

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

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PATRICIA KING,

Claimant,

vs.

CITY OF WEST DES MOINES,

Employer,

Self-Insured,

Defendant.

**FILED**

JAN 25 2019

WORKERS' COMPENSATION

File Nos. 5059104, 5059105

ARBITRATION DECISION

Headnotes: 1802, 1803, 1808, 2209, 2401

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Claimant Patricia King filed two petitions in arbitration on June 30, 2017, File Number 5059104 and 5059105. In File Number 5059104, King alleges she sustained cumulative injuries to her right upper extremity and whole body while working for the defendant, City of West Des Moines ("City"), from October 17, 2011 through June 21, 2017. File Number 5059105, King alleges she sustained cumulative injuries to her left upper extremity and whole body while working for the City from February 17, 2016 to June 21, 2017. The City filed an answer for File Number 5059104 on June 14, 2017. Defendant, Second Injury Fund of Iowa ("Fund") filed an answer in File Number 5059105 on July 14, 2017. The City filed an answer in File Number 5059105 on August 10, 2018. Prior to the hearing King entered into a settlement with the Fund.

An arbitration hearing was held on August 15, 2018, at the Division of Workers' Compensation, in Des Moines, Iowa. Attorney Matthew Sahag represented King. King appeared and testified. Attorney Andrew Tice represented the City. Joint Exhibits ("JE") 1 through 16, and Exhibits 1 through 10 and A through S were admitted into the record. The record was held open through November 1, 2018, for the receipt of post-hearing briefs. The briefs were received and the record was closed.

Before the hearing the parties prepared a hearing report for each case, listing stipulations and issues to be decided. In File Number 5059104, the City asserted the affirmative defenses of untimely notice under Iowa Code section 85.23, untimely claim under Iowa Code section 85.26, refusal of suitable work under Iowa Code section 85.33, and waiver. In File Number 5059105, the City asserted the affirmative defenses of untimely claim under Iowa Code section 85.23, and waiver. The City waived all other affirmative defenses for both files.

**FILE NUMBER 5059104**

**STIPULATIONS**

1. An employer-employee relationship existed between the City and King at the time of the alleged injury.
2. King sustained an injury on October 17, 2011, which arose out of and in the course of her employment with the City.
3. The alleged injury on October 17, 2011, is a cause of temporary disability during a period of recovery.
4. The alleged injury on October 17, 2011, is a cause of permanent disability.
5. If the injury is found to be the cause of permanent disability, the disability is a scheduled member disability to the right upper extremity.
6. At the time of the alleged injury King was married and entitled to two exemptions.
7. Prior to the hearing King was paid 7.5 weeks of compensation at the rate of \$686.18 per week.

**ISSUES**

1. Did King sustain an injury on June 21, 2017, which arose out of and in the course of her employment with the City?
2. Is King's claim barred under Iowa Code section 85.23?
3. Is King's claim barred under Iowa Code section 85.26?
4. If King sustained an injury on June 21, 2017 and her claim is timely, is the alleged injury a cause of temporary disability during a period of recovery?
5. If King sustained an injury on June 21, 2017 and her claim is timely, is the alleged injury a cause of permanent disability?
6. Is King entitled to temporary disability benefits from June 22, 2017 through October 4, 2017?
7. Has the City established King refused suitable work?
8. Did King waive her right to temporary benefits?
9. What is the extent of disability?

10. Has King sustained an industrial disability?
11. Did King waive her right to benefits for an industrial disability?
12. What is the commencement date for permanent partial disability benefits?
13. What is the rate?
14. Is King entitled to recover the cost of an independent medical examination?
15. Should costs be assessed against either party?

**FILE NUMBER 5059105**

**STIPULATIONS**

1. An employer-employee relationship existed between the City and King at the time of the alleged injury.
2. King sustained an injury on February 17, 2016, which arose out of and in the course of her employment with the City.
3. At the time of the alleged injury King was married and entitled to two exemptions.

**ISSUES**

1. Did King sustain an injury on June 21, 2017, which arose out of and in the course of her employment with the City?
2. What is the nature of the injury?
3. Is King's claim barred under Iowa Code section 85.23?
4. If King sustained an injury on June 21, 2017 and her claim is timely, is the alleged injury a cause of temporary disability during a period of recovery?
5. If King sustained an injury on June 21, 2017 and her claim is timely, is the alleged injury a cause of permanent disability?
6. Is King entitled to temporary disability benefits from June 22, 2017 through October 4, 2017?
7. Did King waive her right to temporary benefits?
8. Has King sustained an industrial disability?

9. Did King waive her right to benefits for an industrial disability?
10. What is the extent of disability?
11. What is the commencement date for permanent partial disability benefits?
12. What is the rate?
13. Is King entitled to an award of penalty benefits?
14. Has King waived her right to penalty benefits?
15. Is King entitled to recover the cost of an independent medical examination?
16. Should costs be assessed against either party?

### FINDINGS OF FACT

King is married and lives with her husband in Urbandale, Iowa. (Exhibit F, page 10) King graduated from high school and attended two years of bible college, but she did not obtain a degree. (Ex. F, p. 10; Transcript, pp. 11, 68) King obtained a cosmetology degree from Queen City Beauty School in Springfield, Missouri. (Ex. F, p. 10) To qualify for licensure in Iowa, King attended additional training at Indian Hills Community College in cosmetology. (Ex. F, p. 10; Tr., pp. 11, 68-69) King worked as a cosmetologist for two years. (Tr., pp. 12-14) At the time of the hearing King was fifty-nine. (Tr., p. 10)

In July 1983, the Centerville Police Department hired King as a dispatcher. (Tr., pp. 12, 14) King also provided dispatching services for the Appanoose County Sheriff's Department. (Tr., p. 14) In January 1985 King married and moved to the Des Moines area. (Tr., p. 14) King worked as a long-term temporary dispatcher for the Polk County Sheriff's Office. (Tr., pp. 14-15) In 1988 the Dallas County Sheriff's Department hired King as a full-time dispatcher. (Tr., p. 15) King worked for Dallas County until April 1991 when the West Des Moines Police Department hired her. (Tr., p. 15; Ex. C, p. 3) Approximately ten years ago West Des Moines, Urbandale, and Clive consolidated their dispatching, and later added Norwalk and Waukee. (Tr., p. 15) The consolidated dispatching service is called WesCom. (Tr., p. 15) King worked for WesCom until she retired in 2017. (Tr., p. 15)

When King first worked for West Des Moines she completed handwritten or typed reports. (Tr., p. 16) Dispatching changed to a computer format. (Tr., p. 16) King took dispatch telephone calls for police, fire, and emergency medical services for multiple departments. (Tr., p. 18) King sat at a station in the middle of the room and worked with seven computer screens. (Tr., pp. 17, 20) She operated three mice with her hands, and the radio was on a separate computer. (Tr., p. 21) King moved from device to device constantly throughout her shift. (Tr., p. 21)

On May 6, 2010, King attended an appointment with Kelly Bast, M.D., complaining of problems with her right elbow. (JE 1, p. 1) Dr. Bast documented King had hyperextension of her joints, particularly of the elbow, tenderness in the lateral humeral epicondyle, right arm cubital tunnel syndrome into the fourth and fifth fingers at times, achiness of the right elbow in the tennis elbow area, particularly at night, and some symptoms in the left elbow that were "not as bad." (JE 1, p. 1) Dr. Bast assessed King with right elbow lateral humeral epicondylitis, right elbow cubital tunnel syndrome, and mild left tennis elbow, ordered King to continue doing stretching exercises, and performed an injection. (JE 1, p. 1)

King testified her injury

started out that the pain was right below my elbow, and it was to the point where it was keeping me up all night. And to tell you the truth, I didn't realize it was work-related. I just didn't.

And the second pain came down in my wrist, and then I had numbness in my thumb, my little finger and my ring finger.

I first sought treatment from my personal physician, not realizing it was work-related. After seeing him, his office or that clinic directed me back to my employer saying that it was a work-related injury and that it needed to be addressed that way.

(Tr., pp. 22-23)

King reported a work injury to the City on October 20, 2011, listing an injury date of October 17, 2011. (Ex. A, p. 1) King documented she had pain in her elbow, down her arm, and numbness in her fingers in her right upper extremity, and noted the injury was caused by repetitive motion. (Ex. A, p. 1)

On November 1, 2011, King attended an appointment with Michael Knipp, M.D., with Iowa Methodist Occupational Health and Wellness, reporting for the past year and a half she had some persistent lateral right elbow pain, which was worse at the end of her work week, difficulty opening jars, decreased grip in the right hand, and numbness in the fifth digit and palmar aspect of the tips of the second through fourth digits in her right hand. (JE 2, p. 2) King relayed she experienced pain while brushing her teeth and hair and she did not feel comfortable picking up her grandson. (JE 2, p. 2) Dr. Knipp assessed King with right elbow pain and right upper extremity paresthesias, ordered physical therapy, and imposed restrictions of limiting repetitive use of the right hand to tolerance, and to limit keyboard use to fifty minutes per hour with ten minutes off per hour. (JE 2, p. 3) Dr. Knipp ordered physical therapy, and prescribed an elbow strap to wear as needed, a wrist splint to wear at work or home and for sleeping, and a Medrol Dosepak, and ordered magnetic resonance imaging of the right elbow. (JE 2, p. 3)

On November 2, 2011, King prepared a Workers' Compensation Employee Report, noting she had an injury to the same body part in 2010, and she treated with Dr. Bast for pain in her right elbow. (Ex. B, p. 2)

Charles Denhart, M.D., performed electromyography on King on November 7, 2011. (JE 3, pp. 6-7) Dr. Denhart found the right ulnar nerve to be slower than expected at the elbow consistent with mild right ulnar neuropathy at the elbow, the right median nerve conduction study was normal, and the right upper electromyography needle exam was normal with no evidence of denervation. (JE 3, p. 7)

King returned to Dr. Knipp on November 7, 2011. (JE 2, p. 4) Dr. Knipp noted magnetic resonance imaging revealed a moderately large partial tear involving the common extensor tendon in the humeral origin, and electromyography revealed mild right ulnar neuropathy at the elbow, he continued her physical therapy, medications, and restrictions, and recommended a referral to orthopedics. (JE 2, p. 4) Dr. Knipp issued an opinion letter on November 11, 2011, stating he believed "more likely than not the symptoms in [King's] right elbow and the findings on MRI are related to her job duties." (JE 2, p. 5)

On December 1, 2011, King attended an appointment with Patricia Kallemeier, M.D., an orthopedic surgeon. (JE 4, p. 10) Dr. Kallemeier noted King was an emergency dispatcher who had had right elbow pain over the lateral aspect for over a year and a half, with weakness and numbness and tingling in the small and ring fingers that was intermittent, and worse with computer use, brushing her teeth, and making the bed. (JE 4, p. 10) King reported the numbness and tingling had been intermittent for the past two months and was not better unless she was off work. (JE 4, p. 10) Dr. Kallemeier examined King and assessed her with right cubital tunnel syndrome, and right lateral epicondylitis, discussed surgical intervention, and imposed a work restriction of no use of the right hand and to allow the use of a splint. (JE 4, p. 11)

Dr. Kallemeier performed a right anterior ulnar nerve transposition with Eaton sling, and right lateral elbow tenotomy with debridement on January 3, 2012. (JE 4, p. 13) King returned to Dr. Kallemeier on January 16, 2012, reporting her right numbness and tingling had improved and she was not waking up at night anymore, but she still had mild tingling in her small finger. (JE 4, p. 16) Dr. Kallemeier ordered therapy, and restricted King from working for two days. (JE 4, p. 16)

On January 23, 2012, King attended a follow-up appointment with Dr. Kallemeier, complaining of numbness and tingling in her small and ring fingers after working on Wednesday, reporting she had to take the next day off work because of the pain, and noting on Friday she returned to work and experienced swelling, numbness, and pain. (JE 4, p. 17) Dr. Kallemeier imposed restrictions of no use of the right hand and to cut back on work, and ordered King to continue therapy. (JE 4, p. 17) King testified her condition would become better for a while when she was on light duty, and then when she resumed her normal work activities her condition would become worse. (Tr., p. 24)

During an appointment on February 3, 2012, King told Dr. Kallemeier she believed she could return to full work activities. (JE 4, p. 18) Dr. Kallemeier released King to return to work without restrictions and ordered a final check in six months. (JE 4, p. 18; Tr., pp. 55-56)

King attended an appointment with Dr. Kallemeier on July 12, 2012. (JE 4, p. 19) King reported pain in her right lateral elbow and occasional small finger numbness, but reported she was much improved. (JE 4, p. 19) Dr. Kallemeier assessed King with right lateral elbow tendinopathy, and right ulnar nerve cubital tunnel syndrome with satisfactory healing postop, determined she was at maximum medical improvement, and released King without restrictions. (JE 4, p. 19)

On September 19, 2012, Dr. Kallemeier issued an opinion letter to the City. (JE 4, p. 21) Using the Guides to the Evaluation of Permanent Impairment (AMA Press, 5th Ed. 2001) ("AMA Guides"), Dr. Kallemeier found King had sustained no ratable impairment due to loss of sensation, or for loss of strength, but with range of motion opined,

[a]ccording to page 472 figure 16-34 of the Guides, her elbow extension of -5° results in 1% Impairment, and elbow flexion of 135° results in 1% impairment.

According to page 474 figure 16-37, the patient's pronation of 70° results in 1% impairment. The remainder of her range of motion is within the normal published guidelines. Ms. King's impairment of full range of motion is 3% due to the above-mentioned impairments calculated.

(JE 4, p. 22) Dr. Kallemeier found King had sustained a three percent right upper extremity impairment due to right cubital tunnel syndrome and right lateral elbow tendinopathy. (JE 4, p. 22) Based on Dr. Kallemeier's rating, the City paid King 7.5 weeks of permanent partial disability benefits. (JE L, p. 38)

Ian Crabb, M.D., an orthopedic surgeon, conducted an independent medical examination for King on May 7, 2013. (JE 8; Tr., p. 56) Dr. Crabb noted King had undergone a release for lateral epicondylitis and a subcutaneous ulnar nerve transposition on the right elbow, but continued to have problems with ulnar nerve irritation proximal to the elbow directly related to her work activities of repetitive use of multiple keyboards and mice in her job as a police dispatcher. (JE 8, p. 79) Dr. Crabb opined King was not at maximum medical improvement, but she did not require any restrictions. (JE 8, p. 80) Dr. Crabb recommended King "would benefit from revision ulnar nerve transposition placement of the nerve into a submuscular location, perhaps with a carpal tunnel release," noted her symptoms were impacting her ability to engage in normal activities, and that she was particularly symptomatic at work which required her to interface with multiple computer terminals. (JE 8, p. 82)

King fell at work on May 8, 2013, and reported pain in her left wrist. (JE 5, p. 66) Jon Yankey, M.D., an occupational medicine physician, asked Dr. Quenzer, an orthopedic surgeon, to review the x-rays and he agreed there was an irregularity of the distal radius, which could be a possible nondisplaced fracture, and he recommended a wrist splint, ice, analgesics, and restricted activities. (JE 6, p. 67) King continued to treat with Dr. Yankey, and additional x-rays revealed a nondisplaced fracture of the distal radius, and strain of the left shoulder and neck. (JE 6, pp. 69-70) Dr. Yankey continued King's thumb spica splint, and prescribed hydrocodone for pain. (JE 6, p. 70) King's left wrist injury is not the subject of this proceeding.

King returned to Dr. Kallemeier on July 15, 2013, complaining of recurrent right arm pain that had been worsening since November. (JE 4, p. 23) King reported she had numbness and tingling that was almost constant in her small and ring fingers that bothered her at work, and after a long day her whole hand would go numb, and she had tingling causing her to wake up at night. (JE 4, p. 23) Dr. Kallemeier noted King had broken her left wrist two months before her appointment and she was wearing a removable wrist brace. (JE 4, p. 23) Dr. Kallemeier assessed King with "[l]ikely recurrent right cubital tunnel syndrome," and recommended electromyography. (JE 4, p. 26)

Bill Koenig, M.D., performed electromyography on King's right upper extremity on July 16, 2013. (JE 9, p. 86) Dr. Koenig reported he found no evidence of right nerve root compression or carpal tunnel syndrome, King's right radial sensory and right ulnar sensory distal latencies were normal, and across elbow velocity was a bit slower than Dr. Denhart's November 7, 2011 study. (JE 9, p. 86)

On July 25, 2013, King attended a follow-up appointment with Dr. Kallemeier, following electromyography. (JE 4, p. 27) Dr. Kallemeier documented the electromyography demonstrated "slowing across the right medial elbow for the ulnar nerve" and assessed King with "EMG-negative carpal tunnel syndrome," recurrent right cubital tunnel syndrome, and previous lateral elbow tenotomy with debridement, and recommended additional surgery. (JE 4, p. 27) Dr. Kallemeier released King to full-duty with the exception of wearing a splint. (JE 4, p. 28)

Dr. Kallemeier performed a right revision cubital tunnel release with submuscular ulnar nerve transposition, and right carpal tunnel release on King on October 2, 2013. (JE 4, p. 31; Tr., p. 60) King returned to Dr. Kallemeier on October 14, 2013, reporting she had some pain, but no numbness or tingling. (JE 4, p. 34) Dr. Kallemeier restricted King from working for a week and ordered therapy. (JE 4, p. 34) During an appointment on November 11, 2013, Dr. Kallemeier documented King appeared to be getting better and her activities and time at work would be increased. (JE 4, p. 35)

King continued to treat with Dr. Kallemeier, complaining of throbbing pain after a long busy day at work, with occasional small and ring finger numbness and tingling, and reporting a spasm in her arm after a long shift. (JE 4, pp. 36-37) During an appointment on October 13, 2014, King complained of increasing numbness in her



small and ring finger over the last month, spasms and elevated pain during busy days at work. (JE 4, p. 39) Dr. Kallemeier examined King and noted she had decreased sensation in the dorsoulnar sensory nerve on the right compared with the left, mild tenderness over the medial elbow, and negative Tinel's, with no evidence of subluxation. (JE 4, p. 41)

On January 12, 2015, King returned to Dr. Kallemeier complaining of cramping and spasms, nearly constant numbness in her thumb, ring, and small fingers, forearm and wrist pain, and difficulty sleeping. (JE 4, p. 42) Dr. Kallemeier assessed King with a possible recurrent carpal tunnel, possible distal ulnar tunnel syndrome, and possible recurrent cubital tunnel, and referred her for electromyography. (JE 4, p. 43)

During a follow-up appointment on March 5, 2015, Dr. Kallemeier noted electromyography revealed no diagnostic abnormalities. (JE 4, p. 45) Dr. Kallemeier assessed King with persistent right arm pain, numbness and tingling and cramping in the hand with no objective signs of carpal or cubital tunnel syndrome with the exception of tenderness and a positive cubital tunnel Tinel's, and recommended a referral to neurology and magnetic resonance imaging of her cervical spine. (JE 4, p. 45)

On February 17, 2016, King sent an electronic mail message to Jennifer Colby with the City reporting she had been experiencing pain in her left arm/wrist. (Ex. D, p. 4) King completed a first report of injury form for the City, reporting she had pain in her "left wrist/hand/arm. Due to repetitive action on busy day. Keyboarding/mouse continuous use for several hours with no rest or break." (Ex. C, p. 3) King acknowledged she only alleged an injury to her left upper extremity. (Tr., p. 48)

On February 25, 2016, King attended an appointment with Dr. Kallemeier, complaining of right hand numbness and tingling pain, and tingling in her left hand that started recently. (JE 4, p. 46) King reported she was working overtime and the pain was waking her up at night. (JE 4, p. 46) Dr. Kallemeier noted the most recent electromyography was normal, she did not think it should be repeated, and she administered a carpal tunnel injection and provided King with work restrictions. (JE 4, p. 48)

Jacqueline Stoken, D.O, a physiatrist, conducted an independent medical examination for King on March 2, 2016, and issued her report on March 15, 2016. (JE 12) Dr. Stoken reviewed King's medical records and examined her. (JE 12) Dr. Stoken diagnosed King with:

1. Status post work injury on 10/17/11 with right carpal tunnel syndrome, right cubital tunnel syndrome, and right lateral epicondylitis.
2. Status post right lateral elbow tenotomy and anterior ulnar nerve transposition with Eaton sling on 1/03/12 done by Dr. Patricia

Kallemeier. Postoperative diagnosis is right cubital tunnel syndrome. Right lateral epicondylitis.

3. Status post right revision cubital tunnel release with submuscular ulnar nerve transposition. Right carpal tunnel release on 10/02/13 done by Dr. Patricia Kallemeier. Postoperative diagnosis is right carpal tunnel syndrome. Right recurrent cubital tunnel syndrome.
4. Status post work injury on 2/17/16 with pain and numbness in the left upper extremity.
5. Chronic pain of the bilateral upper extremities.

(JE 12, pp. 100-01) Dr. Stoken opined the repetitive nature of King's work as a dispatcher caused her current injury. (JE 12, p. 102)

Using the AMA Guides, Dr. Stoken issued a permanent impairment rating of three percent to the right upper extremity due to deficits in range of motion, under table 16-3, page 436, which she converted to a two percent impairment of the whole person under Table 16-3, on page 439. (JE 12, p. 101) With respect to the left upper extremity, Dr. Stoken issued a permanent impairment rating of one percent, using Figure 16-1b, on page 437, due to deficits in range of motion, which she converted to a one percent whole person impairment. (JE 12, p. 101) Using the Combined Values Chart on page 604, Dr. Stoken opined King sustained a three percent whole person impairment. (JE 12, p. 101) Dr. Stoken recommended restrictions of avoiding repetitive keying, gripping, and pinching, and recommended King be able to take a break from computer work for five minutes every hour to do stretches of the upper extremities. (JE 12, p. 101)

Dr. Stoken opined King's impairment to her right upper extremity increased and/or worsened on July 15, 2013, when Dr. Kallemeier saw her for increased right upper extremity pain since November 2012. (JE 12, p. 102)

During an appointment with Dr. Kallemeier on April 7, 2016, King reported she received no improvement following the injection and reported she was wearing her splint day and night, with intermittent numbness in her thumb, ring, and small fingers on the right. (JE 4, p. 49) King also reported continuing symptoms in her left wrist, including numbness and pain in the inside of her arm at the medial elbow. (JE 4, p. 49) Dr. Kallemeier recommended repeat electromyography. (JE 4, p. 50) Dr. Kallemeier noted King had "a normal EMG study of the upper extremity and 'inching' study of the ulnar nerve showed normal amplitude and conduction velocity." (JE 5, p. 51) Dr. Kallemeier recommended King return to full-duty work, with an hour of normal dispatch work with alternating hours for the next four weeks, then two hours at a time for two additional weeks, and then full duty. (JE 4, p. 51)

On July 14, 2016, King returned to Dr. Kallemeier, reporting her symptoms were better, and she had some discomfort in the forearm, but with activity modification it has gotten better, and she was wearing a splint, as needed. (JE 4, p. 53) Dr. Kallemeier released King to full duty with a ten minute break every two hours for stretching and ice application. (JE 4, p. 55) Dr. Kallemeier opined King had reached maximum medical improvement. (JE 4, pp. 55-56)

King attended an appointment with Dr. Kallemeier on October 18, 2016, complaining of right worse than left arm pain that throbs at night and is worse with overtime. (JE 4, p. 57) King relayed she was wearing her braces while working, and not taking breaks like she should be. (JE 4, p. 57) Dr. Kallemeier recommended postural strengthening and symptom management with a shoulder girdle. (JE 4, p. 58) During a follow-up appointment King reported improvement with Kinesio tape and Dr. Kallemeier continued therapy. (JE 4, p. 60)

After a decrease in physical therapy to once per week, King reported increasing symptoms, but noted the Kinesio tape was very helpful at work, and reported her right upper extremity was worse than the left, and she was waking up three to four nights per week with throbbing in her arms, and reported neck and shoulder pain. (JE 4, p. 61) Dr. Kallemeier prescribed gabapentin, referred King to pain management, and found she was at maximum medial improvement, with continued use of Kinesio tape. (JE 4, p. 61)

King testified her pain in 2016,

started pretty much the same way, elbow and in the wrist, and then I started getting a numbness in my fingers. My right is my dominant hand. I use it probably 90 – 80 or 90 percent of the time. But as it got weaker, my left arm, I think, was picking up more, and then I started having issues with it.

(Tr., p. 28)

In January 2017, WesCom changed computer systems. (Tr., p. 28) Under the old system King was able to type in codes and did not have to type out sentences. (Tr., p. 28) The codes did not work on the new system and she had to enter information into the computer manually, and sometimes had to retype information for the police officers. (Tr., p. 29) Each day King ran hundreds of queries and reported she had to type the queries not one time but three times per day and “that increase in work with my hands led to further pain and cramping and stuff that I was having.” (Tr., p. 30) King reported the City opened up a second case when she saw Dr. Kallemeier for both of her arms. (Tr., p. 30)

King testified between 2011 and 2017, she was performing “the repetitive action of moving from keyboard to mouse, to one mouse to the other, and back and forth again. It’s just this motion of going back and forth using the equipment consistently.”

(Tr., p. 24) King relayed at the beginning of the day she would have slight pain, and by the end of the day the pain "was bad" and she had days where she could not grip the steering wheel to drive home and she had to use her fingers and knees to drive her car. (Tr., p. 26) Toward the end of her employment King reported she could no longer prepare dinner for her family or perform chores, and she would take pain medication and rest. (Tr., p. 26)

King wore braces on her hands that made it difficult to type, and resulted in many typing errors. (Tr., p. 26) King reported she was experiencing spasms or hand cramps, her fingers and hands would stiffen, similar to a charley horse in a leg, both at home and at work. (Tr., p. 27) King testified since she quit working her spasms or cramps have decreased, and at the time of the hearing she had not had a spasm or cramp in weeks. (Tr., p. 28)

King reported she could not lift pans to cook, she did not have strength in her arms to fill bowls or to pour a pitcher. (Tr., p. 32) King relayed she had problems gripping and turning a stiff doorknob, and peeling potatoes. (Tr., p. 33)

On January 18, 2017, Dr. Kallemeier issued an impairment rating for the City for King's left upper extremity, noting King had been under her care since December 1, 2011, and finding King reached maximum medical improvement on January 10, 2017. (JE 4, p. 63) Using the AMA Guides Dr. Kallemeier concluded King had sustained a zero percent rating for her "left hand paresthesias and EMG negative carpal and cubital tunnel syndrome" and recommended work restrictions of an eight-hour work day with no mandatory or volunteer overtime, a ten-minute break every two hours for stretching and ice application, occupational therapy, and a referral to pain management. (JE 4, p. 64)

King retired from the City on June 26, 2017. (Ex. N, p. 41) At the time of her retirement King had 34.5 years of service in the Iowa Public Employees Retirement System. (Tr., p. 70) The City never disciplined King during her employment. (Tr., pp. 70-71)

Dr. Kallemeier referred King to Christian Ledet, M.D., an anesthesiologist specializing in pain management. (JE 15, p. 126) Dr. Ledet prescribed zonisamide for pain management. (JE 15, p. 133) King did not tolerate zonisamide, and Dr. Ledet prescribed amitriptyline to help with sleep and Lyrica. (JE 15, pp. 136, 139, 142-43) During an appointment on August 30, 2017, King reported improvement in her pain. (JE 15, p. 146) Dr. Ledet prescribed Zonegran and reduced King's Lyrica due to weight gain. (JE 15, p. 146) King did not tolerate Zonegran, and Dr. Ledet discontinued the medication and reinitiated Lyrica. (JE 15, p. 150) On November 13, 2017, Dr. Ledet recommended King return for a surgical evaluation to discuss options while continuing to receive pain management. (JE 15, p. 154)

On February 15, 2018, King attended an appointment with Ze-Hui Han, M.D., an orthopedic surgeon. (JE 16, p. 171) Dr. Han reviewed King's medical records and examined her. (JE 16) Dr. Han diagnosed King with bilateral upper extremity pain. (JE

16, p. 171) Dr. Han found King had previously reached maximum medical improvement and she did not need any surgical intervention for her bilateral upper extremities, and her pain is managed by Dr. Ledet. (JE 16, p. 172) Dr. Han noted, "because of the normal study of the EMG and nerve conduction test, this patient does not need any treatment at this point and she does not need future treatment" for bilateral carpal tunnel syndrome and cubital tunnel syndrome. (JE 16, p. 172)

Robin Sassman, M.D., an occupational medicine physician conducted an independent medical examination for King on January 2, 2018, and issued her report on July 10, 2018. (Ex. 1) Dr. Sassman reviewed King's medical records and examined her. (Ex. 1) During her physical exam Dr. Sassman documented King "had decreased sensation in the bilateral upper extremities in the distribution of the ulnar nerves," and also documented her grip strength was decreased. (Ex. 1, p. 14) Dr. Sassman diagnosed King with right ulnar neuropathy and right carpal tunnel syndrome, status post right ulnar nerve transposition, right lateral elbow tenotomy with debridement, status post right revision cubital tunnel release with submuscular ulnar nerve transposition and right carpal tunnel release, and left ulnar neuropathy. (Ex. 1, p. 14) Dr. Sassman opined King's conditions were caused by her work for the City, that she reached maximum medical improvement on October 4, 2017, and she should continue to receive care with Dr. Ledet. (Ex. 1, p. 15)

Using the AMA Guides, Dr. Sassman opined:

[f]or the right ulnar neuropathy, from Table 16-15 on page 492, she has a motor deficit of the ulnar nerve so the 35% value is used. Turning to Table 16-11 on page 484, I would place her in a Category 4 and assign 25% motor deficit. Therefore, 35% is combined with 25% for a total of 8.75% upper extremity impairment. This is rounded up to 9% upper extremity impairment.

For the right ulnar neuropathy, from Table 16-15 on page 492, she has a sensory deficit as well, so the 7% value is used. Turning to Table 16-10 on page 482, I would place her in a Category 3 using a 60% modifier. When the 60% value is multiplied by the 7%, this is equal to 4.2% upper extremity impairment. This is converted to 4% upper extremity impairment.

For the right carpal tunnel syndrome, and based on the instructions on page 495, Ms. King falls into the third category due to the normal sensibility and normal nerve conduction study after the carpal tunnel release procedure. Therefore, there is no objective basis for an impairment rating for this issue.

Overall, for the right upper extremity, 9% upper extremity impairment is combined with 4% upper extremity impairment for a total of

13% upper extremity impairment. Using Table 16-3 on page 439, this is converted to 8% whole person impairment.

For the left ulnar neuropathy, from Table 16-15 on page 492, she has a motor deficit of the ulnar nerve so the 35% value is used. Turning to Table 16-11 on page 484, I would place her in a Category 4 and assign 25% motor deficit. Therefore, 35% is combined with 25% for a total of 8.75% upper extremity impairment. This is rounded up to 9% upper extremity impairment.

For the left ulnar neuropathy, from Table 16-15 on page 492, she has a sensory deficit as well, so the 7% value is used. Turning to Table 16-10 on page 482, I would place her in a Category 4 using a 25% modifier. When the 25% value is multiplied by the 7%, this is equal to 1.75% upper extremity impairment. This is converted to 2% upper extremity impairment.

For the left upper extremity, 9% upper extremity impairment is combined with 2% upper extremity impairment for a total of 11% upper extremity impairment. Using Table 16-3 on page 439, this is converted to 7% whole person impairment.

Using the combined Values Chart on page 604, 8% whole person impairment (for the right upper extremity) is combined with 7% whole person impairment (for the left upper extremity) for a total of 14% whole person impairment.

This impairment rating differs from that of Dr. Stoken and Dr. Kallemeier. From my review of both ratings, it appears that impairment was assigned based on range of motion only and not on the loss of sensation and strength in the distribution of the ulnar nerve, which is the most prominent symptom. Therefore, it is my opinion that the impairment rating I provided above is both reflective of Ms. King's current status as well as consistent with the instructions in *The Guides*.

(Ex. 1, pp. 15-16) Dr. Sassman recommended permanent restrictions of no lifting, pushing, pulling, or carrying more than twenty pounds occasionally from floor to waist, waist to shoulder, and above shoulder height, no use of vibratory tools or power tools, and to limit repetitive and forceful pinching and gripping with the bilateral upper extremities to a rare basis. (Ex. 1, p. 16)

On August 8, 2018, Dr. Kallemeier, responded to a check-the-box letter from the City's attorney, and provided handwritten comments. (Ex. H) The City provided Dr. Kallemeier with a copy of Dr. Sassman's July 10, 2018 report and asked her to provide her opinion. (Ex. H, p. 31) Dr. Kallemeier wrote:

Right upper extremity impairment – I do not see objective data to suggest a loss of ulnar innervated motor strength. The 2 point discrimination is normal and therefore the sensory category 4-25% modifier should be used for a total of 2% Right upper extremity impairment.

Left upper extremity impairment – I do not see objective data to suggest a loss of strength in the ulnar innervated musculature. The 2 point discrimination is normal and I agree with Category 4 25% modifier. The left upper extremity total Based on these data should be a total of 2%.

#### Whole Person

If desired to convert this to a whole person impairment (typically this is not done as Iowa impairments are measured as scheduled members), The left 2% is combined with the right 2% for a total of 4% whole person impairment. I do not see a reason to report Ms. King's impairments as a whole body, however.

(Ex. H, p. 31)

King did not apply for unemployment insurance benefits after she retired. (Tr., p. 71) King has not applied for any jobs or sought vocational rehabilitation services since she retired. (Tr., pp. 72, 75-76) King testified she has looked for and considered employment, but she has not found anything. (Tr., p. 76)

### **CONCLUSIONS OF LAW**

#### **I. Applicable Law**

This case involves several issues, including the issues of notice, timeliness of the claim, entitlement to temporary benefits, refusal of suitable work, extent of disability, the commencement date for permanency, recovery of the cost of an independent medical examination, and interest under Iowa Code sections 85.23, 85.26, 85.33, 85.34, 85.39, and 535.3. In March 2017, the legislature enacted changes (hereinafter "Act") relating to workers' compensation in Iowa. 2017 Iowa Acts chapter 23 (amending Iowa Code sections 85.16, 85.18, 85.23, 85.26, 85.33, 85.34, 85.39, 85.45, 85.70, 85.71, 86.26, 86.39, 86.42, and 535.3). Under 2017 Iowa Acts chapter 23 section 24, the changes to Iowa Code sections 85.23, 85.26, 85.33, 85.34, and 85.39 apply to injuries occurring on or after the effective date of the Act. This case involves injuries occurring before July 1, 2017. Therefore, the provisions of the new statute involving notice under Iowa Code section 85.23, timeliness of the claim under Iowa Code section 85.26, entitlement to temporary benefits, and refusal of suitable work under Iowa Code section 85.33, extent of disability and commencement date for permanency under Iowa Code section 85.34, and recovery of the cost of an independent medical examination under Iowa Code section 85.39 do not apply to this case.

The calculation of interest is governed by Gamble v. AG Leader Tech., File No. 5054686 (App. Apr. 24, 2018). (Interest for all weekly benefits payable and not paid when due which accrued before July 1, 2017, is payable at the rate of ten percent; all interest on past due weekly compensation benefits accruing on or after July 1, 2017, is 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). Under Gamble, the interest rate calculation formula changed for benefits accruing on or after July 1, 2017.

## **II. Notice Under Iowa Code Section 85.23**

On the hearing report the City alleged King's claims are barred for failure to provide proper notice under Iowa Code section 85.23. The City did not address notice in its post-hearing brief and appears to have abandoned its argument.

Iowa Code section 85.23, provides:

[u]nless the employer or the employer's representative shall have actual knowledge of the occurrence of an injury received within ninety days from the date of the occurrence of the injury, or unless the employee or someone on the employee's behalf or a dependent or someone on the dependent's behalf shall give notice thereof to the employer within ninety days from the date of the alleged occurrence of the injury, no compensation shall be allowed.

The purpose of the notice provision is to afford the employer the opportunity to investigate the circumstances of the injury when the information is fresh. Johnson v. Int'l Paper Co., 530 N.W.2d 475, 477 (Iowa Ct. App. 1995). "Actual knowledge must include information that the injury might be work related." Id. The employer bears the burden of proving the affirmative defense. DeLong v. Iowa State Highway Comm'n, 299 Iowa 700, 703, 295 N.W.2d 91, 92 (1940). The evidence supports the City had actual knowledge of King's injuries. The City has not proven its affirmative defense.

## **III. Alleged Cumulative Injuries to the Right and Left Upper Extremities**

### **A. Manifestation of the Injuries**

King avers she sustained a cumulative injury to her right upper extremity from October 17, 2011 through June 21, 2017 and to her left upper extremity from February 17, 2016 through June 21, 2017. King avers she sustained bilateral injuries to her upper extremities and that she is permanently and totally disabled under Iowa Code section 85.34(2)(s). The City rejects King's assertion.

Permanent partial disabilities are divided into scheduled and unscheduled losses. Iowa Code § 85.34(2) (2015). If the claimant's injury is listed in the specific losses found in Iowa Code section 85.34(2)(a)-(t), the injury is a scheduled injury and is compensated by the number of weeks provided for the injury in the statute. Second



Injury Fund v. Bergeson, 526 N.W.2d 543, 547 (Iowa 1995). “The compensation allowed for a scheduled injury ‘is definitely fixed according to the loss of use of the particular member.’” Id. (quoting Graves v. Eagle Iron Works, 331 N.W.2d 116, 118 (Iowa 1983)). If the claimant’s injury is not listed in the specific losses in the statute, compensation is paid in relation to 500 weeks as the disability bears to the body as a whole. Id.; Iowa Code § 85.34(2)(u). “Functional disability is used to determine a specific scheduled disability; industrial disability is used to determine an unscheduled injury.” Bergeson, 526 N.W.2d at 547.

King alleges she sustained cumulative injuries to her bilateral upper extremities on June 21, 2017. The schedule provides a maximum award of 500 weeks for an injury to both arms, both hands, both feet, both legs, or both eyes as the result of a single accident, unless the employee is permanently and totally disabled under Iowa Code section 85.34(3). Iowa Code § 85.34(2)(s); Simbro v. Delong’s Sportswear, 332 N.W.2d 886, 889 (Iowa 1983). The City avers King did not sustain injuries to her bilateral arms on June 21, 2017.

Cumulative injuries are occupational diseases that develop over time. Baker v. Bridgestone/Firestone, 872 N.W.2d 672, 681 (Iowa 2015). A cumulative injury results from repetitive trauma in the workplace. Larson Mfg. Co., Inc. v. Thorson, 763 N.W.2d 842, 851 (Iowa 2009); McKeever Custom Cabinets v. Smith, 379 N.W.2d 368, 372-74 (Iowa 1985). “A cumulative injury is deemed to have occurred when it manifests – and ‘manifestation’ is that point in time when ‘both the fact of the injury and the causal relationship of the injury to the claimant’s employment would have become plainly apparent to a reasonable person.’” Baker, 872 N.W.2d at 681.

In her post-hearing brief King relies on the case of Fadi Altaher v. TPI, Iowa, File No. 5064411 (Aug. 2, 2018), to support her contention the correct injury date in this case is June 21, 2017. Fadi Altaher involved the claimant’s counsel in this case, and the case was dismissed without prejudice by another workers’ compensation deputy commissioner on August 2, 2018. (“On July 11, 2018, the undersigned issued an order directing claimant to identify a specific date of injury for his petition and to file additional petitions for any separate claims pursuant to rule 876 IAC 4.6. Claimant was given 14 days to comply with the order. Claimant filed no amendments or additional petitions in attempt to comply with the order of July 11, 2018. Claimant has failed to comply with my order. Therefore, pursuant to the order of July 11, 2018 and rule 876 IAC 4.36, the above-captioned matter is dismissed without prejudice”). Fadi Altaher is not on point.

King sustained an injury to her right upper extremity on October 17, 2011. King received treatment, including surgery. Dr. Kallemeier issued an impairment rating on September 19, 2012, opining King had sustained a three percent impairment to the right upper extremity. (JE 4, p. 22) Based on the rating the City paid King 7.5 weeks of permanent partial disability benefits. (JE L, p. 38) I find the cumulative injury to King’s right upper extremity first manifested when King underwent surgery with Dr. Kallemeier on January 3, 2012.

In May 2013, King attended an independent medical examination with Dr. Crabb, who opined she was not at maximum medical improvement and that she would benefit from additional surgery. (JE 8, p. 80) King returned to Dr. Kallemeier and received additional treatment for additional work-related problems with her right upper extremity. (JE 4) Dr. Kallemeier performed additional surgery on October 2, 2013, and continued to treat King through March 2015. (JE 4, pp. 31-45; Tr., p. 60)

King reported a new work injury to her left upper extremity on February 17, 2016. (Ex. D, p. 4) King returned to Dr. Kallemeier for treatment, complaining of symptoms in both upper extremities. (JE 4, p. 46)

A month later Dr. Stoken performed an independent medical examination for King. (JE 12) Dr. Stoken opined King had reached maximum medical improvement and that she had sustained a three percent impairment to her right upper extremity, and a one percent impairment to her left upper extremity, and recommended permanent work restrictions. (JE 12, p. 101) Dr. Stoken opined King's right upper extremity impairment worsened on July 15, 2013, when Dr. Kallemeier saw her for increased upper extremity pain, but she did not find King had sustained any additional permanent impairment beyond the three percent rating assigned by Dr. Kallemeier in 2012. (JE 12) I find King's left upper extremity injury manifested on March 15, 2016, when Dr. Stoken issued her opinion.

King continued to complain of pain and other symptoms with work and continued to receive treatment from Dr. Kallemeier after Dr. Stoken had opined she had reached maximum medical improvement. (JE 4) Dr. Kallemeier ordered electromyography, which was normal. (JE 4, p. 54) Dr. Kallemeier issued another impairment rating on January 18, 2017, finding King had reached maximum medical improvement for her left upper extremity on January 10, 2017, and opining King had sustained a zero percent permanent impairment to the left upper extremity, and recommended work restrictions of an eight-hour work day with no overtime and a ten-minute break every two hours for stretching and ice application, occupational therapy, and a referral to pain management. (JE 4, p. 64) Dr. Kallemeier did not provide any additional treatment to King after she issued her impairment rating on January 18, 2017. King has received pain management through Dr. Ledet since Dr. Kallemeier released her from care. King retired from the City on June 26, 2017.

The record does not support King sustained a new injury or aggravation of a prior injury after February 17, 2016. Dr. Han examined King in February 2018, found she did not need any future treatment, agreed she had previously reached maximum medical improvement, and noted she was receiving pain management from Dr. Ledet. (JE 16, p. 172) The record does not support King sustained cumulative injuries to her bilateral arms on June 21, 2017. The injuries at issue in this case concern two scheduled member injuries, to King's right and left upper extremities.

**B. Iowa Code Section 85.26 and the Right Upper Extremity**

The City alleges King did not timely commence a contested case for her October 17, 2011 right arm claim, and thus her claim is barred by the applicable statute of limitations. King asserts the correct injury date for her right upper extremity is June 21, 2017, and her claim is timely. As analyzed above, King has not established she sustained cumulative injuries to her bilateral upper extremities on June 21, 2017.

Under Iowa Code section 85.26(1),

[a]n original proceeding for benefits under this chapter or chapter 85A, 85B, or 86, shall not be maintained in any contested case unless the proceeding is commenced within two years from the date of the occurrence or injury for which benefits are claimed, or if weekly compensation benefits are paid under section 86.13, within three years from the date of the last payment of weekly compensation benefits.

The City accepted King's October 17, 2011 right arm claim and voluntarily paid King 7.5 weeks of permanent partial disability benefits based on Dr. Kallemeier's permanent impairment rating of three percent to the right upper extremity or \$5,192.72. (Ex. S, p. 76) The last payment King received was on September 20, 2012. (Ex. S, p. 76) The City avers King's claim is time barred because she had until September 20, 2015, to commence a contested case proceeding, and she did not file the original petition until June 30, 2017.

The Iowa Supreme Court has held the discovery rule is applicable to the notice and limitation provisions contained in Iowa Code sections 85.23 and 86.26. IBP, Inc. v. Burress, 779 N.W.2d 210, 218-19 (Iowa 2010). Under the discovery rule, the limitations period "does not begin to run until the claimant knows or in the exercise of reasonable diligence should know 'the nature, seriousness[,] and probable compensable character' of his or her injury." Baker v. Bridgestone/Firestone, 872 N.W.2d 672, 684-85 (Iowa 2015). Thus, the claimant must have actual or imputed knowledge of all three elements before the statute begins to run. Swartzendruber v. Schimmel, 613 N.W.2d 646, 650-51 (Iowa 2000). The Iowa Supreme Court has held:

[u]nder the imputed knowledge prong of the discovery rule, the statute of limitations begins when a claimant gains information sufficient to alert a reasonable person of the need to investigate. Thus, a claimant's knowledge is judged under the test of reasonableness. The need to investigate arises when a reasonable person has knowledge of the *possible* compensability of the condition. This knowledge must include all three characteristics of the condition. As of that date, the duty to investigate begins and the claimant has imputed knowledge of all the facts that would have been disclosed by a reasonable investigation. Thus, a claimant has two years from that time to gather the facts and file a petition.

Id. (internal citations omitted). The discovery rule does not require “exact knowledge of the seriousness of an injury,” nor does it require an expert opinion “to establish knowledge of the characteristics of the injury,” rather, the claimant has a duty to investigate when the claimant is aware of the problem. Baker, 872 N.W.2d at 650-51. “[I]f it is reasonably possible an injury is serious enough to be compensable as a disability, the seriousness component of the test is satisfied.” Id. at 651. King bears the burden of establishing the discovery rule is applicable to this proceeding. Burress, 779 N.W.2d at 219.

The record reflects King sustained an injury to her right upper extremity on October 17, 2011, which manifested when King underwent surgery with Dr. Kallemeier on January 3, 2012. Given King did not file her petition until June 30, 2017, any claim concerning benefits relating to the October 17, 2011 injury is barred by the statute of limitations.

The record also reflects King sustained an aggravation of the right upper extremity injury on July 15, 2013, as noted by Dr. Stoken in her March 15, 2016 report. There is no evidence in the record supporting King possessed exact knowledge she had sustained a new aggravation of the injury until Dr. Stoken issued her report on March 15, 2016. King did not specifically plead July 15, 2013 as an injury date, but rather alleged a continuing cumulative injury from October 17, 2011 through June 21, 2017, in her petition. I find under the discovery rule King’s claim concerning an aggravation of the original injury is not time barred.

### **C. Extent of Disability**

Permanent partial disabilities are divided into scheduled and unscheduled losses. Iowa Code § 85.34(2). If the claimant’s injury is listed in the specific losses found in Iowa Code section 85.34(2)(a)-(t), the injury is a scheduled injury and is compensated by the number of weeks provided for the injury in the statute. Second Injury Fund v. Bergeson, 526 N.W.2d 543, 547 (Iowa 1995). “The compensation allowed for a scheduled injury ‘is definitely fixed according to the loss of use of the particular member.’” Id. (quoting Graves v. Eagle Iron Works, 331 N.W.2d 116, 118 (Iowa 1983)). If the claimant’s injury is not listed in the specific losses in the statute, compensation is paid in relation to 500 weeks as the disability bears to the body as a whole. Id.; Iowa Code § 85.34(2)(u). “Functional disability is used to determine a specific scheduled disability; industrial disability is used to determine an unscheduled injury.” Bergeson, 526 N.W.2d at 547. King alleges she sustained an injury to her right upper extremity, and an injury to her left upper extremity. The schedule provides a maximum award of two hundred and fifty weeks of compensation for loss of an arm. Iowa Code § 85.34(2)(m).

Three experts have provided impairment ratings concerning King’s right and left upper extremities, Dr. Kallemeier, a treating orthopedic surgeon, Dr. Stoken, a physiatrist who conducted an independent medical examination for King, and Dr. Sassman, an occupational medicine physician who conducted an independent medical

examination for King. I find the opinion of Dr. Kallemeier, as supported by Dr. Stoken, most persuasive. Dr. Kallemeier has superior training to Dr. Sassman, and provided treatment to King from December 1, 2011 through January 18, 2017.

Dr. Kallemeier issued an impairment rating on September 19, 2012, opining King had sustained a three percent impairment to the right upper extremity. (JE 4, p. 22) In March 2016, Dr. Stoken opined King sustained a three percent impairment to her right upper extremity, and a one percent impairment to her left upper extremity, and recommended permanent work restrictions. (JE 12, p. 101) Dr. Stoken opined King's right upper extremity impairment worsened on July 15, 2013, when Dr. Kallemeier saw her for increased upper extremity pain, but she did not find King had sustained any additional permanent impairment beyond the three percent rating assigned by Dr. Kallemeier in 2012. (JE 12)

Dr. Kallemeier provided additional treatment to King after Dr. Stoken issued her impairment rating. On January 18, 2017, Dr. Kallemeier issued another impairment rating, finding King reached maximum medical improvement on January 10, 2017, and issuing a zero percent permanent impairment rating for her left upper extremity, and offering no additional rating concerning her right upper extremity. (JE 4, p. 64) King returned to work after Dr. Kallemeier released her with restrictions.

Dr. Sassman opined King reached maximum medical improvement on October 4, 2017, as of her appointment with Dr. Ledet. Dr. Sassman assigned a thirteen percent permanent impairment rating to the right upper extremity, and an eleven percent impairment rating to the left upper extremity. Dr. Sassman challenged the opinions of Drs. Kallemeier and Stoken opining, "[f]rom my review of both ratings, it appears that impairment was assigned based on range of motion only and not on the loss of sensation and strength in the distribution of the ulnar nerve, which is the most prominent symptom." (Ex. 1, p. 16)

Dr. Kallemeier opined, based on her own personal examination of King she did not find any objective data to suggest a loss of ulnar innervated motor strength in the right upper extremity, or any objective data to suggest a loss of strength in the ulnar innervated musculature of the left upper extremity, but she did agree under Table 16-10, on page 482, King should be placed in a Category 4, using a twenty-five percent modifier, which converts to a two percent left upper extremity impairment for ulnar neuropathy. (Ex. H, p. 31) King was paid 7.5 weeks of compensation for the three percent right upper extremity impairment. She has not established she sustained any additional impairment to her right upper extremity.

King has established she sustained a two percent impairment to her left upper extremity, entitling her to an additional five weeks of permanent partial disability benefits. The record does not support a deviation from the schedule. Considering all of the evidence, lay and medical, the record establishes King has sustained a two percent permanent impairment to her left upper extremity. Under the schedule, the maximum

award for a loss of an arm is 250 weeks. Iowa Code § 85.34(2)(m). King is entitled to five weeks of permanent partial disability benefits.

**D. Commencement Date**

King has established she sustained a two percent permanent impairment to her left upper extremity as a result of the February 17, 2016, work injury. King returned to work after her work injury. There is no evidence presented at hearing she missed work after reporting the injury. In the case of Evenson v. Winnebago Indus., Inc., 881 N.W.2d 360, 372-74 (Iowa 2016), the Iowa Supreme Court held that the healing period set forth in the statute lasts until the claimant has returned to work, has reached maximum medical improvement, or until the claimant is medically capable of returning to substantially similar employment, “whichever occurs first.” Under Evenson, the commencement date for permanency is February 18, 2016.

**E. Rate**

The parties stipulated at the time of the alleged injuries King was married and entitled to two exemptions. As discussed above, King has not established she is entitled to any additional benefits for her right upper extremity injury. King has established she is entitled to five weeks of permanent partial disability benefits for her left upper extremity. I also found the injury date for King’s left upper extremity to be February 17, 2016.

Iowa Code section 85.36 sets forth the basis for determining an injured employee’s compensation rate. Mercy Med. Ctr. v. Healy, 801 N.W.2d 865, 870 (Iowa Ct. App. 2011). The basis of compensation shall be the “weekly earnings of the injured employee at the time of the injury.” Iowa Code § 85.36. The statute defines “weekly earnings” as

gross salary, wages, or earnings of an employee to which such employee would have been entitled had the employee worked the customary hours for the full pay period in which the employee was injured, as regularly required by the employee’s employer for the work or employment for which the employee was employed . . . rounded to the nearest dollar.

Id. The term “gross earnings” is defined as “recurring payments by employer to the employee for employment, before any authorized or lawfully required deduction or withholding of funds by the employer, excluding irregular bonuses, retroactive pay, overtime, penalty pay, reimbursement of expenses, expense allowances, and the employer’s contribution for welfare benefits.” Id. § 85.61. Weekly earnings for employees paid on an hourly basis

shall be computed by dividing by thirteen the earnings, including shift differential pay but not including overtime or premium pay, of the employee earned in the employ of the employer in the last completed

period of thirteen consecutive calendar weeks immediately preceding the injury. If the employee was absent from employment for reasons personal to the employee during part of the thirteen calendar weeks preceding the injury, the employee's weekly earnings shall be the amount the employee would have earned had the employee worked when work was available to other employees of the employer in a similar occupation. A week which does not fairly reflect the employee's customary earnings shall be replaced by the closest previous week with earnings that fairly represent the employee's customary earnings.

Id. § 85.36(6). Thus under the statute, overtime is counted hour for hour, and shift differential, vacation, and holiday pay are also included. Irregular pay is not included.

King was paid biweekly. The City did not produce the entire pay record for King in Exhibit Q. Exhibit Q only shows the actual hours she worked and does not include vacation, holiday pay, comp time, or sick leave, which are documented on Exhibit 6, which the City produced to King in discovery. The City produced payroll records for the week ending January 31, 2016, to King, Exhibit 6. The payroll records document King received the following gross weekly earnings: (1) for the period ending January 31, 2016 King received \$2,184.75 in gross wages; (2) for the period ending January 17, 2016 King received \$2,175.00 in gross wages; (3) for the period ending January 3, 2016 King received \$2,173.50 in gross wages; (4) for the period ending December 20, 2015 King received \$2,178.76 in gross wages; (5) for the period ending December 6, 2015 King received \$2,137.00 in gross wages; (6) for the period ending November 22, 2015 King received \$2,283.00 in gross wages; (7) for the period ending November 8, 2015 King received \$2,178.00 in gross wages. (Ex. C, pp. 55-58) Dividing the sum of these amounts, \$15,310.01, by fourteen, results in a gross weekly wage of \$1,093.57. Under the ratebook at the time of the February 2016 work injury, King's weekly rate is \$686.94.<sup>1</sup> Thus, King is entitled to five weeks of permanent partial disability benefits at the weekly rate of \$686.94, commencing on February 18, 2016.

#### **F. Temporary Benefits**

King seeks an award of healing period benefits from June 22, 2017 through October 4, 2017. The City rejects King's claim and avers she has not proven entitlement to healing period benefits, and even if she has, she has waived her claim.

Iowa Code section 85.33 (2016) governs temporary disability benefits, and Iowa Code section 85.34 governs healing period and permanent disability benefits. Dunlap v. Action Warehouse, 824 N.W.2d 545, 556 (Iowa Ct. App. 2012).

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<sup>1</sup> <http://www.iowaworkcomp.gov/sites/authoring.iowadivisionofworkcomp.gov/files/2015ratebook.pdf>.

An employee has a temporary partial disability when because of the employee's medical condition, "it is medically indicated that the employee is not capable of returning to employment substantially similar to the employment in which the employee was engaged at the time of the injury, but is able to perform other work consistent with the employee's disability." Iowa Code § 85.33(2). Temporary partial disability benefits are payable, in lieu of temporary total disability and healing period benefits, due to the reduction in earning ability as a result of the employee's temporary partial disability, and "shall not be considered benefits payable to an employee, upon termination of temporary partial or temporary total disability, the healing period, or permanent partial disability, because the employee is not able to secure work paying weekly earnings equal to the employee's weekly earnings at the time of the injury." Id.

As a general rule, "temporary total disability compensation benefits and healing-period compensation benefits refer to the same condition." Clark v. Vicorp Rest., Inc., 696 N.W.2d 596, 604 (Iowa 2005). The purpose of temporary total disability benefits and healing period benefits is to "partially reimburse the employee for the loss of earnings" during a period of recovery from the condition. Id. The appropriate type of benefit depends on whether or not the employee has a permanent disability. Dunlap, 824 N.W.2d at 556. In this case King established she sustained permanent impairments to her right and left upper extremities, therefore, if she is entitled to additional temporary benefits, she is entitled to healing period benefits.

Temporary total, temporary partial, and healing period benefits can be interrupted or intermittent. Teel v. McCord, 394 N.W.2d 405 (Iowa 1986); Stourac-Floyd v. MDF Endeavors, File No. 5053328 (App. Sept. 11, 2018); Stevens v. Eastern Star Masonic Home, File No. 5049776 (App. Dec. Mar. 14, 2018). Although permanent partial disability benefits commenced on February 18, 2016, under Evenson, King may be entitled to payment of intermittent healing period benefits that are payable concurrently with permanent partial disability benefits. Stourac-Floyd, File No. 5053328 (App. Sept. 11, 2018).

The record reflects King returned to work with restrictions from Dr. Kallemeier in January 2017. King chose to retire on June 26, 2017. No physician restricted King from working from June 22, 2017 through October 4, 2017. King is not entitled to any additional healing period benefits. Given this finding, there is no need to address the defense of refusal of suitable work.

#### **IV. Penalty**

King seeks an award of penalty benefits for her left upper extremity claim. The City avers King is not entitled to penalty benefits and she waived her claim by failing to address penalty during discovery in the case. No motion to compel was filed prior to hearing. King asserted penalty on the hearing report for the left upper extremity injury only. The City's claim King waived the issue of penalty lacks merit.



Iowa Code section 86.13 governs compensation payments. Under the statute's plain language, if there is a delay in payment absent "a reasonable or probable cause or excuse," the employee is entitled to penalty benefits, of up to fifty percent of the amount of benefits that were denied, delayed, or terminated without reasonable or probable cause or excuse. Iowa Code § 86.13(4); see also Christensen v. Snap-On Tools Corp., 554 N.W.2d 254, 260 (Iowa 1996) (citing earlier version of the statute). "The application of the penalty provision does not turn on the length of the delay in making the correct compensation payment." Robbennolt v. Snap-On Tools Corp., 555 N.W.2d 229, 236 (Iowa 1996). If a delay occurs without a reasonable excuse, the commissioner is required to award penalty benefits in some amount to the employee. Id.

The statute requires the employer or insurance company to conduct a "reasonable investigation and evaluation" into whether benefits are owed to the employee, the results of the investigation and evaluation must be the "actual basis" relied on by the employer or insurance company to deny, delay, or terminate benefits, and the employer or insurance company must contemporaneously convey the basis for the denial, delay, or termination of benefits to the employee at the time of the denial, delay, or termination of benefits. Iowa Code § 86.13(4). An employer may establish a "reasonable cause or excuse" if "the delay was necessary for the insurer to investigate the claim," or if "the employer had a reasonable basis to contest the employee's entitlement to benefits." Christensen, 554 N.W.2d at 260. "A 'reasonable basis' for denial of the claim exists if the claim is 'fairly debatable.'" Burton v. Hilltop Care Ctr., 813 N.W.2d 250, 267 (Iowa 2012). "Whether a claim is 'fairly debatable' can generally be determined by the court as a matter of law." Id. The issue is whether the employer had a reasonable basis to believe no benefits were owed to the claimant. Id. "If there was no reasonable basis for the employer to have denied the employee's benefits, then the court must 'determine if the defendant knew, or should have known, that the basis for denying the employee's claim was unreasonable.'" Id.

Benefits must be paid beginning on the eleventh day after the injury, and "each week thereafter during the period for which compensation is payable, and if not paid when due," interest will be imposed. Iowa Code § 85.30. In Robbennolt, the Iowa Supreme Court noted, "[i]f the required weekly compensation is timely paid at the end of the compensation week, no interest will be imposed . . . . As an example, if Monday is the first day of the compensation week, full payment of the weekly compensation is due the following Monday." Robbennolt, 555 N.W.2d at 235. A payment is "made" when the check addressed to the claimant is mailed, or personally delivered to the claimant. Meyers v. Holiday Express Corp., 557 N.W.2d 502, 505 (Iowa 1996) (abrogated by Keystone Nursing Care Ctr. v. Craddock, 705 N.W.2d 299 (Iowa 2005) (concluding the employer's failure to explain to the claimant why it would not pay permanent benefits upon the termination of healing period benefits did not support the commissioner's award of penalty benefits)).

When considering an award of penalty benefits, the commissioner considers "the length of the delay, the number of delays, the information available to the employer regarding the employee's injuries and wages, and the prior penalties imposed against

the employer under section 86.13.” Schadendorf v. Snap-On Tools Corp., 757 N.W.2d 330, 336 (Iowa 2008). The purposes of the statute are to punish the employer and insurance company and to deter employers and insurance companies from delaying payments. Robbennolt, 555 N.W.2d at 237.

The City paid no benefits to King for her left upper extremity claim, even after receiving Dr. Kallemeier’s opinion on August 8, 2018, finding King had sustained a two percent left upper extremity impairment. The City did not communicate the reason why it refused to pay the rating. Five weeks of benefits at the weekly rate of \$686.94 equals \$3,434.47. I find the City should pay King penalty benefits of \$500.00 to deter the City and other employers from failing to timely pay benefits.

## **V. Costs**

King seeks to recover the \$4,797.50 cost of Dr. Sassman’s independent medical examination. (Ex. 10) The City avers King is not entitled to recover the cost of Dr. Sassman’s independent medical examination because Dr. Sassman was the third physician to perform an independent medical examination for King, the City paid for the independent medical examination with Dr. Crabb in April 2013 with respect to the 2011 claim, and Dr. Sassman’s charges are unreasonable and excessive.

Iowa Code section 86.40, provides, “[a]ll costs incurred in the hearing before the commissioner shall be taxed in the discretion of the commissioner.” Rule 876 IAC 4.33(6), provides,

[c]osts taxed by the workers’ compensation commissioner or a deputy commissioner shall be (1) attendance of a certified shorthand reporter or presence of mechanical means at hearings and evidential depositions, (2) transcription costs when appropriate, (3) costs of service of the original notice and subpoenas, (4) witness fees and expenses as provided by Iowa Code sections 622.69 and 622.72, (5) the costs of doctors’ and practitioners’ deposition testimony, provided that said costs do not exceed the amounts provided by Iowa Code sections 622.69 and 622.72, (6) the reasonable costs of obtaining no more than two doctors’ or practitioners’ reports, (7) filing fees when appropriate, (8) costs of persons reviewing health service disputes.

After receiving an injury, the employee, if requested by the employer, is required to submit to examination at a reasonable time and place, as often as reasonably requested to a physician, without cost to the employee. Iowa Code § 85.39. If an evaluation of permanent disability has been made by a physician retained by the employer and the employee believes the evaluation is too low, the employee “shall, upon application to the commissioner and upon delivery of a copy of the application to the employer and its insurance carrier, be reimbursed by the employer the reasonable fee for a subsequent examination by a physician of the employee’s own choice . . . .”

Id.

As I found above, any claim concerning benefits relating to the October 17, 2011 injury is barred by the statute of limitations. Dr. Stoken later found King sustained an aggravation of the right upper extremity injury on July 15, 2013, as noted by Dr. Stoken in her March 15, 2016 report. I also found under the discovery rule King's claim concerning an aggravation of the original October 17, 2011 injury is not time barred.

King filed two separate actions, alleging injuries to her bilateral upper extremities. Dr. Kallemeier did not provide a rating after 2012, until January 18, 2017. King disagreed with Dr. Kallemeier's zero percent impairment rating, Dr. Kallemeier did not make a finding of no causation and later agreed King had sustained a permanent impairment to her left upper extremity. King disagreed with Dr. Kallemeier's opinion and obtained an independent medical examination from Dr. Sassman, in compliance with the statute. The City has provided no documentation showing Dr. Sassman's bill is not customary with industry standards and is unreasonable and excessive. The City is assessed the \$4,797.50 cost of Dr. Sassman's independent medical examination.

#### **ORDER**

IT IS THEREFORE ORDERED, THAT:

#### **File Number 5059104**

For File Number 5059104, the claimant shall take nothing

#### **File Number 5059105**

Defendant shall pay the claimant five (5) weeks of permanent partial disability benefits, at the weekly rate of six hundred eighty-six and 94/100 dollars (\$686.94), commencing on February 18, 2016.

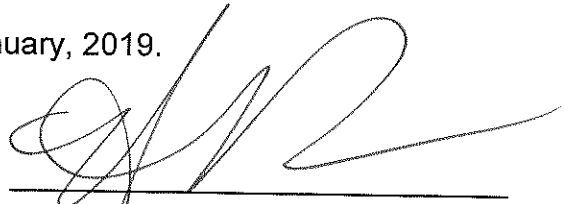
Defendant shall pay accrued weekly benefits in a lump sum together with interest at the rate of ten percent for all weekly benefits payable and not paid when due which accrued before July 1, 2017, and all interest on past due weekly compensation benefits accruing on or after July 1, 2017, shall be payable 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 Tech., File No. 5054686 (App. Apr. 24, 2018).

Defendant shall pay the claimant five hundred and 00/100 dollars (\$500.00) in penalty benefits.

Defendant shall pay the claimant four thousand seven hundred ninety-seven and 50/100 dollars (\$4,797.50) for Dr. Sassman's independent medical examination.

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

Signed and filed this 25<sup>th</sup> day of January, 2019.



HEATHER L. PALMER  
DEPUTY WORKERS'  
COMPENSATION COMMISSIONER

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HLP/sam

**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.