November 10, 2017, the date of injury is listed as October 2017. The November 27, 2017 clinical notes list the date of injury as October 20, 2017. (JE1, pp.

2-3) Early on he also received treatment from Spine & Sport Chiropractic Center, P.C. Their records indicate an injury date of October 1, 2017. (JE2, pp. 5-6) Mr. Koeller also attended physical therapy. Those records state his injury occurred in October of 2017. (JE4, p. 25)

Defendants argue the correct date is November 2, 2017. Defendants argue that the medical records identify several different dates in October 2017 as the potential date of injury and therefore, the exact date of injury cannot be pinpointed, and the discovery rule should apply. I do not find this argument to be convincing. Shortly after his injury, Mr. Koeller reported his injury to his boss. Thus, early on the defendants were in a position to know the exact date of injury. That date, October 13, 2017, is reflected in their correspondence. Additionally, the October 13, 2017 date of injury fits with the timeline Mr. Koeller set forth. I find that the appropriate date of injury in this case is October 13, 2017.

We now turn to the issue of the extent of permanency sustained by Mr. Koeller as the result of the injury. There is no dispute that Mr. Koeller sustained permanent impairment as the result of the work injury; the dispute is the amount of impairment he sustained. Early in his treatment, Mr. Koeller continued to follow up with Finley Occupational Health. Unfortunately, conservative treatment was not successful, and he was referred to Westside Orthopedic in Dubuque. He underwent an MRI of his right shoulder on December 14, 2017. On December 21, 2017, Mr. Koeller saw Christopher G. Palmer, M.D. at Westside Orthopaedic. Dr. Palmer reviewed the MRI which was consistent with some diffuse degenerative changes. He felt the anterior labrum may be a bit frayed. He also noted some blunting of the anterior glenoid labrum and what appeared to be some subacromial bursitis, some AC joint hypertrophy, type 2 acromion, and findings consistent with impingement syndrome. Dr. Palmer's impression was right shoulder strain/impingement syndrome, AC osteoarthritis. He injected Mr. Koeller's right shoulder with Celestone and Lidocaine. Dr. Palmer allowed Mr. Koeller to continue to work without restrictions; however, he advised that anything over 40 or 50 pounds, he needs to buddy lift. (JE3, pp. 7-10)

On May 4, 2018, David S. Field, M.D., performed diagnostic arthroscopy, arthroscopic bursectomy, arthroscopic subacromial decompression and diagnostic arthroscopy of the right shoulder. The postoperative diagnoses were impingement pattern with significant bursitis, mild tendinosis of the supraspinatus tendon. (JE3, pp. 14-15) Dr. Field placed Mr. Koeller at maximum medical improvement (MMI) on May 24, 2018. Dr. Field released Mr. Koeller to full duty. (JE3, p. 18)

Unfortunately, Mr. Koeller continued to have shoulder symptoms. On August 29, 2018, Dr. Field recommended surgical resection of the AC joint. (JE3, pp. 23-24) However, neither the claimant nor the defendants were pleased with the treatment provided by Dr. Field, so Mr. Koeller was sent to Matthew Bollier, M.D. (Testimony)

On March 1, 2019, Dr. Bollier noted that Mr. Koeller had pain generators that were not addressed completely during the May 2018 operation. Dr. Bollier performed shoulder surgery on April 3, 2019. The postoperative diagnoses were right shoulder SLAP tear, biceps tendinopathy, and AC joint arthropathy. The operation included a distal clavicle excision. (JE5, pp. 31-40)

On August 23, 2019, Mr. Koeller asked Dr. Bollier if he could be returned to work. Dr. Bollier placed Mr. Koeller at MMI. (JE5, pp. 43-45) Dr. Koeller addressed the issue of permanent functional impairment. He stated:

> To the nearest degree of medical certainty he has a permanent partial impairment rating of 6% of the upper extremity which is equivalent to 4% of the whole person according to the Guides to the Evaluation of Permanent Impairment of the AMA 5th Edition. This rating is the result of loss of forward flexion 1% upper extremity) and extension 1% upper extremity per figure 16-40 on page 476, loss of abduction 1% upper extremity) and adduction 1% upper extremity) per figure 16-43 on page 477, loss of internal rotation 2% upper extremity) per figure 16-46. Upper extremity impairment was converted to whole person impairment according to table 16-3 on page 439. Kevin was released to work without restrictions. This rating is intended to be an assessment of the functional loss of this patient today and not intended to be combined with previously assigned impairment.

(JE5, p. 45)

On December 16, 2019, at the request of his attorney, Mr. Koeller saw Mark C. Taylor, M.D. for an independent medical evaluation (IME). Dr. Taylor addressed the issue of impairment due to the work injury. He stated:

> Based upon the reasonably demonstrable objective findings, and using the *AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition,* I would assign impairment as follows:
>
> Turning to Figures 16-40, 16-43, and 16-46, on pages 476-479, and compared to his unaffected left side, Mr. Koeller would qualify for 8% right upper extremity impairment related to decrements in range of motion. This is only slightly higher than the range of motion impairment assigned by Dr. Bollier. However, Mr. Koeller also underwent a distal clavicle excision. As per Table 16-27, on page 506, this is assigned an additional 10%. When 10% is combined with 8%, according to the Combined Values Chart on page 604, the result is 17% right upper extremity impairment. As per Table 16-3, on page 439, this converts to 10% whole person impairment.

(Cl. Ex. 1, pp. 9-10)

Dr. Taylor felt that as long as Mr. Koeller is able to self-restrict, then he should be able to continue to perform his job. However, Dr. Taylor did have some activity recommendations such as Mr. Koeller should avoid heavy overhead lifting, no more than 25 to 30 pounds above shoulder or head level. (Cl. Ex. 1, pp. 1-10)

After Dr. Bollier placed Mr. Koeller at MMI, Mr. Koeller returned to full duty work. He returned to Dr. Bollier with ongoing shoulder problems on February 28, 2020. Dr. Bollier related the ongoing problems to the work injury and recommended another surgical procedure. On April 29, 2020, Dr. Bollier performed a revision surgery and rotator cuff repair. (JE5, pp. 46-50)

Mr. Koeller continued to follow-up with Dr. Bollier's office. On August 14, 2020, Mr. Koeller asked to be allowed to return to work without restrictions. Dr. Bollier noted that he was still early in his recovery and that he may continue to gain range of motion and strength over the next few months. Dr. Bollier placed him at MMI and issued an impairment rating. (JE5, pp. 63-67) Dr. Bollier stated:

> To the nearest degree of medical certainty kevin [*sic*] has a permanent partial impairment rating of 6% of the upper extremity which is equivalent to 4% of the whole person according to the Guides to the Evaluation of Permanent Impairment of the AMA 5th Edition. This rating is the result of loss of forward flexion (1% upper extremity) and extension (1% upper extremity) per figure 16-40 on page 476, loss of abduction (1% upper extremity) and adduction (1% upper extremity) per figure 16-43 on page 477, loss of internal rotation (2% upper extremity) per figure 16-46. Upper extremity impairment was converted to whole person impairment according to table 16-3 on page 439. he [*sic*] was released to work without restrictions. This rating is intended to be an assessment of the functional loss of this patient today and not intended to be combined with previously assigned impairment.

(JE5, p. 66)

Dr. Taylor saw Mr. Koeller again on October 12, 2020. (Cl. Ex. 1, pp. 13-23) Dr. Taylor again addressed the issue of permanent impairment. He stated:

> Turning to Figures 16-40, 16-43, and 16-46, on pages 476-479, and compared to his unaffected left side, Mr. Koeller qualifies for 11% right upper extremity impairment due to decrements in range of motion. The main difference between his range of motion values on this occasion compared to last time was that he struggled with internal rotation on the day of this evaluation. Each of his range of motion values were checked and rechecked with the use of a goniometer and only the maximum value for each movement was used to assign a rating.

> Mr. Koeller also underwent a distal clavicle excision as part of his first surgery with Dr. Bollier (second surgery overall), which was April 3, 2019. As per Table 16-27, on page 506, this is assigned 10%. When 11% is combined with 10%, as per the Combined Values Chart on page 604, the result is 20% right upper extremity impairment. As per Table 16-3, on page 439, this converts to 12% whole person impairment.

(Cl. Ex. 1, p. 21)

Both Dr. Bollier and Dr. Taylor have rendered their opinions on the extent of permanent impairment. Ultimately, on August 14, 2020, Dr. Bollier opined Mr. Koeller sustained 6 percent permanent impairment of the right upper extremity. As set forth above, this rating was based on loss of range of motion. The most recent opinion from Dr. Taylor is dated October 12, 2020. He opined Mr. Koeller sustained 20 percent permanent impairment of his right upper extremity. For the loss of range of motion, Dr. Koeller assigned 11 percent permanent impairment of the right upper extremity. He assigned an additional 10 percent for the distal clavicle excision. Claimant contends Dr. Taylor's rating should prevail because he properly applied The Guides in this case to reach his impairment rating. Defendants contend that Dr. Bollier's rating should prevail because he properly applied The Guides in this case to reach his impairment rating. Dr. Taylor is a Certified Independent Medical Examiner. (Cl. Ex. 1, p. 24) I find Dr. Taylor's rating should be applied in this case. Thus, I find Mr. Koeller sustained 20 percent permanent impairment of his right upper extremity as the result of his shoulder injury.

There is a dispute in this case regarding the appropriate weekly workers' compensation rate. The dispute centers on claimant's gross earnings. The parties agree that claimant's gross weekly earnings should be calculated according to Iowa Code section 85.36. Claimant contends the appropriate gross weekly earnings are $2022.68, based on an injury date of October 13, 2017. Defendants contend the appropriate gross weekly earnings are $1956.50, based on an injury date of November 2, 2017. As noted above, I found the appropriate date of injury in this case is October 13, 2017. Claimant's rate calculation is based on the correct date of injury. Therefore, I find claimant's gross weekly earnings at the time of the injury were two thousand twenty-two and 68/100 dollars ($2,022.68).

First, claimant asserts penalty benefits are appropriate for underpayment of temporary and permanent disability benefits based upon the dispute as to claimant's rate calculation. Claimant argues penalty benefits are appropriate because defendants' rate calculation is based on an impossible date of injury. Defendants based their rate of compensation on a November 2, 2017 date of injury. Claimant points out that the rate calculation was based on a November 2, 2017 date of injury, but benefits paid in 2019 state the date of injury as October 13, 2017. I do not find claimant's argument to be persuasive. Claimant contends the November 2, 2017 date of injury is an "impossible" date. However, claimant filed his petition in April 2019 and alleged an injury date of November 2, 2017. It was not until approximately two weeks before the arbitration

hearing that claimant moved to amend the date of injury. Additionally, defendants' discovery requests made inquiry regarding the claimant's calculation of rate. Claimant failed to identify rate as a disputed issue. (Def. Ex. C, p. 8) I find defendants' use of the November 2, 2017 alleged injury date to calculate the weekly workers' compensation rate was reasonable, especially in light of the fact that claimant did not dispute the rate calculation until shortly before the hearing. Furthermore, defendants admit that the rate was initially underpaid, but was quickly rectified and benefits were actually overpaid for a period of time. Defendants had a credit for overpaid temporary benefits until July 2019. I find claimant has failed to show that the underpayment of temporary and permanent disability benefits based upon the rate calculation dispute was unreasonable. Thus, I find penalty benefits are not appropriate.

Second, claimant asserts penalty benefits are appropriate for delay in payment of temporary partial disability (TPD) benefits. After Mr. Koeller's second shoulder operation with Dr. Bollier, Mr. Koeller was given activity restrictions. Mr. Koeller was offered light duty work with a nonprofit organization that offers a transition to work program which was not located on the defendants' premises. Mr. Koeller was not making the same pre-injury wages at his light duty work due to the number of hours he worked. Defendants contend penalty benefits are not appropriate because the insurance adjuster had to obtain the paystub from the nonprofit for the payroll period at the end of each week before they would be able to calculate and issue the temporary partial disability benefits. Specifically, claimant argues penalty benefits are appropriate for two weeks. The TPD payment in the amount of $1,154.56 for the week of June 23, 2019 through June 29, 2019 was not made until July 12, 2019. I find that this delay is unreasonable. The TPD payment in the amount of $1,072.25 for the week of June 30, 2019 through July 7, 2019 was also not made until July 12, 2019. I find that this delay is also unreasonable. (Cl. Ex. 5, p. 45; Def. Ex. B, p. 2) Defendants contend the delay was not unreasonable due to the time it takes to obtain payroll information from a third-party. I do not find this argument to be persuasive. Defendants decided to arrange for Mr. Koeller to perform light duty work for a third-party; any delay in issuing TPD checks due to a delay in obtaining payroll information from a third-party is delay attributed to the defendants. Claimant should not have to wait days or weeks to receive his temporary benefits. I find that defendants unreasonably delayed TPD payments totaling $2,226.81. I find a penalty in the amount of $800.00 should be sufficient to punish and deter such unreasonable action in the future.

Third, claimant asserts penalty benefits are appropriate for defendants' failure to volunteer more than 24 weeks of permanent disability benefits (PPD). Defendants paid 24 weeks of PPD based on the August 2019 impairment rating of Dr. Bollier. (Def. Ex. B; Def. Ex. E, p. 14) After Dr. Bollier performed his final surgery and issued his impairment rating, defendants advised claimant that no additional benefits would be paid because Dr. Bollier stated that the new impairment rating was not in addition to his prior rating. Therefore, all benefits to satisfy the rating of Dr. Bollier had already been paid. (Ex. E, p. 13) Although Dr. Taylor issued a higher impairment rating, I find it was

reasonable for defendants to rely on the impairment rating of the treating surgeon in this case. I find claimant has failed to demonstrate that defendants unreasonably denied any PPD benefits.

Claimant is seeking reimbursement for two IMEs pursuant to Iowa Code section 85.39. Claimant is seeking reimbursement in the amount of $2,790.50 for Dr. Taylor's December 2019 IME pursuant to Iowa Code section 85.39. Dr. Bollier assigned an impairment rating on August 23, 2019. The claimant felt that rating was too low. On December 16, 2019, at the request of the claimant, Dr. Taylor conducted his IME. I find that the prerequisites for defendants to reimburse the claimant for an IME were met. Pursuant to section 85.39, defendants shall reimburse claimant for the IME conducted by Dr. Taylor in December 2019, in the amount of two thousand seven hundred ninety and 50/100 dollars ($2,790.50).

Claimant is also seeking reimbursement in the amount of $1,012.50 for Dr. Taylor's October 2020 IME pursuant to Iowa Code section 85.39. Claimant points out that defendants had their authorized physician provide impairment ratings on two different occasions, after two different surgeries. Claimant argues that in these circumstances, Iowa Code section 85.39 allows claimant to obtain reimbursement for both IMEs. I find that the prerequisites for defendants to reimburse the claimant for the second IME were met. Pursuant to section 85.39, defendants shall reimburse claimant for the IME conducted by Dr. Taylor in October 2020, in the amount of one thousand twelve and 50/100 dollars ($1,012.50).

Finally, claimant is seeking an assessment of costs as set forth in claimant's exhibit 9. Costs are to be assessed at the discretion of the Iowa Workers' Compensation Commissioner or at the discretion of the deputy hearing the case. I find claimant was generally successful in his claim and therefore, an assessment of costs against the defendants is reasonable.

First, claimant is seeking as assessment of costs in the amount of one hundred and no/100 dollars ($100.00) for the filing fee. I find that this is an appropriate cost under agency rule 4.33(7). Defendants shall reimburse costs in the amount of one hundred and no/100 dollars ($100.00).

Second, claimant is seeking as assessment of costs in the amount of six and 80/100 dollars ($6.80) for certified mail service. I find this is an appropriate cost under 4.33(3). Defendants shall reimburse costs in the amount of six and 80/100 dollars ($6.80).

Third, claimant is seeking as assessment of costs in the amount of ninety-two and 40/100 dollars ($92.40) for the deposition transcript of the claimant. I find this is an appropriate cost under 4.33(2). Defendants shall reimburse costs in the amount of ninety-two and 40/100 dollars ($92.40).

CONCLUSIONS OF LAW

The party who would suffer loss if an issue were not established ordinarily has the burden of proving that issue by a preponderance of the evidence. Iowa R. App. P. 6.904(3).

The claimant has the burden of proving by a preponderance of the evidence that the injury is a proximate cause of the disability on which the claim is based. A cause is proximate if it is a substantial factor in bringing about the result; it need not be the only cause. A preponderance of the evidence exists when the causal connection is probable rather than merely possible. George A. Hormel & Co. v. Jordan, 569 N.W.2d 148 (Iowa 1997); Frye v. Smith-Doyle Contractors, 569 N.W.2d 154 (Iowa App. 1997); Sanchez v. Blue Bird Midwest, 554 N.W.2d 283 (Iowa App. 1996).

The question of causal connection is essentially within the domain of expert testimony. The expert medical evidence must be considered with all other evidence introduced bearing on the causal connection between the injury and the disability. Supportive lay testimony may be used to buttress the expert testimony and, therefore, is also relevant and material to the causation question. The weight to be given to an expert opinion is determined by the finder of fact and may be affected by the accuracy of the facts the expert relied upon as well as other surrounding circumstances. The expert opinion may be accepted or rejected, in whole or in part. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); IBP, Inc. v. Harpole, 621 N.W.2d 410 (Iowa 2001); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995). Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417 (Iowa 1994). Unrebutted expert medical testimony cannot be summarily rejected. Poula v. Siouxland Wall & Ceiling, Inc., 516 N.W.2d 910 (Iowa App. 1994).

Defendants argue the correct date is November 2, 2017. Defendants argue that the medical records identify several different dates in October 2017 as the potential date of injury and therefore, the exact date of injury cannot be pinpointed and the discovery rule should apply. I do not find this argument to be convincing. Shortly after his injury, Mr. Koeller reported his injury to his boss. Thus, early on in this claim the defendants were in a position to know the exact date of injury. That date, October 13, 2017, is reflected in their correspondence. Additionally, the October 13, 2017 date of injury fits with the timeline Mr. Koeller set forth. I find that the appropriate date of injury in this case is October 13, 2017.

There is no dispute that Mr. Koeller sustained permanent impairment as the result of the work injury; however, there is a dispute surrounding the amount of permanent partial disability benefits that he is entitled to receive. In this case the parties have stipulated that Mr. Koeller's injury is a scheduled member disability to the shoulder. Shoulders are to be compensated based on the 400-week schedule pursuant to Iowa Code 85.34(2)(n).

Under the Iowa Workers' Compensation Act, permanent partial disability is compensated either for a loss or loss of use of a scheduled member under Iowa Code

section 85.34(2)(a)-(u) or as an unscheduled injury pursuant to the provisions of section 85.34(2)(v). The extent of scheduled member disability benefits to which an injured worker is entitled is determined by using the functional method. Functional disability is "limited to the loss of the physiological capacity of the body or body part." Mortimer v. Fruehauf Corp., 502 N.W.2d 12, 15 (Iowa 1993); Sherman v. Pella Corp., 576 N.W.2d 312 (Iowa 1998).

Iowa Code section 85.34(x) permanent disabilities states:

> 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 (x).

This agency has adopted The Guides to the Evaluation of Permanent Impairment, Fifth Edition, published by the American Medical Association for determining the extent of loss or percentage of impairment for permanent partial disabilities. See 876 IAC 2.4.

A determination must be made whether to apply the upper extremity rate or the whole person rating to the 400-week schedule. The Commissioner addressed this question in Deng. He stated:

> The question then becomes whether to apply the upper extremity or whole person rating to the 400-week schedule set forth in section 85.34(2)(n). The Commissioner has stated that it is appropriate to apply the upper extremity impairment rating for a shoulder injury. See Deng v. Farmland Foods, Inc., File No. 5061883 (App., September 29, 2020); Chavez v. MS Technology, LLC, File No. 5066270 (App., September 30, 2020); Smidt v. JKB Restaurants, LC, File No. 5067766 (App, December 11, 2020). Thus, I find it is appropriate to apply the upper extremity impairment rating for a shoulder injury.

Deng v. Farmland Foods, Inc., File No. 5061883 (App., September 29, 2020).

Based on the above findings of fact, I conclude that Mr. Koeller has sustained 20 percent impairment to his right upper extremity. As such, Mr. Koeller has demonstrated entitlement to 80 weeks of permanent partial disability benefits commencing on the stipulated August 23, 2019 commencement date.

There is a dispute in this case regarding the appropriate weekly workers' compensation rate. The dispute centers on claimant's gross earnings. 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).

There is no dispute that Mr. Koeller's rate should be compensated pursuant to Iowa Code section 85.36(6). Claimant contends the appropriate gross weekly earnings are $2022.68, based on an injury date of October 13, 2017. Defendants contend the appropriate gross weekly earnings are $1956.50, based on an injury date of November 2, 2017. Based on the above findings of fact, I concluded the appropriate date of injury in this case is October 13, 2017. Claimant's rate calculation is based on the correct date of injury. Therefore, I conclude claimant's gross weekly earnings at the time of the injury were two thousand twenty-two and 68/100 dollars ($2,022.68). The parties have stipulated that Mr. Koeller was married and entitled to 3 exemptions. Thus, I conclude the appropriate weekly workers' compensation rate is one thousand two hundred four and 54/100 dollars ($1,204.54).

Next, we turn to the issue of penalty. Claimant is asserting penalty benefits are appropriate in this case for three separate reasons. Defendants deny that any penalty benefits are appropriate.

In Christensen v. Snap-on Tools Corp., 554 N.W.2d 254 (Iowa 1996), and Robbennolt v. Snap-on Tools Corp., 555 N.W.2d 229 (Iowa 1996), the supreme court said:

> Based on the plain language of section 86.13, we hold an employee is entitled to penalty benefits if there has been a delay in payment unless the employer proves a reasonable cause or excuse. A reasonable cause or excuse exists if either (1) the delay was necessary for the insurer to investigate the claim or (2) the employer had a reasonable basis to contest the employee's entitlement to benefits. A "reasonable basis" for denial of the claim exists if the claim is "fairly debatable."
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> Christensen, 554 N.W.2d at 260.

The Supreme Court has stated:

(1) If the employer has a reason for the delay and conveys that reason to the employee contemporaneously with the beginning of the delay, no penalty will be imposed if the reason is of such character that a reasonable fact-finder could conclude that it is a "reasonable or probable cause or excuse" under Iowa Code section 86.13. In that case, we will defer to the decision of the commissioner. See Christensen, 554 N.W.2d at 260 (substantial evidence found to support commissioner's finding of legitimate reason for delay pending receipt of medical report); Robbennolt, 555 N.W.2d at 236.

(2) If no reason is given for the delay or if the "reason" is not one that a reasonable fact-finder could accept, we will hold that no such cause or excuse exists and remand to the commissioner for the sole purpose of assessing penalties under section 86.13. See Christensen, 554 N.W.2d at 261.

(3) Reasonable causes or excuses include (a) a delay for the employer to investigate the claim, Christensen, 554 N.W.2d at 260; Kiesecker v. Webster City Custom Meats, Inc., 528 N.W.2d at 109, 111 (Iowa 1995); or (b) the employer had a reasonable basis to contest the claim—the "fairly debatable" basis for delay. See Christensen, 554 N.W.2d at 260 (holding two-month delay to obtain employer's own medical report reasonable under the circumstances).

(4) For the purpose of applying section 86.13, the benefits that are underpaid as well as late-paid benefits are subject to penalties, unless the employer establishes reasonable and probable cause or excuse. Robbennolt, 555 N.W.2d at 237 (underpayment resulting from application of wrong wage base; in absence of excuse, commissioner required to apply penalty).

> If we were to construe [section 86.13] to permit the avoidance of penalty if any amount of compensation benefits are paid, the purpose of the penalty statute would be frustrated. For these reasons, we conclude section 86.13 is applicable when payment of compensation is not timely . . . or when the full amount of compensation is not paid.

Id.

(5) For purposes of determining whether there has been a delay, payments are "made" when (a) the check addressed to a claimant is mailed (Robbennolt, 555 N.W.2d at 236; Kiesecker, 528 N.W.2d at 112), or (b) the check is delivered personally to the claimant by the employer or its workers' compensation insurer. Robbennolt, 555 N.W.2d at 235.

> (6) In determining the amount of penalty, the commissioner is to consider factors such as the length of the delay, the number of delays, the information available to the employer regarding the employee's injury and wages, and the employer's past record of penalties. Robbennolt, 555 N.W.2d at 238.
>
> (7) An employer's bare assertion that a claim is "fairly debatable" does not make it so. A fair reading of Christensen and Robbennolt, makes it clear that the employer must assert facts upon which the commissioner could reasonably find that the claim was "fairly debatable." See Christensen, 554 N.W.2d at 260.
>
> Meyers v. Holiday Express Corp., 557 N.W.2d 502 (Iowa 1996).
>
> Weekly compensation payments are due at the end of the compensation week. Robbennolt, 555 N.W.2d 229, 235.

When an employee's claim for benefits is fairly debatable based on a good faith dispute over the employee's factual or legal entitlement to benefits, an award of penalty benefits is not appropriate under the statute. Whether the issue was fairly debatable turns on whether there was a disputed factual dispute that, if resolved in favor of the employer, would have supported the employer's denial of compensability. Gilbert v. USF Holland, Inc., 637 N.W.2d 194 (Iowa 2001).

The purpose of Iowa Code section 86.13 is both punishment for unreasonable conduct but also deterrence for future cases. Id. at 237. In this regard, the Commissioner is given discretion to determine the amount of the penalty imposed with a maximum penalty of 50 percent of the amount of the delayed, or denied, benefits. Christensen v. Snap-On Tools Corp., 554 N.W.2d 254, 261 (Iowa 1996).

In exercising its discretion, the agency must consider factors such as the length of the delays, the number of delays, the information available to the employer regarding the employee's injury and wages, and the employer's past record of penalties. Meyers v. Holiday Express Corp., 557 N.W.2d 502, 505 (Iowa 1996). Having considered the relevant factors and the purposes of the penalty statute, I conclude that a section 86.13 penalty in the amount of eight hundred dollars ($800.00) is appropriate in this case.

First, claimant asserts penalty benefits are appropriate for underpayment of temporary and permanent disability benefits based upon the dispute as to claimant's rate calculation. Claimant argues penalty benefits are appropriate because their rate calculation is based on an impossible date of injury. Defendants based their rate of compensation on a November 2, 2017 date of injury. Claimant points out that the rate calculation was based on a November 2, 2017 date of injury, but benefits paid in 2019 state the date of injury as October 13, 2017. I do not find claimant's argument to be persuasive. Claimant contends the November 2, 2017 date of injury is an "impossible" date. However, claimant filed his petition in April 2019 and alleged an injury date of

November 2, 2017. It was not until approximately two weeks before the arbitration hearing that claimant moved to amend the date of injury. I conclude defendants' use of the November 2, 2017 alleged injury date to calculate the weekly workers' compensation rate was reasonable. I conclude claimant has failed to show that the underpayment of temporary and permanent disability benefits based upon the rate calculation dispute was unreasonable. Thus, penalty benefits are not appropriate.

Second, claimant asserts penalty benefits are appropriate for delay in payment of temporary partial disability benefits. After Mr. Koeller's second shoulder operation with Dr. Bollier, Mr. Koeller's activities were restricted. Based on the above findings of fact, I conclude that the TPD payment in the amount of $1,154.56 for the week of June 23, 2019 through June 29, 2019 was not made until July 12, 2019. I conclude that this delay is unreasonable. The TPD payment in the amount of $1,072.25 for the week of June 30, 2019 through July 7, 2019 was also not made until July 12, 2019. I conclude that this delay is also unreasonable. (Cl. Ex. 5, p. 45; Def. Ex. B, p. 2) I conclude that defendants unreasonably delayed TPD payments totaling $2,226.81. I conclude a penalty in the amount of eight hundred and no/100 dollars ($800.00) should be sufficient to punish and deter such unreasonable action in the future.

Third, claimant asserts penalty benefits are appropriate for defendants' failure to volunteer more than 24 weeks of permanent disability benefits (PPD). Defendants paid 24 weeks of PPD based on the August 2019 impairment rating of Dr. Bollier. (Def. Ex. B; Def. Ex. E, p. 14) After Dr. Bollier performed his final surgery, he issued another impairment rating. Defendants advised claimant that no additional benefits would be paid because Dr. Bollier stated that the new impairment rating was not in addition to his prior rating. Therefore, all benefits to satisfy the rating of Dr. Bollier had already been paid. (Ex. E, p. 13) Although Dr. Taylor issued a higher impairment rating, I conclude it was reasonable for defendants to rely on the impairment rating of the treating surgeon in this case. I conclude claimant failed to demonstrate that defendants unreasonably denied any PPD benefits.

Claimant is seeking reimbursement for two IMEs pursuant to Iowa Code section 85.39. Section 85.39 permits an employee to be reimbursed for subsequent examination by a physician of the employee's choice where an employer-retained physician has previously evaluated "permanent disability" and the employee believes that the initial evaluation is too low. The section also permits reimbursement for reasonably necessary transportation expenses incurred and for any wage loss occasioned by the employee attending the subsequent examination.

Claimant is seeking reimbursement in the amount of $2,790.50 for Dr. Taylor's December 2019 IME pursuant to Iowa Code section 85.39. Based on the above findings of fact, I conclude that the prerequisites for defendants to reimburse the claimant for this IME were met. Pursuant to section 85.39, defendants shall reimburse claimant for the IME conducted by Dr. Taylor in December 2019, in the amount of two thousand seven hundred ninety and 50/100 dollars ($2,790.50).

Claimant is also seeking reimbursement in the amount of $1,012.50 for Dr. Taylor's October 2020 IME pursuant to Iowa Code section 85.39. Claimant points out that defendants had their authorized physician provide impairment ratings on two different occasions, after two different operations. Claimant argues that in these circumstances, Iowa Code section 85.39 allows claimant to obtain reimbursement for both IMEs. In support of his position claimant cites an agency appeal decision. The decision states:

> The final issue on appeal is whether claimant is entitled to reimbursement for her second IME with Dr. Bansal and Dr. Bansal's supplemental report. . . . Iowa Code section 85.39 allows a claimant to request reimbursement for an IME "[i}f an evaluation of permanent disability has been made by a physician retained by the employer and the employee believes this evaluation to be too low." Iowa Code section 85.39(2). In this case, I find Dr. Boulden, a physician retained by defendant-employer, performed an evaluation of permanent disability before Dr. Bansal's second IME. I therefore find Dr. Boulden's IME triggered the reimbursement provisions of Iowa Code section 85.39, meaning defendants are required to reimburse claimant for Dr. Bansal's IME in the amount of $2,985.00.

Ngan Phu v. Tension Envelope Corp., File 5035804 (May 17, 2019).

Based on the agency precedent cited by claimant, I conclude claimant is entitled to reimbursement for the October 2020 IME of Dr. Taylor. Defendants shall reimburse claimant for this IME in the amount of one thousand twelve and 50/100 dollars ($1,012.50).

ORDER

THEREFORE, IT IS ORDERED:

All weekly benefits shall be paid at the rate of one thousand two hundred four and 54/100 dollars ($1,204.54).

Defendants shall pay eighty (80) weeks of permanent partial disability benefits commencing on the stipulated commencement date of August 23, 2019.

Defendants shall be entitled to credit for all weekly benefits paid to date.

Defendants shall pay accrued weekly benefits in a lump sum together with interest at the rate of ten percent for all weekly benefits payable and not paid when due which accrued before July 1, 2017, and all interest on past due weekly compensation benefits accruing on or after July 1, 2017, shall be payable at an annual rate equal to the one-year treasury constant maturity published by the federal reserve in the most recent H15 report settled as of the date of injury, plus two percent. See Deciga-Sanchez v. Tyson Fresh Meats, Inc., File No. 5052008 (App. Apr. 23, 2018) (Ruling on

Defendants' Motion to Enlarge, Reconsider or Amend Appeal Decision re: Interest Rate Issue).

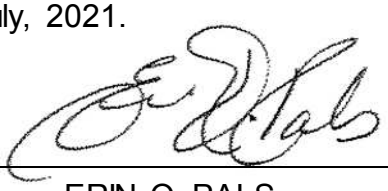
Defendants shall pay penalty benefits in the amount of eight hundred and no/100 dollars ($800.00).

Defendants shall reimburse claimant for the two Independent Medical Examinations as set forth above.

Defendants shall reimburse claimant costs as set forth above.

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

Signed and filed this ____27th____ day of July, 2021.



ERIN Q. PALS
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Joseph Powell (via WCES)

Charles Blades (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.