BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

ROCHELLE POTTER, Claimant, vs. INVIGORATING SERVICES, INC., Employer, Defendant.	File No. 23000175.01 ARBITRATION DECISION Head Notes: 1108.50, 1402.40, 1403.10, 1802, 1803, 2501, 2906, 2907, 4000

STATEMENT OF THE CASE

Rochelle Potter, claimant, filed a petition in arbitration seeking workers' compensation benefits from Invigorating Services, Inc., employer as defendant. Hearing was held via Zoom in the virtual/Des Moines, Iowa venue on August 4, 2023.

The parties filed a hearing report at the commencement of the arbitration hearing[1]. On the hearing report, the parties entered into various stipulations. All of those stipulations were accepted and are hereby incorporated into this arbitration decision. The parties are now bound by their stipulations.

Claimant, Rochelle Potter, was the only witness to testify live at trial. The evidentiary record also includes Joint Exhibits 1-4, Claimant's Exhibits 1-5 and Defendant's Exhibits A-E. All exhibits were received without objection. The evidentiary record closed at the conclusion of the arbitration hearing. The parties submitted post-hearing briefs on September 9, 2023. An amended and corrected hearing report was filed on October 9, 2023.

ISSUES

The parties submitted the following issues for resolution:

1. Whether claimant is entitled to healing period benefits from June 28, 2022 to December 22, 2022.

[1] A Hearing Report was filed by the parties on August 4, 2023, approximately 2 hours before the arbitration hearing was scheduled to begin. While preparing this arbitration decision the undersigned discovered 2 errors in paragraph 6 of the Hearing Report. A corrected hearing report was filed on October 9, 2023 to reflect that there was no dispute regarding claimant's gross weekly wages and that the appropriate rate was $291.45, and not the previously listed $292.59.

2. The nature and extent of permanent disability claimant sustained as the result of the stipulated June 27, 2022 injury.

3. Whether defendant is responsible for past medical expenses under Iowa Code section 85.27.

4. Whether claimant is entitled to reimbursement for an independent medical examination (IME) under Iowa Code section 85.39.

5. Whether claimant is entitled to additional medical care under Iowa Code section 85.27.

6. Whether claimant may assert a claim for penalty benefits.

7. Assessment of costs.

FINDINGS OF FACT

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

Claimant, Rochelle Potter, sustained an injury that arose out of and in the course of her employment with Invigorating Services on June 27, 2022. (Hearing Report) Invigorating Services provides nonemergency medical transportation to individual members. (Hearing Transcript, page 17) Ms. Potter began working there as a driver, taking members to their appointments. She transitioned to working in the office as a dispatcher. (Tr. p. 17) At the time of the injury, Ms. Potter was walking down cement steps when she fell. She experienced immediate pain and was taken via ambulance to the emergency room at Mercy Medical Center in Cedar Rapids. (Tr. pp. 19-21; Joint Exhibit 2, pp. 1-4[2]; JE2, pp.5-18)

At the emergency room Ms. Potter reported she fell down 2 concrete steps, hit the back of her head on the concrete, and landed on her right arm. She experienced right arm and shoulder pain. She was unable to fully externally rotate her right arm. She had no loss of consciousness. X-rays were taken of the right shoulder and humerus. A CT of the head was negative, and a small right occipital scalp hematoma was noted. The impression was closed displaced transverse fracture of the mid right humeral shaft and closed head injury. She was discharged with prescriptions for Lortab and Zofran. She was also provided a humeral fracture cuff. She was instructed to follow-up with Cassandra S. Lange, M.D., in 7-10 days. (JE2, pp. 5-18; JE3, pp. 26-27)

On July 6, 2022, Ms. Potter saw Dr. Lange at Lange Orthopaedics for a chief complaint of right arm pain. She was referred by Mercy emergency room. She was

[2] The joint exhibit index lists these records as joint exhibit 1, pages 1-4. However, the exhibit pages are labeled as joint exhibit 2, pages 1-4. There are no exhibits in evidence labeled as joint exhibit 1.

instructed to always wear her brace. She was not to do any heavy lifting, pushing, or pulling. The purpose of the visit was to make sure the patient was maintaining her alignment. However, the doctor noted there appeared to be some issue with workers' compensation because she was not able to obtain x-rays. Dr. Lange stated that Ms. Potter was unable to return to work until further specified. She recommended routine x-rays at the next visit. (JE4, pp. 29-30)

On July 28, 2022, Ms. Potter returned to Mercy Medical Center for re-evaluation of the fracture of the humerus. X-rays were obtained with the arm in the sling. The impression from the x-ray was mid humeral shaft fracture in stable alignment with mild changes of interval healing. (JE2, p. 19)

Ms. Potter saw Dr. Lange on September 2, 2022. Dr. Lange noted that follow-up was sporadic at best due to her work situation. She had been wearing her fracture orthosis. Her pain was much improved from when she was there the first time. Dr. Lange instructed her to continue her fracture brace and return in 1 month for repeat x-rays. If things looked good, then she would get her going to physical therapy. Dr. Lange opined that Ms. Potter was unable to work until further specified. (JE2, p. 20; JE4, pp. 31-32)

On October 13, 2022, Ms. Potter returned to Dr. Lange. Ms. Potter continued to be compliant with wearing her brace. She was interested in a home exercise program for rehab because she did not have insurance. On exam her brace was well fitting, and her alignment was normal. She could elevate the elbow and shoulder without discomfort in the upper arm. Dr. Lange instructed Ms. Potter that she could perform one-handed duties with her left hand. She could pursue gentle active and passive range of motion of the shoulder, but no aggressive strengthening. She did not have to wear the orthosis full-time indoors; however, if she was out and about shopping, getting in and out of vehicles, etc., she should wear the orthosis. Ms. Potter was to return in 6 weeks for final films. (JE2, p. 21; JE4, pp. 33-34)

Ms. Potter saw Dr. Lange again on December 14, 2022. The doctor reported that Ms. Potter had remained compliant with her brace wear. She had started to wean herself out with no increase in pain. Her shoulder felt a little stiff, but she was able to use her right arm. Dr. Lange stated it was difficult to know if Ms. Potter had gone onto a fibrous union. She really was not experiencing any pain; she was leaning on her arm in the chair, and she was able to use it for the things she needed around her house. Dr. Lange stated that if there was a good functional result and no pain, then she felt that was a reasonable endpoint. Dr. Lange felt Ms. Potter could return to work with some reasonable activity restrictions. Dr. Lange wanted to see Ms. Potter again in a few months for follow-up films. Dr. Lange stated that Ms. Potter may drive. She restricted her to no lifting or pushing more than 20 pounds. (JE2, p. 22; JE4, p. 35)

Dr. Lange last saw Ms. Potter on May 19, 2023. She was seen for follow-up of right arm pain. The doctor noted that since the last visit her condition had resolved. She was nearly a year out from her humeral shaft fracture. She had multiple comorbidities that made surgery very unappealing, and her alignment was excellent in

her coaptation splint. She had not been wearing a splint, and they talked about a home exercise program. Ms. Potter denied any pain. She still had some shoulder weakness but could use it for all activities of daily living. Dr. Lange noted that her rotator cuff strength was 5 out of 5 in internal rotation, 4+ out of 5 in external rotation. She noted 110 degrees of elevation as well as abduction. Dr. Lange counseled Ms. Potter that she has had an excellent functional and cosmetic result. She did not place any restriction on how much she could lift, push, pull, or carry because of this injury. Dr. Lange noted that Ms. Potter does have other health concerns that might make physical labor difficult. Ms. Potter was discharged to follow up as needed. (JE2, p. 23; JE4, p. 36)

At the request of her attorney Ms. Potter saw Sunil Bansal, M.D. for an independent medical evaluation (IME) on June 26, 2023. In addition to examining Ms. Potter, Dr. Bansal also reviewed the records provided to him. Dr. Bansal stated Ms. Potter sustained an injury to her right shoulder and upper arm at work on June 27, 2022. He noted Ms. Potter continued to have intermittent pain in her right shoulder and arm. Part of her job duties with Rapid Run Logistics included lifting walkers or other equipment, which can weigh 20 to 30 pounds. Ms. Potter reported she avoided pushing, pulling, carrying, or lifting with her right arm, as her arm is now weaker. She also noted decreased mobility. Ms. Potter reported she is not able to lift a gallon of milk overhead with her right arm, and now must use her left arm. Dr. Bansal agreed with Dr. Lange and placed Ms. Potter at maximum medical improvement (MMI) on May 19, 2023. Dr. Bansal's diagnosis included displaced right mid shaft humerus fracture. He noted her symptoms were consistent with possible right rotator cuff pathology and he recommended an MRI of her right shoulder to adequately assess. Dr. Bansal opined that the mechanism of slipping and falling onto concrete steps, landing on her right arm, was consistent with her right mid shaft displaced humerus fracture. Additionally, he stated, "this mechanism of forceful direct impact to the shoulder/upper arm, coupled with her clinical presentation of immediate right arm and shoulder pain, is consistent with an acute rotator cuff or labral tear. However, she has not had an MRI of her right shoulder." (Claimant's Exhibit 3, pp. 31-32) Dr. Bansal assigned 15 percent upper extremity impairment. He based his rating on range of motion and comparing to the left shoulder. He cited to the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, specifically Figures 16-40 through 16-46. He placed the following permanent restrictions: No lifting greater than 10 pounds with the right arm, no overhead lifting with the right arm, and no forceful pushing, pulling with the right arm. (Cl. Ex. 3-4)

At the request of the defendant, Ms. Potter saw Charles D. Mooney, M.D. for an IME on July 6, 2023. Ms. Potter reported that she had ongoing pain in her right arm. She rated her pain at a level 2 at rest and 9 with some activity. Her pain was in the posterolateral aspect of the elbow, which she reported occasionally locks. She was also tender over the fracture site and felt that her grip strength was decreased. Ms. Potter reported that she avoids lifting or extending her arm and lifting because she fears it will cause her pain. Dr. Mooney's assessment was slip and fall with subsequent humeral fracture treated conservatively with overall good fracture healing and outcome. He noted she appeared to have completely healed the fracture and was released by her physician. Dr. Mooney agreed with the MMI date of May 19, 2023. He also agreed with

the treating physician, Dr. Lange, that Ms. Potter did not require restrictions for her healed humeral shaft fracture. Dr. Mooney stated Ms. Potter demonstrated evidence of partial permanent impairment, based on the Fifth Edition of the AMA Guides to the Evaluation of Permanent Impairment, as it related to loss of motion of the right upper extremity. Dr. Mooney cited to figure 16-40, 16-43, and 16-46 and arrived at 9 percent impairment of the upper extremity as the result of the work injury. Dr. Mooney recommended Ms. Potter continue range of motion exercises at home and no additional intervention was otherwise needed for the fracture. (Defendant's Exhibit C)

I find that Ms. Potter sustained a displaced right midshaft humerus fracture as the result of the June 27, 2022 work injury. I further find that both Dr. Bansal and Dr. Mooney assigned permanent impairment based on the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition.

Ms. Potter is seeking temporary total disability or healing period benefits from June 28, 2022 to December 22, 2022. Because the work injury caused permanent disability, these benefits are appropriately categorized as healing period benefits. Ms. Potter did not return to work with Invigorating Services after the date of the injury. (Tr. p. 26) Ms. Potter returned to work, with a different employer, on December 30, 2022. She testified that she did not work from June 28, 2022 until December 30, 2022. (Tr. pp. 26-27) Ms. Potter's testimony is unrebutted. Defendant disputes that claimant was off work during this period but fails to offer any evidence that claimant was not off work. I find Ms. Potter was off work during the period of time for which she seeks healing period benefits which is June 28, 2022 to December 22, 2022. The medical providers placed Ms. Potter in a brace and sling on the date of the injury. Dr. Lange continued to place restrictions on Ms. Potter's activities through December 22, 2022. (JE4) Ms. Potter testified that she did not get a new job until December 22, 2022 because Dr. Lange told her she could not work at all. (Tr. p. 27) Thus, I find claimant was not medically capable of returning to employment substantially similar to the work she was performing at the time of the injury.

Ms. Potter is seeking payment of past medical expenses as set forth in Claimant's Exhibit 1. (Cl. Ex. 1) A review of Claimant's Exhibit 1 reveals that Ms. Potter incurred these expenses for treatment she needed as the result of the work injury. I find that the medical expenses set forth in Claimant's Exhibit 1 were reasonable and necessary due to the June 27, 2022 work injury.

Claimant is seeking reimbursement for the expenses she incurred in connection with the IME she had with Dr. Bansal. (Cl. Ex. 2, p. 25) I find that Dr. Bansal conducted his IME on June 26, 2023 and issued his report on July 5, 2023. I further find that defendant obtained an impairment rating via an IME with Dr. Mooney on July 6, 2023. (Def. Ex. C) I find the impairment rating obtained by the claimant was performed before the employer obtained an evaluation of permanent disability.

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).

Based on the above findings of fact, I conclude claimant sustained a displaced right midshaft humerus fracture as the result of the work injury.

The parties stipulated that the work injury was the cause of permanent disability, and that the disability is not an industrial disability. (Hearing Report, paragraph 3(b)) The parties disagree on whether the claimant sustained permanent partial disability to her right upper extremity and/or to her right shoulder. (Hearing Report, paragraph 5)

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 for loss of earning capacity under 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).

The claimant argues that she sustained an injury to the right shoulder because Dr. Bansal indicates that the impairment is to the shoulder, not the upper extremity. Claimant does not cite any legal authority for her position. Defendant argues that

because claimant sustained a closed displaced transverse fracture of the shaft of the right humerus, her injury is contained to the upper extremity. Defendant relies on prior agency precedence to support their argument. See Derrickson v. Securitas Security Services USA, Inc., File No. 1646401.01 (App. Oct. 26, 2021).

In Derrickson the claimant sustained a highly comminuted fracture to the left proximal humeral surgical neck and head through the greater and lesser tuberosities. In that case the claimant testified that she had reduced range of motion and continued pain in her left upper extremity. In reaching its conclusion that the injury should be compensated as an injury to the upper extremity, the agency relied on the analysis from 2 Iowa Supreme Court cases which have addressed the 2017 legislative changes, including Iowa Code section 85.34(2)(m) making the "shoulder" a scheduled member. See Deng v. Farmland Foods, Inc., 972 N.W.2d 727 (Iowa 2022) and Chavez v. MS Technology, LLC, 972 N.W.2d 662 (Iowa 2022).

Based upon the rulings in Chavez and Deng, I disagree with the assertion that the claimant's displaced right midshaft humerus fracture is an injury to the shoulder. A fractured humerus is not connected to, or closely entwined with, the glenohumeral joint. Therefore, I conclude permanency should be awarded to the right upper extremity based upon Iowa Code section 85.34(2)(m).

In all scheduled member injuries:

> [T]he 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 . . ."

Iowa Code section 85.34(2)(x).

Based on the above findings of fact, I conclude both Dr. Bansal and Dr. Mooney assigned permanent impairment based on the Guides to the Evaluation of Permanent Impairment, Fifth Edition. Iowa Code section 85.34(2)(x)

Pursuant to Code Section 85.34(2)(x), the extent of percentage of permanent impairment for scheduled member injuries shall be based solely on the Guides. In the present case there are 2 impairment ratings based on the Guides. The difference between the 2 ratings appears to be based on the range of motion measurements each doctor used. The statute prohibits the use of lay testimony or agency expertise to determine permanent impairment. Unfortunately, the Code does not provide any guidance on how the undersigned is to proceed when there is more than one rating assigned based on the Guides. Based on the opinion of Dr. Mooney, I conclude claimant proved a 9 percent permanent functional impairment of her right upper extremity. When a functional disability of less than 100 percent is found, an award of

permanent partial disability benefits is made proportional to the number of weeks assigned for each scheduled member injury. Iowa Code section 85.34(2)(w).

An injury to the upper extremity is compensated on a 250-week schedule. Iowa Code section 85.34(2)(m). Pursuant to Iowa Code section 85.34(2)(w), claimant is entitled to 9 percent of 250 weeks. Therefore, I conclude claimant proved entitlement to 22.5 weeks of permanent partial disability benefits. Iowa Code section 85.34(2)(n), (w). The parties stipulated that permanency benefits should commence on May 19, 2023.

Claimant is seeking healing period benefits from June 28, 2022 to December 22, 2022. Section 85.34(1) provides that healing period benefits are payable to an injured worker who has suffered permanent partial disability until (1) the worker has returned to work; (2) the worker is medically capable of returning to substantially similar employment; or (3) the worker has achieved maximum medical recovery. The healing period can be considered the period during which there is a reasonable expectation of improvement of the disabling condition. See Armstrong Tire & Rubber Co. v. Kubli, 312 N.W.2d 60 (Iowa App. 1981). Healing period benefits can be interrupted or intermittent. Teel v. McCord, 394 N.W.2d 405 (Iowa 1986).

Based on the above findings of fact, I concluded claimant was off work during this period of time and was not medically capable of returning to substantially similar employment. Thus, I conclude that claimant is entitled to healing period benefits from June 28, 2022 to December 22, 2022. Defendant shall pay claimant healing period benefits from June 28, 2022 to December 22, 2022 at the weekly rate of $291.45.

Claimant is seeking payment of past medical bills. 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).

Based on the above findings of fact, I conclude the medical expenses set forth in Claimant’s Exhibit 1 were reasonable and necessary due to the June 27, 2022 work injury. Thus, I conclude that defendant is responsible for those expenses.

Claimant is seeking reimbursement for the IME conducted by Dr. Bansal. 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.

Based on the above findings of fact, I conclude that the claimant obtained the impairment rating from Dr. Bansal before an employer-retained physician had rendered

an evaluation of impairment. Thus, because the requirements of Iowa Code section 85.39 were not met, claimant is not entitled to reimbursement for the IME pursuant to section 85.39.

Claimant has made a claim for alternate medical care. (Hearing Report, paragraph 8) In her post-hearing brief claimant specifically requests an order directing the employer to authorize a return appointment with Dr. Lange to assess whether physical therapy is still necessary and to consider Dr. Bansal's recommendation of an MRI.

Iowa Code section 85.27(4) provides, in relevant part:

> For purposes of this section, the employer is obliged to furnish reasonable services and supplies to treat an injured employee, and has the right to choose the care. . . . The treatment must be offered promptly and be reasonably suited to treat the injury without undue inconvenience to the employee. If the employee has reason to be dissatisfied with the care offered, the employee should communicate the basis of such dissatisfaction to the employer, in writing if requested, following which the employer and the employee may agree to alternate care reasonably suited to treat the injury. If the employer and employee cannot agree on such alternate care, the commissioner may, upon application and reasonable proofs of the necessity therefor, allow and order other care.

There is no evidence in the record to demonstrate that, prior to the hearing, claimant communicated her dissatisfaction with the care offered. Because it appears that claimant did not meet the statutory requirements, I conclude an order of alternate medical care is not appropriate. However, defendant is reminded of its obligation under Iowa Code section 85.27 to provide reasonable and necessary medical treatment that is causally connected to the work injury. See Iowa Code Section 85.27.

We now turn to the issue of penalty benefits under Iowa Code Section 86.13[3]. Claimant asserts a claim for penalty benefits. Defendant asserts that penalty was not properly pled and therefore was waived. Under additional issues the hearing report states: "Claimant's [*sic*] assert penalty – Defendant objects as the issue of penalty was never pled in the original petition or amended petition as required under 876 IAC 4.2." (Hearing Report, numbered paragraph 10)

Defendant asserts that claimant did not assert penalty in her Original Notice and Petition and did not amend her petition to reflect a penalty claim. Defendant also

[3] The Iowa General Assembly enacted legislation that took effect July 1, 2023, transferring chapter 86 to sections 10A.303 through 10A.333 in the Iowa Code. See 2023 Iowa Acts ch. 19, § 1477. At the filing of this decision, it does not appear the Iowa Code has been published to reflect that change. For clarity, this decision will rely on and cite to prior Iowa Code chapter 86.

asserts that claimant did not indicate penalty was at issue in any discovery materials. According to the defendant, penalty was not raised until the hearing report[4].

Claimant did not seek permission to amend her petition for a second time. Rather, claimant argues that she did plead the issue of penalty. Specifically, claimant contends the issue of penalty was raised in her amended petition which was filed on August 29, 2022. Numbered paragraph 10 of the amended petition states the issues in the case as, "Nature and extent of disability, entitlement to workers' comp benefits." (Agency File, Amended Petition) Claimant argues that Iowa Code 86.13 does not contain the word penalty; rather it refers to an obligation to pay additional benefits under certain circumstances. Claimant admits that the way she pled the disputed issues is vague, but contends it is appropriate under the Iowa Rules of Civil Procedure. I.R.C.P. 1.402 addresses the general rules of pleadings. The Rule states in pertinent part:

> **1.402(1)** *Form and sufficiency.* The form and sufficiency of all pleadings shall be determined by these rules, construed and enforced to secure a just, speedy and inexpensive determination of all controversies on their merits.
>
> **1.402(2)** *Pleading to be concise and direct; consistency.*
>
> a. Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleadings are required.

Iowa R. Civ. P. 1.402.

While claimant argues her pleading is appropriate under the Iowa Rules of Civil Procedure, she does not address the requirements of Iowa Code Section 17A or agency rules. Agency rule 4.35 states in part as follows:

> [t]he rules of civil procedure shall govern the contested case proceedings before the workers' compensation commissioner unless the provisions are in conflict with these rules and Iowa Code chapters 85, 85A, 85B, 86, 87 and 17A, or obviously inapplicable to the workers' compensation commissioner. In those circumstances, these rules or the appropriate Iowa Code section shall govern.

876 IAC 4.35.

Iowa Code section 17A.12(2) requires that parties be given notice of disputed issues to be tried at a contested case proceeding. Obviously, this agency is bound by the provisions of the Iowa Administrative Procedure Act. Claimant has not complied with the provisions of Iowa Code section 17A.12(2) by providing reasonable notice of the

[4] Pursuant to 876 IAC 4.19(3)(f), at least 14 days before the hearing, the parties are to file a joint hearing report. In this case the hearing report was not filed until approximately 2 hours before the start of the hearing.

intent to pursue a penalty benefit claim. In this case, the first time the term penalty benefits was identified was on the hearing report which was filed approximately 2 hours before the start of the hearing. Furthermore, a penalty benefit claim includes an evidentiary burden shifting in which the defendant is required to produce evidence to demonstrate the basis(es) for their denial and evidence that they contemporaneously conveyed the basis(es) of denial to the claimant. Iowa Code section 86.13(4)(b)-(c). Requiring defendant to marshal and introduce evidence on a claim that was not identified prior to the close of evidence is prejudicial on its face. I find that vaguely stating "entitlement to workers' comp benefits" does not provide defendant reasonable notice that claimant is making a claim for penalty benefits in the original notice and petition or in the amended petition. Asserting entitlement to workers' compensation benefits does not provide defendant sufficient notice of a penalty claim so that defendant may make an adequate response. I conclude claimant did not comply with Iowa Code section 17A.12(2).

Agency rule 876 IAC 4.2 specifically requires, "[e]ntitlement to denial or delay benefits provided in Iowa Code section 86.13 shall be pled." The Iowa Court of Appeals has addressed the pleading requirement contained in agency rule 4.2. In Allen v. Tyson Fresh Meats, although the claimant had raised the issue of entitlement to penalty benefits in answers to interrogatories, penalty was not pled, and the court concluded that since 876 IAC 4.2 states that "entitlement to denial or delay benefits provided in Iowa Code Section 86.13 shall be pled," the language was mandatory and required actual pleading of entitlement to penalty benefits. See Allen v. Tyson Fresh Meats, Inc., 913 N.W.2d 275 (Iowa App. 2018). In the present case there is no indication that the issue of penalty was pled. Thus, I conclude claimant has not complied with agency rule 876 IAC 4.2.

Furthermore, agency rule 876 IAC 4.2 provides a mechanism in which claimant may bifurcate the penalty benefit claim for a later trial. Pursuant to that administrative rule, "claimant may bifurcate the denial or delay issue by filing and serving a notice of bifurcation at any time before a case is assigned for hearing." 876 IAC 4.2. Again, claimant is clearly not in compliance with agency rule 876 IAC 4.2. Claimant made no attempt to identify the penalty benefit claim during the discovery phase of this case, let alone file a notice of bifurcation before the hearing assignment order was filed.

Therefore, I conclude that claimant's request to advance a penalty benefit claim after the close of evidence should be denied and that the penalty claim cannot be bifurcated or raised and litigated at a later date.

Claimant is seeking an assessment of costs as set forth in claimant's exhibit 2. Costs are to be assessed at the discretion of the Iowa Workers' Compensation Commissioner or the hearing deputy. 876 IAC 4.33. I find that claimant was generally successful in her case. I exercise my discretion and conclude that an assessment of costs against the defendant is appropriate.

Claimant seeks costs in the amount of $100.30 for the filing fee. I find this is an appropriate cost under 876 IAC 4.33(7).

Next, claimant seeks costs in the amount of $56.60 for service of petition. I find this is an appropriate cost under 876 IAC 4.33(3).

Finally, claimant seeks costs in the amount of $2,874.00 for the IME of Dr. Bansal. Iowa Code section 85.39 is the sole method for reimbursement of an exam by a physician of the employee's choice. If an injured worker seeks reimbursement for an IME, the provisions established by the legislature, under Iowa Code section 85.39, must be followed. Only the costs associated with preparation of the written report of a claimant's IME can be reimbursed as a cost at hearing under rule 876 IAC 4.33. Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839, 846-847 (Iowa 2015). The July 5, 2023 invoice submitted for Dr. Bansal's IME is in the amount of $2,874.00 for the total cost for IME. (Cl. Ex. 2, p. 25) Unfortunately, there is no itemization or any way for the undersigned to know what portion of the $2,874.00 are the costs associated with preparation of the written report. Although there is no meaningful way to apportion out the expenses associated with preparation of the written report versus the examination, it appears this agency must do just that. See Fuller v. Bimbo Bakeries, U.S.A., File No. 20012896.01 (App. September 12, 2023). In this case, the doctor reviewed numerous medical records, took a history from the claimant, and examined the patient, including taking detailed measurements of claimant's upper extremities and shoulders. I find the costs associated with preparation of the written report of a claimant's IME amount to $1,000.00.

Thus, I conclude defendant is assessed costs totaling one thousand one hundred fifty-six and 90/100 dollars ($1,156.90).

ORDER

THEREFORE, IT IS ORDERED:

All weekly benefits shall be paid at the stipulated rate of two hundred ninety-one and 45/100 dollars ($291.45).

Defendant shall pay healing period benefits from June 28, 2022 to December 22, 2022.

Defendant shall pay 22.5 weeks of permanent partial disability benefits commencing on the stipulated commencement date of May 19, 2023.

Defendant shall pay accrued weekly benefits in a lump sum together with interest 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.

Defendant shall pay the medical providers, reimburse claimant, reimburse all third-party payers, or otherwise satisfy and hold claimant harmless for medical expenses as set forth in Claimant's Exhibit 1.

Defendant is assessed costs totaling one thousand one hundred fifty-six and 90/100 dollars ($1,156.90).

Defendant 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.

This case is referred to the Iowa Workers' Compensation Commissioner for determination of whether further investigation or action is needed pursuant to Iowa Code section 87.19.

Signed and filed this 6th day of November, 2023.

ERIN Q. PALS
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Brian Keit (via WCES)

Jason Wiltfang (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.