BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

MICHELLE BREITBACH,

Claimant,

vs.

SEDONA STAFFING,

Employer,

and

ACE AMERICAN INSURANCE COMPANY,

Insurance Carrier,
Defendants.

File No. 5054061

ARBITRATION DECISION

Head Note Nos.: 1803, 2500, 3001

STATEMENT OF THE CASE

Michelle Breitbach, claimant, filed a petition in arbitration seeking workers' compensation benefits from Sedona Staffing (Sedona) and its insurer, Ace American Insurance Company, as a result of an injury she sustained on July 30, 2014, that arose out of and in the course of her employment. This case was heard in Des Moines, Iowa and fully submitted on November 13, 2017. The evidence in this case consists of the testimony of claimant, Mark Callan and Joint Exhibits 1 – 19, Claimant's Exhibits 1 - 8, and Defendants' exhibits A through F. Both parties submitted briefs.

The parties filed hearing reports at the commencement of the arbitration hearing. On the hearing reports, 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.

ISSUES

Whether the alleged disability is a scheduled member disability or an unscheduled disability.

The extent of claimant's disability.

Claimant's gross weekly rate and claimant's weekly workers' compensation rate.

Whether claimant's current symptoms are related to her work injury of July 30, 2014.

Whether claimant is entitled to payment of medical expenses.

Whether claimant is entitled to penalty benefits.

Assessment of costs.

FINDINGS OF FACT

The deputy workers' compensation commissioner, having heard the testimony and considered the evidence in the record, finds that:

Michelle Breitbach was 53 years old at the time of the hearing. Claimant graduated from high school and went to a community college and graduated the clerical program in 1988. (Transcript, page 40) Claimant is right-hand dominant. Claimant said that prior to July 30, 2014, she was able to engage in a wide range of activities from typical housework, playing golf, shooting pool, softball and throwing darts. (Tr. p. 40) Prior to her injury date, she was in generally good health. Claimant said that since her injury she is unable to perform normal activities. (Tr. p. 41; Exhibit 1, pp. 42, 43) Claimant cannot perform activities overhead such as showering and washing her hair. Dressing is painful and difficult when she needs to use her right arm. She cannot shovel snow or write for a long period without pain. (Tr. pp. 83, 84) Claimant said that Richard Kreiter, M.D., has recommended restrictions of no overhead use of her right upper extremity, limit two-handed lift to up to 35 pounds. (Tr. p. 43) Claimant has looked for work in her relevant labor market. (Ex. 8, pp. 1 – 5)

Claimant started working for Sedona Staffing at the Hawkeye/Ertl foundry in 2012, earning about $12.00 per hour. (Tr. p. 48) Claimant was laid off from the Hawkeye/Ertl Foundry and was assigned to work for Animal Health by Sedona in May 2014. She was making about $10.00 per hour at Animal Health. (Tr. p. 102)

While at Animal Health claimant injured her right shoulder. Claimant was on a stepladder and was pulling a box towards her when she felt a pain and pop in the right shoulder. (Ex. p. 15) Claimant reported her injury to her supervisor at Sedona on July 30, 2014. That also was the last day claimant worked at Animal Health. (Ex. 1, p. 22)

Before her injury claimant could lift up to 60 pounds at work and was able to perform all core department duties. (Tr. p. 50) Claimant said that before her injury she could spend hours at a computer keyboarding and after her surgery she can only work keyboarding about 20 minutes. (Tr. p. 82)

The first work claimant was able to obtain after her work at Sedona was working for Sedgwick on June 13, 2016. She worked at Sedgwick until March of 2017 and was earning $13.08 per hour. (Tr. p. 115) Claimant was a leave of absence coordinator at Sedgwick entering information concerning FMLA leave into a computer. (Tr. p. 96)

Mark Callan testified at the hearing. Mr. Callan was claimant's supervisor while she was working for Sedona at the foundry when she was injured and was her supervisor at Russelloy Foundry. (Tr. pp. 12, 16) Claimant started working for Russelloy on January 19, 2015. (Tr. p. 28) Mr. Callan knew claimant had injured her shoulder while working for Sedona. Mr. Callan left Sedona sometime after claimant's injury and worked for Russelloy Foundry. Mr. Callan asked claimant to work for him overseeing the core department once claimant had a full release to return to work. (Tr. p. 17) Claimant informed Mr. Callan she had a full release from Scott Schemmel, M.D. as of January 13, 2015. (Tr. p. 54; Ex. C, p. 7) Claimant was hired to be a supervisor in the core department at Russelloy. Her job was to keep the molding and cores going; to coordinate the workflow in the department. Claimant's work at Russelloy was supervisory; she was not performing production work. (Tr. pp. 20, 23) At Russelloy Foundry claimant was working at least 40 hours per week and was earning $14.50 per hour. (Tr. p 29) Claimant was laid off from Russelloy Foundry on November 25, 2015.

Claimant testified that she tried to see Dr. Schemmel after she was working at Russelloy regarding shoulder and neck pain. Claimant said Dr. Schemmel would not see claimant about her neck pain. (Tr. p. 54) Claimant testified that during the month before Dr. Schemmel discharged her from care she was having right-sided neck pain which was radiating down the back and shoulder down to her hands and her hands would become numb. (Tr. p. 61)

Mr. Callan said that since claimant's injury at Sedona he has noticed that claimant has not been able to engage in non-work related activities such as playing pool or riding on a motorcycle due to her shoulder pain. (Tr. p. 27)

On August 1, 2014, Thomas Miner, D.O. diagnosed claimant as having rotator cuff strain and recommended limited use of claimant's right arm. (Joint Ex. 1, p. 2) Claimant continued to have right shoulder pain and Dr. Miner recommended an MRI on August 22, 2014. (JEx. 1, p. 7) A September 2, 2014 MRI showed a full-thickness right supraspinatus tendon tear. (JEx. 1, p. 8) On September 8, 2014, Scott Schemmel, M.D. examined the claimant. Dr. Schemmel wrote that it was more likely than not that claimant's rotator cuff tear occurred at her work on July 30, 2014. Dr. Schemmel recommended surgery. Dr. Schemmel noted that even with a good result from surgery and physical therapy, claimant's shoulder would not return to normal; claimant would continue to have pain. (JEx. 3, pp. 2, 6) On October 1, 2014, Dr. Schemmel operated on claimant's right shoulder. His postoperative diagnoses were:

1. Full thickness rotator cuff tear of the supraspinatus tendon (less than 1 cm nonretracted).

2. Subacromial impingement type III acromion with offending acromial spur.

3. Type II superior labrum anterior and posterior lesion with unstable bicipital labral complex.

(JEx. 4, p. 1) Dr. Schemmel returned claimant to work regular duty as of January 19, 2015 and found her to be at maximum medical improvement (MMI) as of that date. (JEx. 3, p. 14)

On February 25, 2015, Erin Kennedy, M.D. performed a record review in order to determine a permanent partial disability rating. (JEx. 5, p. 1) Dr. Kennedy did not provide a rating and stated as claimant had been returned to work full duty she did not recommend restrictions. (JEx. 5, p. 3)

On April 25, 2015, claimant saw Dr. Kennedy for neck pain on the right side of her neck. Dr. Kennedy wrote,

It is my opinion that she is having trapezius pain, chronic dysfunction of the right shoulder. In other words the dysfunction [*sic*] shoulder loads the trapezius muscle more than it should. The trapezius muscle is a myofascial concern that would easily be addressed with physical therapy. However, if the shoulder remains dysfunction [*sic*] it will continue to fatigue the trapezius muscle. I believe this is a direct result of the work-related shoulder injury. I think it is appropriate to rule out a new problem or recurrent tear of the shoulder with MRI. This is ordered.

(JEx. 5, p. 5) On June 1, 2015, Dr. Kennedy reviewed an MRI of the right shoulder. Dr. Kennedy wrote,

There are significant findings present, but all of them degenerative. Specifically there is articular-sided predominantly partial thickness tear superimposed on moderate patchy foci tendinopathy and pinpoint full thickness involvement of the supraspinatus tendon. Additionally there is degenerative tearing of the superior labrum consistent with a biceps tenodesis.

(JEx. 5, p. 6) Claimant returned to Dr. Kennedy on June 25, 2015. Claimant reported her neck pain is worse. The cervical neck MRI was negative for focal derangement. (JEx. 5, p. 7) Claimant was advised her guarding of the right shoulder was causing fatiguing at the right side of the neck and myofascial pain. (JEx. 5, p. 70) On September 9, 2015, Dr. Kennedy provided a rating of the claimant's right shoulder injury. Dr. Kennedy noted that she had determined claimant's neck complaints were myofascial based upon a normal MRI. (JEx. 8, p. 3) Dr. Kennedy provided a nine

percent whole body impairment rating for the right shoulder and stated that there was no need for additional treatment. (JEx. 8, p. 4)

Dr. Kreiter performed an evaluation of the claimant on December 30, 2015. Dr. Kreiter's diagnosis was,

> A) Adhesive capsulitis of the right shoulder, post arthroscopic rotator cuff repair with biceps tenotomy, and acromioplasty. B) Continued painful right acromioclavicular joint and sternoclavicular joints of the right shoulder. C) Right carpal tunnel syndrome. D) Painful upper thoracic/scapular areas and neck pain with myofascial pain. Doubt cervical disc. E) Anxiety and depression secondary to chronic pain, posttraumatic type syndrome.

(JEx. 9, p. 1) Dr. Kreiter suggested claimant have a resection of the lateral clavicle and EMG and nerve conduction testing. Dr. Kreiter disagreed with Dr. Schemmel's failure to provide claimant with restrictions. (JEx. 9, p. 1) Dr. Kreiter provided a 15 percent whole body impairment rating. (JEx. 9, p. 2)

On April 4, 2016, Dr. Schemmel issued a report concerning claimant's conditions. (JEx. 11, pp. 1, 2) Dr. Schemmel noted that it was difficult for him to make a diagnosis due to the pain and guarding of the claimant. In evaluating claimant's most recent shoulder MRI he said,

> Her MRI scan appears to show that the area of previous full thickness tearing [*sic*] least partially healed and I would interpret that these all pinpoint areas of contrast penetrating through the cuff are the result of the passage of the fiber tapes at the time of surgery. Tendinopathy and partial thickness tearing persist on the MRI scan however this could be just strictly postsurgical changes. Under the circumstances as with any shoulder [*sic*] is imperative to clinically correlated [*sic*] any changes on the MRI scan with the patient's history and physical findings are [*sic*] determine if the imaging studies are of truly any clinical significance. Complete healing of rotator cuff tears is a common outcome and in about [*sic*] itself is not physically diagnostic for the patient's current complaints.
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> Based on this patient's history, physical findings and repeat imaging studies I am not able to determine [*sic*] definitive cause of her ongoing symptoms. I cannot with any degree of certainty determine if the patient's current symptoms are [*sic*] direct result of her previous work exposure/injury. Under the circumstances the prognosis for improvement with any attempts at revision [*sic*] surgical procedures is poor. The patient might respond favorably to treatment at a pain clinic combined with ongoing and continued therapy and could possibly benefit from a more formal evaluation by someone [*sic*] an area of expertise with chronic

> pain/complex regional pain syndrome although there was no overt evidence of this on my examination today.

(JEx. 11, p. 1) On June 8, 2016 and June 13, 2016, Dr. Schemmel confirmed that he recommended claimant receive pain management. He also stated he could not state with any degree of medical certainty that claimant's current problems are directly the result of her work injury or subsequent surgery. (JEx. 13, p. 1; JEx. 14, p. 1)

On October 28, 2016, Guy McCaw, M.D. saw claimant. Dr. McCaw is a general practitioner and referred claimant to a neurologist. (JEx. 16, p. 1) Dr. McCaw noted that the right shoulder pain and neck/arm pain and weakness could be cervical radiculopathy separate from the shoulder. (JEx. 16, p. 2)

On November 11, 2016, clamant saw neurologist Mark Fortson, M.D. An EMG of the right upper extremity was within normal limits. Dr. Fortson's impression was,

> Considerations include most likely complex regional pain syndrome. However, persistent/recurrent rotator cuff disease and cervical radiculopathy due to disc herniation need to be ruled out before considering aggressive treatment of the complex regional pain syndrome.

(JEx. 15, p. 1) After reviewing an MRI of the cervical spine on November 23, 2016, Dr. Fortson noted a rotator cuff tear and disk herniation in the neck. (JEx. 15, p. 2) On November 28, 2016, Dr. Fortson noted claimant has multiple factors for her shoulder and neck pain. He recommended she first be evaluated by orthopedics concerning her shoulder. (JEx. 15, p. 3) On December 6, 2016, Dr. Fortson wrote to claimant's attorney that claimant appeared to have an orthopedic problem, not neurological, and that he had no opinion regarding causation. (JEx. 15, p. 4)

On February 2, 2017, Dr. Kennedy performed a records review and report. In this report Dr. Kennedy said,

> To summarize, it is my opinion that the patient continues to experience right shoulder complaints secondary to the chronic condition of her rotator cuff and labrum. These concerns are unchanged compared to evaluation that I performed for the purpose of permanent partial impairment on September 9, 2015. MRI is noted to be stable. Her symptoms reflect her new baseline following this injury. What I will add is that she continues to demonstrate waxing and waning of function which was reported by Dr. Schemmel, by me, and is now reflected in the report by Dr. Kreiter who obtained formal measurements of shoulder motion with unexplainable changes compared to my September 9, 2015, evaluation. In regard to the cervical spine, pain complaints were felt to be myofascial during the workup I performed. MRI was obtained on June 17, 2015, and was not concerning. She has now demonstrated interval changes as

represented on MRI dated November 23, 2016. These interval changes do not reflect injury on July 30, 2014, while working for Sedona.

(JEx. 17, p. 8) On February 28, 2017, Dr. Kreiter wrote,

After the chart review, it is my opinion, the shoulder continues [*sic*] symptomatic, with an inferior spur arising from the AC joint, causing rotator cuff impingement, and perhaps causing the small tear of the supraspinatus tendon. Resection of the lateral clavicle with removal of the inferior spur, would decompress the underlying rotator cuff, and prevent further damage. This was the recommendation done by myself in 12/2015. I am not surprised there is no improvement in the situation.

(JEx. 17, p. 9) On August 25, 2017, Dr. Kreiter recommended restrictions of

No overhead work with the right upper extremity.

Lifting with right arm to the side, not reaching away from the body, should not exceed 5-10 pounds.

Repetitive push/pull with the right upper extremity should be avoided.

Limit or avoid sudden pulling with the right arm.

Two-handed lifting with arms to the side of 30-35 pounds should be tolerated.

(JEx. 18, p. 2)

At the time of claimant's injury on July 30, 2014, claimant was on a temporary assignment by Sedona at Animal Health at $10.00 per hour. Most of claimant's weekly earnings for the relevant time before her injury were at $12.00 per hour when she worked at the Hawkeye/Ertl Foundry while on assignment by Sedona. Claimant's rate calculation used the 13 weeks that claimant asserted were representative of her work with Sedona before her injury. The claimant excluded the weeks of July 27, 2014 with 12.50 hours and the week of March 30, 2014 with 44 hours as being unrepresentative. (Ex. 3, p. 20) Using her wages at $12.00 per hour, the claimant asserted an average weekly wage of $481.82 and a weekly workers' compensation rate of $305.99. (Ex. 3, p. 2) The claimant provided the following chart of her wages:

	Weeks	**Hours**	**Rate**	**Totals**
1	7/27	12.50	10.00	125.00
2	4/27	40	12.00	480.00

3	4/20	40	12.00	480.00
4	4/13	40	12.00	480.00
5	4/6	40	12.00	480.00
6	3/30	44	12.00	528.00
7	3/23	42	12.00	504.00
8	3/16	40	12.00	480.00
9	3/9	40	12.00	480.00
10	3/2	40	12.00	480.00
11	2/23	40	12.00	480.00
12	2/16	40	12.00	480.00
13	2/9	40	12.00	480.00
14	2/2	40	12.00	480.00
15	1/26	40	12.00	480.00
		522		6,264.00

(Ex. 3, p. 2) I find that these are claimant's earnings for Sedona for the relevant time before her injury. I do note that the week ending May 4, 2014 should be used and the week ending January 26, 2016 should not be used. As the wages were identical for those weeks, it does not impact the calculations. (Ex. C, p. 3)

Claimant has requested payment of certain medical expenses listed in Exhibit 4. The total bill by providers is $7,177.05 and the total still owing is $2,074.90. (Ex. 4, p. 1) Defendants denied that claimant's current symptoms and treatments after she reached MMI were related to her work injury of July 30, 2014 and rotator cuff surgery.

Claimant has requested costs of $500.00 for a letter by Dr. Kreiter and $100.00 for the filing fee. (Attached to Hearing Report)

CONCLUSIONS OF LAW

The parties stipulated that claimant had an injury that arose out of and in the course of employment with Sedona on July 30, 2014. The largest dispute between the

parties is the extent of her injury and whether her current symptoms of shoulder, neck and arm/hand pain are related to her July 30, 2014 injury.

The claimant has the burden of proving by a preponderance of the evidence that the alleged injury actually occurred and that it both arose out of and in the course of the employment. Quaker Oats Co. v. Ciha, 552 N.W.2d 143 (Iowa 1996); Miedema v. Dial Corp., 551 N.W.2d 309 (Iowa 1996). The words "arising out of" referred to the cause or source of the injury. The words "in the course of" refer to the time, place, and circumstances of the injury. 2800 Corp. v. Fernandez, 528 N.W.2d 124 (Iowa 1995). An injury arises out of the employment when a causal relationship exists between the injury and the employment. Miedema, 551 N.W.2d 309. The injury must be a rational consequence of a hazard connected with the employment and not merely incidental to the employment. Koehler Electric v. Wills, 608 N.W.2d 1 (Iowa 2000); Miedema, 551 N.W.2d 309. An injury occurs "in the course of" employment when it happens within a period of employment at a place where the employee reasonably may be when performing employment duties and while the employee is fulfilling those duties or doing an activity incidental to them. Ciha, 552 N.W.2d 143.

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).

I find claimant has proven by a preponderance of the evidence that she has a permanent disability and impairment to her right shoulder caused by the July 30, 2014 work injury. Dr. Schemmel wrote that even after the rotator cuff surgery claimant would never have a normal shoulder.

The claimant has failed to meet her burden of proof that her neck and cervical symptoms are related to her July 30, 2014 injury.

Claimant's cervical symptoms did not appear at the same time as her shoulder injury and the MRI that showed disk herniation was taken well after her injury. Based upon the convincing evidence, the record shows that the claimant's cervical condition was subsequent to her shoulder condition and that her cervical condition is not causally related to the July 30, 2014 injury. I find the opinions of Dr. Schemmel and Dr. Kennedy to be the most persuasive. Dr. Kennedy and Dr. Schemmel examined claimant more often and were more familiar with claimant than Dr. Kreiter, who did not provide any convincing evidence that claimant's neck complaints were related to her work injury and rotator cuff surgery.

The next issue to be determined is the extent of claimant's disability. In considering claimant's extent of disability, I am considering the claimant's right shoulder injury and limitations that are a result of the July 30, 2014 injury and rotator cuff surgery. I am not considering the symptoms claimant has related to her cervical condition.

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, 593; 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. However, consideration must also be given to the injured worker's medical condition before the injury, immediately after the injury and presently; the situs of the injury, its severity, and the length of healing period; the work experience of the injured worker prior to the injury, after the injury, and potential for rehabilitation; the injured worker's qualifications intellectually, emotionally and physically; the worker's earning before and after the injury; the willingness of the employer to re-employ the injured worker after the injury; the worker's age, education, and motivation; and, finally the inability because of the injury to engage in employment for which the worker is best fitted. Thilges v. Snap-On Tools Corp., 528 N.W.2d 614, 616 (Iowa 1995); 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).

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

Industrial Commissioner Decisions, 529 (App. March 26, 1985); Peterson v. Truck Haven Cafe, Inc., Vol. 1 No. 3 Industrial Commissioner Decisions, 654 (App. February 28, 1985).

Assessments of industrial disability involve a viewing of loss of earning capacity in terms of the injured workers' present ability to earn in the competitive labor market without regard to any accommodation furnished by one's present employer. Quaker Oats Co. v. Ciha, 552 N.W.2d 143, 158 (Iowa 1996); Thilges v. Snap-On Tools Corp., 528 N.W.2d 614 (Iowa 1995).

In assessing an unscheduled, whole-body injury case, the claimant's loss of earning capacity is determined as of the time of the hearing based upon industrial disability factors then existing. The commissioner does not determine permanent disability, or industrial disability, based upon anticipated future developments. Kohlhaas v. Hog Slat, Inc., 777 N.W.2d 387, 392 (Iowa 2009).

Since claimant has left Sedona she has obtained employment and earned similar and sometimes more wages than she was making while she was working for Sedona. Claimant has also been unemployed and engaged in active work search. Claimant does have limitations in the use of her right arm due to the rotator cuff injury and surgery. She has some restriction in range of motion and ability to work above her head. She would have difficulty in working in production in a foundry or other work that requires repetitive overhead work or repetitive lifting with her right arm. Claimant's age is not a positive factor. She has shown motivation to be employed.

Considering all of the factors of industrial disability, claimant has a 20 percent industrial disability entitling her to 100 weeks of permanent partial disability benefits.

The next issue to determine is the rate that claimant should be paid for the permanent partial disability.

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).

Defendant argued that the $10.00 per hour that claimant earned while on temporary assignment to Animal Health should be used in determining her average weekly wage. Defendants cited no legal authority for using $10.00 per hour rather than $12.00 per hour, which were the wages Sedona paid claimant in the relevant weeks before her injury. She was on a temporary assignment and only briefly worked for Animal Health. (Ex. 3, p. 3) Claimant's employer was employed by Sedona, not Animal Health. Looking at the wage records, the claimant's hourly rate was $12.00 per hour for the 13 representative weeks leading up to her injury.

I find, using the applicable Iowa Workers' Compensation Manual (rate book) from July 1, 2014 through June 30, 2015, with claimant as single and entitled to one exemption with a weekly wage of $481.82, claimant's weekly workers' compensation rate is $305.59.

Defendants paid claimant at the rate of $293.52 per week. (Hearing Report) This is an underpayment of $12.07 per week ($305.59 - $293.52 = $12.07).

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. Section 85.27. Holbert v. Townsend Engineering Co., Thirty-second Biennial Report of the Industrial Commissioner 78 (Review-Reopening October 1975).

Claimant has requested payment and reimbursement of medical expenses in Claimant's Exhibit 4. The medical bills were not authorized by defendants. The medical care is primarily related to claimant's cervical condition and as I have found that the claimant has not proven causation for that injury the medical bills are not allowed. While some of the treatment that was reimbursed may have been for claimant's shoulder condition, I have no way, based upon the evidence presented, to make a determination of how I could apportion the medical expenses. Claimant's request for payment of medical expenses found in Claimant's Exhibit 4 is denied.

Claimant has requested penalty.

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.

If weekly compensation benefits are not fully paid when due, section 86.13 requires that additional benefits be awarded unless the employer shows reasonable cause or excuse for the delay or denial. Robbennolt v. Snap-on Tools Corp., 555 N.W.2d 229 (Iowa 1996).

Delay attributable to the time required to perform a reasonable investigation is not unreasonable. Kiesecker v. Webster City Meats, Inc., 528 N.W.2d 109 (Iowa 1995).

It also is not unreasonable to deny a claim when a good faith issue of law or fact makes the employer's liability fairly debatable. An issue of law is fairly debatable if viable arguments exist in favor of each party. Covia v. Robinson, 507 N.W.2d 411 (Iowa 1993). An issue of fact is fairly debatable if substantial evidence exists which would support a finding favorable to the employer. Gilbert v. USF Holland, Inc., 637 N.W.2d 194 (Iowa 2001).

An employer's bare assertion that a claim is fairly debatable is insufficient to avoid imposition of a penalty. The employer must assert facts upon which the commissioner could reasonably find that the claim was "fairly debatable." Meyers v. Holiday Express Corp., 557 N.W.2d 502 (Iowa 1996).

If the employer fails to show reasonable cause or excuse for the delay or denial, the commissioner shall impose a penalty in an amount up to 50 percent of the amount unreasonably delayed or denied. Christensen v. Snap-on Tools Corp., 554 N.W.2d 254 (Iowa 1996). The factors to be considered in determining the amount of the penalty include the length of the delay, the number of delays, the information available to the employer and the employer's past record of penalties. Robbennolt, 555 N.W.2d at 238.

Under the current statutory framework, the burden is on the claimant to demonstrate when a payment is due and that the payment was not made on time. Once

the claimant has proven the delay or denial, the burden shifts to the defendants to provide a reasonable excuse. Claimant has proven denial and delay of payment. The claimant has been underpaid $12.07 per week for approximately 45 weeks.

The defendants provided no evidence that they contemporaneously conveyed to claimant how they determined her weekly rate. Defendants' argument in a brief is not evidence. If there was evidence in the record of the defendants contemporaneously explaining their rationale for the rate, I would not award a penalty. There was no such evidence provided. I award a penalty of $150.00 dollars based upon the underpayment for 45 weeks. I find that given the relatively small amount of total underpayment and the conduct of the defendants, the $150.00 is reasonable and should encourage defendants to provide notice in the future under Iowa Code section 86.13. Given the reports of Dr. Kennedy and Dr. Schemmel, I find that no penalty will be awarded for failure to pay indemnity. Defendants had reasonable cause or excuse for the decision not to pay permanency.

The last issue is whether claimant is entitled to certain costs. Claimant has requested $500.00 for a letter prepared by Dr. Kreiter. The invoice for this letter is dated February 28, 2017. (Attachment to Hearing Report) I am unable to determine what this invoice relates to in the record before me. There is no letter on or about February 28, 2017 in the record by Dr. Kreiter. I decline to award this cost. I do award the $100.00 filing fee under 876 IAC 4.33.

ORDER

THEREFORE, IT IS ORDERED:

Defendants shall pay claimant one hundred (100) weeks of permanent partial disability benefits at the weekly rate of three hundred five and 59/100 dollars ($305.59) commencing October 15, 2014.

Defendants shall pay claimant the underpayment of weekly benefits as set forth in this decision.

Defendants shall have a credit of thirteen thousand two hundred fifty-three and 40/100 dollars ($13,253.40) for benefits previously paid.

Defendants shall pay claimant penalty of one hundred fifty and 00/100 dollars ($150.00).

Defendants shall pay claimant one hundred and 00/100 dollars ($100.00) in costs.

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 Gamble v. AG Leader Technology File No. 5054686 (App. Apr. 24, 2018).

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, 2018.

JAMES F. ELLIOTT
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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JFE/srs

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.