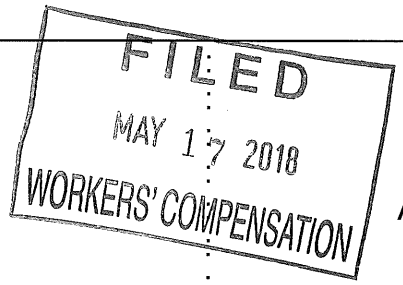
BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER



DELTA DAWN BERTE, Claimant, vs. SNAP-ON LOGISTICS COMPANY, Employer, Self-Insured, Defendant.	:	File No. 5065025 ARBITRATION DECISION Head Note Nos.: 1803.1; 2701; 4000

STATEMENT OF THE CASE

Delta Dawn Berte, claimant, filed a petition in arbitration seeking workers' compensation benefits from Snap-On Tools, Inc., the self-insured employer and defendant.

The matter proceeded to hearing on December 1, 2017. The evidentiary record includes: Joint Medical Exhibit JE1; Claimant's Exhibits 1 and 2; and, Defendant's Exhibits A through H. At hearing, claimant and her significant other, Mr. Tony Wilhelmi, provided testimony.

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

The parties submitted post-hearing briefs on January 22, 2018 and the matter was considered fully submitted at that time.

ISSUES

The parties submitted the following disputed issues for resolution:

1. Extent of Permanent Partial Disability.

   A) Whether the injury involves a scheduled member or the body as a whole.

B) Whether the body as a whole claim, if present, is barred by the notice defense, per Iowa Code section 85.23.

2. Medical Expenses.

3. Reimbursement of an independent medical evaluation (IME) per Iowa Code section 85.39.

4. Alternate care per Iowa Code section 85.27.

5. Penalty benefits.

6. Costs.

FINDINGS OF FACT

After a review of the evidence presented, I find as follows:

Claimant was 44 years old at the time of the hearing. (Transcript page 34) She graduated from high school in 1991, with no additional formal education. (Tr. pp. 74, 77; Ex. G, p. 24-9) She is right hand dominant. (Tr. p. 103; Ex. JE1, p. 5)

Claimant began working for the defendant employer in Algona, Iowa, on January 5, 2015, making large toolboxes. (Tr., pp. 34, 76; Ex. G, p. 24-9) Previously claimant worked as a stay-at-home mother from 1995 to 2004. (Tr. p. 74) She then worked for about four to five years for her brother in a pig farrowing facility, which was a manual labor position that claimant described as harder than her job at Snap-On. (Tr. pp. 74-75) Claimant was uncertain if she could return to this pig farrowing job with her finger in its current condition. (Tr. p. 75)

She next worked for Aluma performing a job of wiring trailers in a manufacturing facility. (Tr. p. 75) She described this job as having similar physical requirements as her job at Snap-On. (Id.) She quit her job at Aluma and later went to work for the defendant employer. (Tr. p. 76) After her work injury, she found that her job at the defendant employer was more challenging. (Tr. p. 77) Claimant left her job at the defendant employer about three weeks prior to the hearing in this matter. (Tr. p. 87) She obtained a new job at Pioneer, but she reported not working at the time of the hearing, due to depression. She had been working at Pioneer for a little over one week, as a production tech. (Tr. pp. 77, 103) This job requires her to use both hands to scoop out bins of corn with a shovel and use a broom and move long and awkward augers. (Tr. p. 104)

Claimant has a long history of mental health treatment following the death of her husband in 2002. (Tr. pp. 63-64)

On September 7, 2016, about six weeks before the work injury in this matter, claimant was seen at the Mason City Clinic by Katelyn Froehner, ARNP, for mental health issues. (Ex. JE1, p. 1) On that date claimant described emotional volatility with irritability and anger. She was tearful when explaining her symptoms. Claimant had been treated for depression off and on for the previous 14 years. (Id.) Her treatment included multiple medications and therapy services. She was on Citalopram and Lamictal on September 7, 2016, although she reported self-stopping the Lamictal, which had been prescribed on August, 23, 2016, because she was increasingly sad and "crying all the time." (Id.) The diagnosis was "[m]ajor depressive disorder that is recurrent without psychotic features." (Ex. JE1, p. 2) The provider started claimant on Sertaline 25 mg daily for one week then to increase to 50 mg. She was also started on Quetiapine 50mg daily to be taken at night to assist with sleep with an increased dose of 100 mg as needed. Claimant continued to treat with Ms. Froehner for her mental health after the work injury.

Claimant testified that her mental health condition has never caused her to lose a job. (Tr. p. 76)

The Injury

On October 20, 2016, claimant was working for Snap-On Tools, the defendant employer, in the form weld department. (Tr. p. 34) Claimant got her finger caught in a weld gun. (Tr. p. 36) The way the machine had been set up created a pinch point between the welding arms. (Ex. 1, p. 13; Ex. F) The injury resulted in a crush/amputation of her left middle/long fingertip at the base of the distal phalanx. (Tr. pp. 52; Ex. JE1, p. 4) She was seen at the Kossuth Regional Health Center Emergency Department. (Ex. JE1, p. 42) An x-ray confirmed an "amputation of the distal aspect of the middle finger, with associated comminuted fracture of the distal phalanax." (Ex. JE1, p. 41) Claimant requested "any type of treatment to be done over in Mason City either with Dr. Recinos or Dr. Ratay." (Ex. JE1, p. 42) She refused all treatment after tetanus immunization was administered, signed "AMA papers" and "left AMA with her significant other." (Id.) Claimant stated that based on a prior bad experience she did not want to have treatment at the Kossuth Regional Health Center. (Tr. p. 40)

On October 20, 2016, claimant sought care at the Mercy Medical Center of North Iowa in Mason City, Iowa. (Ex. JE1, p. 54) The emergency room irrigated the wound, applied antibiotic ointment and dressing. She was stable and released to follow-up with Rene Recinos, M.D., Ph.D., the following day.

On October 21, 2016, claimant underwent surgery of a nail bed ablation and amputation revision, performed by Dr. Recinos . (Tr. p. 42; Ex. JE1, p. 4)

On October 22, 2016, claimant returned to the Emergency Room in Mason City, and reported an inability to get her pain under control following the surgery. (Ex. JE1, p. 64) She was administered pain medication, reported feeling better, and was discharged. (Ex. JE1, p. 65)

Claimant had been fitted with a custom finger orthosis/splint and underwent occupational therapy. (Ex. JE1, p. 9) She continued with occupational therapy until December 1, 2016. (Ex. JE1, p. 53)

She returned to see Dr. Recinos on October 31, 2016, and reported that she was doing "well." (Ex. JE1, pp. 6) Claimant testified at hearing that she was not asked at that time if she was experiencing any phantom pain or if she had any mental or emotional problems. Claimant said that she did not ask any questions of Dr. Recinos at that time. (Tr. p. 44)

On November 3, 2016, the nurse case manager, Jane Klein, noted that claimant may have "[p]otential depression/sadness over fingertip loss and change of use and appearance of hand." (Ex. JE1, p. 77)

On November 14, 2016, claimant began desensitization therapy for the fingertip. On November 16, 2016, claimant was returned to work with restrictions. (Ex. JE1, p. 78)

On November 28, 2016, claimant reported pain and redness in her finger and that it was warm to the touch. However, the therapist stated that she "did not notice any adverse or new changes" in the finger, and that the "wound is closed and healing nicely." (Ex. JE1, p. 52) She continued to wear the splint at work and soak her hand in salt water.

On November 30, 2016, claimant saw Dr. Recinos and described improvement, "but not as fast as she'd like," noting sensitivity in the tip of her finger. (Ex. JE1, p. 20) She was returned to work with no restrictions and was advised to wear a compression sleeve on her finger as needed. (Ex. JE1, pp. 21, 22)

On December 14, 2016, claimant called Ms. Froehner, and reported that she had been struggling emotionally since losing her finger and was feeling depressed and unmotivated. (Ex. JE1, p. 23)

On January 6, 2017, claimant called Dr. Recinos' office with concern about swelling and redness in her fingertip and was counseled to stop wearing the compression sleeve and use lotramin for a possible yeast infection. (Ex. JE1, p. 24) On the same date, claimant presented herself at Kossuth Regional Health Center Emergency Room with the same complaints and described the onset of the symptoms to be just one day ago. (Ex. JE1, p. 69) She was given antibiotics. She did not complain of any mental health, emotional or phantom limb pain. (Id.)

On January 9, 2017, claimant was seen by Dr. Recinos with continued complaints of swelling and redness in her fingertip. (Ex. JE1, p. 25) Dr. Recinos noted that claimant continued to work without restrictions, taking two Aleve per day and wearing her compression sleeve. The physical exam found no obvious signs of edema, no tenderness to palpation, excellent range of motion and moderate grip strength. (Ex. JE1, pp. 25, 26) She was advised to stop wearing the compression sleeve during the day. (Ex. JE1, p. 27)

On February 20, 2017, it was noted that claimant was still wearing the compression sleeve and she was "strongly encouraged" to stop using it, because her continued reliance on it, "is promoting continued hypersensitivity of the finger." (Ex. JE1, p. 32) She advised that the texture of a towel was very irritating. Dr. Recinos "recommended that she expose her fingertip to that towel texture as much as possible, if she does not desensitize the finger appropriately, she will likely be left with hypersensitivity for the rest of her life." (Id.)

On the same date, February 20, 2017, claimant advised Ms. Froehner, that her "mood is the best it has ever been and she has not been having any ups and down[s]. She is motivated and was able to return to work full time without being anxious about getting injured at work." (Ex. JE1, p. 33)

On April 13, 2017, claimant was seen at Hanger Clinic for a consultation regarding a fingertip prosthetic. (E. JE1, p. 86) On September 25, 2017, she received two silicone partial finger prosthetics. (Ex. JE1, p. 93)

On May 21, 2017, Ms. Froehner noted that claimant was "doing fairly well" and that she was "doing well advocating for herself." (Ex. JE1, p. 36)

On September 18, 2017, claimant reported to Ms. Froehner that "her mood has overall been good and fairly stable." (Ex. JE1, p. 37) She also reported self-stopping the Lamictal because she found it to be "too sedating during the day." (Id.) She also reported that she has had some increased stress at work and that "she is managing that fairly well and is proud of herself for not walking out of her job as she would have in the past." (Id.)

On October 25, 2017, claimant was seen by Dr. Recinos for routine follow-up. Dr. Recinos noted that claimant was working full-time, without restrictions, in the same job that she was doing when she was injured. (Ex. JE1, p. 38) She was taking no pain medications although she reported pain in the fingertip and that the finger was sensitive to cold. She reported continued use of the finger orthosis and she "is pleased with it." (Id.)

On October 23, 2017, claimant underwent an independent medical evaluation (IME) with Sunil Bansal, M.D., M.P.H., at the request of claimant's counsel. Dr. Bansal reviewed medical records post injury and indicated that he reviewed additional records prior thereto, although it is not entirely clear the extent to which Dr. Bansal was aware of

claimant's long standing mental health history and treatment. (Ex. 1, p. 15) He provided only a brief description of her psychiatric care prior to and after the work injury. (Ex. 1, p. 20) Dr. Bansal stated in his deposition initially that he had no prior mental health records and then indicated later that he had a few. (Ex. H-25, p. 7, 25) He did note claimant's report of increased depression post injury and an increase in dosage of medication. (Ex. 1, p. 21) However, he does not reference claimant self-stopping some medications and reporting feeling that her mood was the best it had ever been in February, 2017. (Ex. JE1, p. 33)

Dr. Bansal stated that claimant sustained "PTSD type effects," which "led to an overall aggravation of her mental health condition." (Ex. 1, p. 23) However, he provides no discussion of the diagnosis criteria of PTSD from the DSM-IV or DSM-5. He recommended a referral to a mental health specialist for further management, but in the absence of referral, he would place claimant at maximum medical improvement (MMI) on October 23, 2017, the date of his examination. In his deposition, Dr. Bansal was firm that he was not actually making a PTSD diagnosis. (Ex. H-25, p. 17) He also agreed that claimant does not meet the DSM-5 criteria for PTSD and that no provider has ever diagnosed claimant with PTSD. (Ex. H-25, pp. 18, 19)

Concerning the increase in medication that Dr. Bansal relies upon for his opinion concerning causation related to mental health, he agreed in his deposition, that claimant was started on Sertaline about a month and a half prior to the work injury. (Ex. H-25, p. 25) He also agreed that after starting a new medication for mental health treatment, adjustments to the dosage may be expected. (Ex. H-25, pp. 23, 24)

Concerning the claimant's physical condition, Dr. Bansal recorded claimant's complaint of pain, numbness and tingling in the finger along with swelling. (Ex. 1, p. 22) She also described hypersensitivity at the tip of the finger and for the first time, she indicated a feeling of phantom pain in the missing fingertip. (Id.)

Dr. Bansal, concerning the left hand, assigned 17 percent permanent impairment to the whole person. (Ex. 1, p. 25) This is allegedly based on utilization of chapter 16 of the American Medical Association Guides to the Evaluation of Permanent Impairment, Fifth Edition (AMA Guides). (Ex. 1, p. 24) He assigned 6 percent impairment to the injured finger for loss of range of motion at the MP joint and another 6 percent for the PIP joint. He assigned 40 percent for the amputation at the distal phalanx and an additional 10 percent for sensory loss. He alleges that these combine to become 54 percent impairment of the digit, which he converts to 11 percent of the hand, then to 10 percent of the upper extremity and finally to 17 percent of the whole person.

Dr. Bansal's conversion from the upper extremity to the whole person is incorrect. It is understood that when an impairment rating is converted to a percentage of the whole person and not limited to the extremity of origin, the rating number will not increase. Upon further inquiry I also note that the initial digit impairments are improperly combined and do not follow the instructions provided at pages 511 and 604 of the AMA

Guides. Dr. Bansal gave a deposition in this case and stated that when comparing the range of motion of the MP and PIP joints between the left long finger and the right long finger, there was no difference. (Ex. H-25, p. 13) Therefore, the applicability of the range of motion impairment seems questionable as well. I also note that Dr. Bansal agreed in his deposition that his assessment of 40 percent impairment for the amputation was likely incorrectly too high. (Ex. H-25, p. 16) I therefore put very little weight on Dr. Bansal's calculation of physical impairment.

Dr. Bansal, concerning the alleged mental injury, mentions claimant's mental health by reference to the AMA Guides and placement in Class 2 concerning social function, concentration, activities of daily living, and adaptation. (Ex. 1, p. 25) He does not discuss how he arrived at these placements. There is no reference to a psychological or psychiatric examination as part of the IME and presumably, Dr. Bansal's assessment came from a review of records and his general observations during the physical examination. It is unclear whether Dr. Bansal reviewed the most relevant records from claimant's 14 year mental health history. Also, Dr. Bansal's C.V. does not indicate any specific training or certifications concerning the assessment of mental health issues.

The AMA Guides indicate that certain principles "are central to assessing mental impairment." Guides to the Evaluation of Permanent Impairment, Fifth Edition, p. 358. These principles include a "clear diagnosis," which is "established according to the DSM-IV criteria." (Id.) Dr. Bansal clarified in his deposition as stated above that he did not diagnose PTSD and that claimant was not previously diagnosed with PTSD by any provider. Nevertheless, in a supplemental report signed on November 17, 2017, Dr. Bansal stated that claimant's mental health impairment would include permanent phantom pain and PTSD. (Ex. 1, p. 31) There is little evidence to support the phantom pain complaint which arose for the first time in this IME and there is no PTSD diagnosis by Dr. Bansal or any other medical provider. I place little weight on the psychological/psychiatric assessment of Dr. Bansal.

On November 9, 2017, Dr. Recinos authored a letter concerning claimant's permanent impairment. (Ex. B, p. 2) He stated that he last saw claimant on October 25, 2017 and he placed her at MMI on that date. He assigned no restrictions and anticipated no further surgery or therapy would be needed. Dr. Recinos agreed that claimant suffered "quite a bit of psychological stress as the result of her injury, but thankfully has overcome it." (Id.)

Dr. Recinos does not appear to have any specific training or certification concerning the assessment of mental health issues. Dr. Recinos stated that claimant benefited significantly from the finger prosthetic, but that "[s]he has been left with permanent mild cold sensitivity of her finger as a result of her injury." (Id.)

Dr. Recinos stated that based on chapter 16 of the AMA Guides, "I have deemed the patient to have a 30% impairment rating of her left long finger as a result of her injury." (Ex. B, p. 2) There is no specific reference to any tables, figures or page

numbers within chapter 16 that Dr. Recinos relied upon. There is also no reference to any specific findings that he utilized to form the basis of the rating. However, I note that Figure 16-5, page 443, of the AMA Guides provides for digit impairment percentages for finger amputations and 30 percent does appear to relate to the approximate level of claimant's amputation, which occurred distal to the DIP joint and was then contoured to remove rough edges from the fracture. (Ex. JE1, pp. 5, 41) Table 16-1 and Table 16-2 on pages 438 and 439 of the AMA Guides provide for the conversion from 30 percent of the digit to 5 percent of the upper extremity, consistent with Dr. Recinos' letter. Therefore, I find that the impairment rating and conversion to the upper extremity assigned by Dr. Recinos is corroborated by the AMA Guides.

Concerning the situs of the injury, I find that the work injury involved the fingertip of the left middle finger. The effect of that injury as described by Dr. Recinos was the fingertip amputation and a permanent sensitivity to cold in the finger. (Ex. B, p. 2) According to Dr. Bansal, the effect of that injury included the fingertip amputation, loss of range of motion in the finger, and sensory loss in the finger. Therefore, even if I were to accept the opinions of Dr. Bansal, claimant's IME physician, the physical effects of the injury remain limited to the finger. No physician has found permanent physical functional loss that extends beyond the finger.

Considering the physical impairment, I accept the opinion of the treating surgeon, Dr. Recinos, whom claimant requested to be her treating physician on the day of the injury. (Ex. JE1, p. 42) I find the functional rating assigned by Dr. Recinos to the finger to be the most accurate and reliable, having found significant problems with the impairment assigned by Dr. Bansal as set forth above. I, therefore, find that claimant sustained 30 percent impairment to her left long/middle finger based on the opinion of Dr. Recinos.

Considering the mental health claim, it is significant that just six weeks prior to this work injury, claimant described herself as being emotionally volatile, with irritability and anger and being tearful. (Ex. JE1, p. 1) She was already on multiple medications for mental health treatment and was diagnosed with recurring major depressive disorder. She had self-stopped one prescription medication and was started on new medications on September 7, 2016. (Id.) It would be expected given this circumstance, there would likely be additional changes in either dose levels or medications thereafter. Although her primary mental health provider, Ms. Froehner, stated that she was struggling emotionally on December 14, 2016, after the loss of her fingertip, she also stated about two months later on February 20, 2017, that her mood had improved to the point that it was the best it had ever been and she was no longer having the ups and downs that she had previously. (Ex. JE1, p. 33)

Also on September 18, 2017, Ms. Froehner stated that claimant was proud of herself that after her job stress increased, she did not leave her job "as she would have done in the past," indicating that she had maintained a reasonably good and stable mood and that she also had some improvement in her condition as compared to before the work injury. (Tr. p. 76) This is corroborated by the statement of Dr. Recinos that

claimant suffered "quite a bit of psychological stress as the result of her injury, but thankfully has overcome it." (Id.) (Ex. B, p. 2)

I accept the opinion of Dr. Recinos and find that claimant had a history of mental health problems and her condition was exacerbated by the work injury on a temporary basis, but that claimant has failed to show any permanent psychological impairment as a result of the work injury.

In support of this finding, it is important to note that Ms. Froehner did not provide any specific opinion concerning any permanent impairment related to claimant's mental health. It is also significant that claimant did not mention phantom pain in any medical treatment record, nor in her deposition. It was not until her IME with Dr. Bansal that the issue arose and that only occurred after Dr. Bansal specifically asked claimant about it. (Ex. H-25, p. 50) Further, it is significant that claimant's mental health medications were being adjusted in the weeks prior to this work injury. Although, the claimant was understandably upset by the injury, I reject the notion that the changes in her medication alone form an adequate basis to conclude that she sustained a permanent impairment in her mental health condition related to the work injury. The fact that six weeks prior to the injury, claimant's medications were in the process of being adjusted and claimant was admittedly unstable, is significant. It is also important that some of the most recent mental health notes indicate that claimant, from a mental health standpoint, was doing better than she ever has before and is coping well with her stressors in ways that exceed her ability to cope prior to the injury. These records support a finding that the mental health exacerbation was temporary and did not result in any permanent psychological impairment.

I find that claimant has failed to carry her burden of proof that she sustained any permanent mental/psychological injury as a result of this work injury and that the permanent partial disability is limited to the left long/middle finger.

Considering medical bills and medical mileage, I find that the treatment claimant received was beneficial to her condition and was reasonably suited to treat her condition.

Considering claimant's IME, I note that claimant obtained her IME with Dr. Bansal on October 23, 2017. Dr. Recinos, the treating surgeon did not place claimant at MMI until two days later on October 25, 2017 and did not assign a permanent impairment rating until November 9, 2017. Indeed, Dr. Bansal agreed that claimant had not reached MMI when he conducted his evaluation and agreed with Dr. Recinos that MMI was not reached until October 25, 2017. (Ex. 1, p. 26) Claimant was examined for her IME before a physician retained by the employer had made an evaluation of permanent disability and there was no impairment rating issued by said physician that claimant could have objected to and found to be too low when her IME with Dr. Bansal occurred.

Concerning claimant's request for alternate medical care for a mental health specialist to manage claimant's alleged phantom limb pain and PTSD. I find that despite claimant receiving mental health treatment with Ms. Froehner, she has never been diagnosed with PTSD and during the year prior to the IME with Dr. Bansal, there had been no report of phantom limb pain. As stated above, I gave little weight to Dr. Bansal's IME opinion and I find no clearly diagnosed conditions of PTSD or phantom limb pain attributable to this work injury. In addition, I do not find a prior statement of dissatisfaction of care from claimant to defendant prior to the time of the hearing.

Defendants commenced payment of temporary benefits on November 2, 2016, which was 13 days after the injury. (Ex. 2, p. 2) Weekly temporary benefits were paid again on November 15, November 22, November 29, and December 15, 2016. (Ex. 2, p. 3-5) Claimant was returned to work on November 30, 2016. (Ex. JE1, pp. 21-22) On January 3, 2017, defendants issued 6 weeks of anticipated permanency benefits, about a month after her return to work and about 10 months before receiving any impairment rating assigned by any physician. The payment included a letter of explanation that this was based on anticipated permanent impairment, with additional payments to be made based on the treating physician's opinion of permanency when it was completed. (Ex. 2, p. 7) I find that defendant's payment of weekly benefits were delayed by a period of days, and that the assessment of 6 weeks of permanency benefits was a reasonable assessment following the amputation injury and the information that defendants had available to them at that time. I further find that the benefits paid were underpaid at the rate of $421.26 as compared to the stipulated rate in the Hearing Report of $440.18. (Ex. 2, p. 4)

The parties are in agreement that defendant is entitled to a credit against any additional permanent partial disability that may be awarded in the sum of $486.47. (Tr. p. 14)

The parties have stipulated that the proper commencement date for permanent partial disability benefits is November 16, 2016. (Hearing Report, p. 1)

The parties have stipulated that the correct weekly workers' compensation benefit rate in this case is $440.18. (Hearing Report, p. 2)

CONCLUSIONS OF LAW

1. Extent of Permanent Partial Disability.

   A) Whether the injury is to a scheduled member or the body as a whole.

   B) Whether the body as a whole claim is barred by the notice defense, Iowa Code section 85.23.

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).

When an expert opinion is based upon an incomplete history, the opinion is not necessarily binding upon the commissioner. The commissioner as trier of fact has the duty to determine the credibility of the witnesses and to weigh the evidence, together with the other disclosed facts and circumstances, and then to accept or reject the opinion. Dunlavey v. Economy Fire & Casualty Co., 526 N.W.2d 845 (Iowa 1995).

I have found above for the reasons there stated that claimant has sustained a permanent impairment only to her left long/middle finger, and has failed to carry her burden of proof that she sustained any permanent impairment for a mental injury.

Therefore, the assessment of permanent impairment is limited to the left long/middle finger.

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)-(t) or for loss of earning capacity under section 85.34(2)(u). 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 fact finder must consider both medical and lay evidence relating to the extent of the functional loss in determining permanent disability resulting from an injury to a scheduled member. Terwilliger v. Snap-On Tools Corp., 529 N.W.2d 267, 272-273 (Iowa 1995); Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417, 420 (Iowa 1994).

Where an injury is limited to scheduled member the loss is measured functionally, not industrially. Graves v. Eagle Iron Works, 331 N.W.2d 116 (Iowa 1983).

The courts have repeatedly stated that for those injuries limited to the schedules in Iowa Code section 85.34(2)(a-t), this agency must only consider the functional loss of the particular scheduled member involved and not the other factors which constitute an "industrial disability." Iowa Supreme Court decisions over the years have repeatedly

cited favorably the following language in the 66 year old case of Soukup v. Shores Co., 222 Iowa 272, 277; 268 N.W. 598, 601 (1936):

> [t]he legislature has definitely fixed the amount of compensation that shall be paid for specific injuries . . . and that, regardless of the education or qualifications or nature of the particular individual, or of his inability . . . to engage in employment . . . the compensation payable . . . is limited to the amount therein fixed.

Our court has even specifically upheld the constitutionality of the scheduled member compensation scheme. Gilleland v. Armstrong Rubber Co., 524 N.W.2d 404 (Iowa 1994). Permanent partial disabilities are classified as either scheduled or unscheduled. A specific scheduled disability is evaluated by the functional method; the industrial method is used to evaluate an unscheduled disability. Graves, 331 N.W.2d 116; Simbro v. DeLong's Sportswear 332 N.W.2d 886, 887 (Iowa 1983); Martin v. Skelly Oil Co., 252 Iowa 128, 133, 106 N.W.2d 95, 98 (1960).

When the result of an injury is loss to a scheduled member, the compensation payable is limited to that set forth in the appropriate subdivision of Code section 85.34(2). Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961). "Loss of use" of a member is equivalent to "loss" of the member. Moses v. National Union C. M. Co., 194 Iowa 819, 184 N.W. 746 (1921). Pursuant to Iowa Code section 85.34(2)(u) the workers' compensation commissioner may equitably prorate compensation payable in those cases wherein the loss is something less than that provided for in the schedule. Blizek v. Eagle Signal Co., 164 N.W.2d 84 (Iowa 1969).

Evidence considered in assessing the loss of use of a particular scheduled member may entail more than a medical rating pursuant to standardized guides for evaluating permanent impairment. A claimant's testimony and demonstration of difficulties incurred in using the injured member and medical evidence regarding general loss of use may be considered in determining the actual loss of use compensable. Soukup, 222 Iowa 272, 268 N.W. 598. Consideration is not given to what effect the scheduled loss has on claimant's earning capacity. The scheduled loss system created by the legislature is presumed to include compensation for reduced capacity to labor and to earn. Schell v. Central Engineering Co., 232 Iowa 421, 4 N.W.2d 339 (1942).

I have considered all of the evidence including the testimony of claimant and Mr. Tony Wilhelmi and I accept the opinion of the treating physician, Dr. Recinos as stated above and conclude that claimant sustained 30 percent impairment to her left long/middle finger, which is 9 weeks based on Iowa Code section 85.34(2)(c).

Concerning the issue of notice, I found above that on October 26, 2016, the nurse case manager, noted that claimant may have "[p]otential depression/sadness over fingertip loss and change of use and appearance of hand." (Ex. JE1, p. 77)

Iowa Code section 85.23 requires an employee to give notice of the occurrence of an injury to the employer within 90 days from the date of the occurrence, unless the employer has actual knowledge of the occurrence of the injury.

The purpose of the 90-day notice or actual knowledge requirement is to give the employer an opportunity to timely investigate the facts surrounding the injury. The actual knowledge alternative to notice is met when the employer, as a reasonably conscientious manager, is alerted to the possibility of a potential compensation claim through information which makes the employer aware that the injury occurred and that it may be work related. Dillinger v. City of Sioux City, 368 N.W.2d 176 (Iowa 1985); Robinson v. Department of Transp., 296 N.W.2d 809 (Iowa 1980).

Failure to give notice is an affirmative defense which the employer must prove by a preponderance of the evidence. DeLong v. Highway Commission, 229 Iowa 700, 295 N.W. 91 (1940).

The note from the nurse case manager acknowledging the potential mental health impact of the work injury, demonstrates the employer's actual notice of the mental health claim. Defendants had actual notice of the mental health injury just 6 days after the injury occurred, well within the 90-day requirement. Having received actual notice, the employer's notice defense fails. However, I have determined that the mental injury was a temporary aggravation and did not result in permanent impairment.

2. Medical Expenses (attachment to the hearing report, pages 6 through 8).

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 16, 1975).

Prudent persons customarily rely upon their physician's recommendation for medical care without expressly asking the physician if that care is reasonable. Proof of reasonableness and necessity of the treatment can be based on the injured person's testimony. Sister M. Benedict v. St. Mary's Corp., 255 Iowa 847, 124 N.W.2d 548 (1963).

It is said that "actions speak louder than words." When a licensed physician prescribes and actually provides a course of treatment, doing so manifests the physician's opinion that the treatment being provided is reasonable. A physician practices medicine under standards of professional competence and ethics. Knowingly providing unreasonable care would likely violate those standards. Actually providing care is a nonverbal manifestation that the physician considers the care actually provided

to be reasonable. A verbal expression of that professional opinion is not legally mandated in a workers' compensation proceeding to support a finding that the care provided was reasonable. The success, or lack thereof, of the care provided is evidence that can be considered when deciding the issue of reasonableness of the care. A treating physician's conduct in actually providing care is a manifestation of the physician's opinion that the care provided is reasonable and creates an inference that can support a finding of reasonableness. Jones v. United Gypsum, File No. 1254118 (App. May 2002); Kleinman v. BMS Contract Services, Ltd., File No. 1019099 (App. September 1995); McClellon v. Iowa Southern Utilities, File No. 894090 (App. January 1992). This inference also applies to the reasonableness of the fees actually charged for that treatment.

Claimant is entitled to an order of reimbursement only if he has paid treatment costs; otherwise, to an order directing the responsible defendants to make payments directly to the provider. See, Krohn v. State, 420 N.W.2d 463 (Iowa 1988). Defendants should also pay any lawful late payment fees imposed by providers. Laughlin v. IBP, Inc., File No. 1020226 (App., February 27, 1995).

The Court in Bell Bros. stated:

> We do not believe the statute can be narrowly construed to foreclose all claims by an employee for unauthorized alternative medical care solely because the care was unauthorized. Instead, the duty of the employer to furnish reasonable medical care supports all claims for care by an employee that are reasonable under the totality of the circumstances, even when the employee obtains unauthorized care, upon proof by a preponderance of the evidence that such care was reasonable and beneficial. In this context, unauthorized medical care is beneficial if it provides a more favorable medical outcome than would likely have been achieved by the care authorized by the employer.

Bell Bros. Heating and Air Conditioning v. Gwinn, 779 N.W.2d 193, 206 (Iowa 2010).

I have found above that the medical treatment claimant received was helpful to her condition. She improved with the treatment. I conclude that defendants are obligated to the pay the medical expenses, including mileage found in pages 6 through 8 attached to the Hearing Report.

3. Reimbursement of an independent medical evaluation (IME) per Iowa Code section 85.39 (attachment to the hearing report, page 8).

Section 85.39 permits an employee to be reimbursed for subsequent examination by a physician of the employee's choice where an employer-retained physician has previously evaluated "permanent disability" and the employee believes that the initial evaluation is too low. The section also permits reimbursement for

reasonably necessary transportation expenses incurred and for any wage loss occasioned by the employee attending the subsequent examination.

Defendants are responsible only for reasonable fees associated with claimant's independent medical examination. Claimant has the burden of proving the reasonableness of the expenses incurred for the examination. See Schintgen v. Economy Fire & Casualty Co., File No. 855298 (App. April 26, 1991). Claimant need not ultimately prove the injury arose out of and in the course of employment to qualify for reimbursement under section 85.39. See Dodd v. Fleetguard, Inc., 759 N.W.2d 133, 140 (Iowa App. 2008).

I have found above that claimant's IME with Dr. Bansal on October 23, 2017, preceded Dr. Recinos' opinion of permanent impairment, and also preceded claimant's date of MMI according to both Dr. Recinos and Dr. Bansal. There was no employer-retained physician opinion concerning permanency that claimant could have believed was too low when claimant obtained her IME with Dr. Bansal. Therefore, claimant is not entitled to reimbursement.

Considering the possible argument that claimant had been released to return to work with no restrictions on November 30, 2016, and that this should be deemed an assessment of zero percent by the treating physician under, Moffitt v. Estherville Food, Inc., File Nos. 5029474, 5039475, 5029476, (App., September 21, 2011); Flynn v. John Deere Davenport Works, File Nos. 5030928, 5030940, (App., November 21, 2011); and Countryman v. Des Moines Metro Transit Authority, File Nos. 5009718, 5013883 (App., March 16, 2006), I note that those cases contemplated that there was no further inquiry concerning permanency. In this case, it was understood that there would be some permanency due to the amputation, but it was necessary to wait until claimant reached MMI to assess permanency. Therefore, this line of prior agency decisions is distinguished from the present case.

4. Alternate care per Iowa Code section 85.27.

Alternate medical care proceedings are governed by specific administrative rules that provide expedited proceedings. 876 IAC 4.48. Agency rule 4.48(5) provides that an alternate medical care hearing can "concern only the issue of alternate care."

Under Iowa law, the employer is required to provide care to an injured employee and is permitted to choose the care. Pirelli-Armstrong Tire Co. v. Reynolds, 562 N.W.2d 433 (Iowa 1997).

> [T]he 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.

By challenging the employer's choice of treatment – and seeking alternate care – claimant assumes the burden of proving the authorized care is unreasonable. See Iowa R. App. P. 14(f)(5); Long v. Roberts Dairy Co., 528 N.W.2d 122 (Iowa 1995). Determining what care is reasonable under the statute is a question of fact. Id. The employer's obligation turns on the question of reasonable necessity, not desirability. Id.; Harned v. Farmland Foods, Inc., 331 N.W.2d 98 (Iowa 1983). In Pirelli-Armstrong Tire Co. v. Reynolds, 562 N.W.2d 433 (Iowa 1997), the court approvingly quoted Bowles v. Los Lunas Schools, 109 N.M. 100, 781 P.2d 1178 (App. 1989):

> [T]he words "reasonable" and "adequate" appear to describe the same standard.
>
> [The New Mexico rule] requires the employer to provide a certain standard of care and excuses the employer from any obligation to provide other services only if that standard is met. We construe the terms "reasonable" and "adequate" as describing care that is both appropriate to the injury and sufficient to bring the worker to maximum recovery.

The commissioner is justified in ordering alternate care when employer-authorized care has not been effective and evidence shows that such care is "inferior or less extensive" care than other available care requested by the employee. Long, 528 N.W.2d at 124; Pirelli-Armstrong Tire Co., 562 N.W.2d at 437.

In this case, I have found that the particular alternate medical care being sought is for mental health treatment due to alleged PTSD and phantom limb pain, neither of which has been diagnosed by any treating physician in this case. Indeed, Dr. Bansal in his deposition specifically agreed that he was not making such a diagnosis. Further, I have found that the mental health injury was a temporary exacerbation and did not result in any permanent impairment.

I am unable to conclude from the evidence presented that the undiagnosed conditions of phantom limb pain and PTSD as set forth by Dr. Bansal are in fact current conditions that claimant suffers from or that they are causally related to the work injury. Therefore, the request is denied.

5. Penalty benefits.

If weekly compensation benefits are not fully paid when due, section 86.13 requires that additional benefits be awarded unless the employer shows reasonable cause or excuse for the delay or denial. Weekly compensation payments are due at the

end of the compensation week. Robbennolt v. Snap-on Tools Corp., 555 N.W.2d 229, 235 (Iowa 1996).

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

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

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

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

Payments are "made" either when (a) the check addressed to a claimant is mailed or when (b) the check is delivered personally to the claimant by the employer or its workers' compensation insurer. Robbennolt, 555 N.W.2d at 236; Kiesecker, 528 N.W.2d at 112.

Penalty is not imposed for delayed interest payments. Davidson v. Bruce, 593 N.W.2d 833, 840 (Iowa 1999).

I have found above that there was an underpayment of benefits previously paid and that there was some delay, mostly a matter of days, in the payment of weekly benefits. I found that the assessment of permanent partial disability benefits of 6 weeks paid in early January, 2017 was reasonable when it was paid based on the then existing information concerning claimant's amputation injury. However, I did not find an adequate explanation from defendants concerning the basis for the delay of a few days or for the underpayment. Iowa Code section 86.13 states that a penalty "shall" be awarded when there is a lack of a reasonable basis for the delay. Iowa Code section 86.13(4)(a). I conclude that based on the relatively short period of delay, and the amount delayed, that claimant is entitled to penalty benefits of $100.00, which is less than 50 percent of the amount delayed.

6. Costs.

The final issue is costs. Assessment of costs is a discretionary function of this agency. Iowa Code section 86.40. Costs are to be assessed at the discretion of the deputy commissioner or workers' compensation commissioner hearing the case. 876 IAC 4.33. I assess costs to be paid by defendant in the sum of $107.61 for the filing fee and service fee and $2,316.00 for the cost of Dr. Bansal's report, which excludes the cost of the physical examination.

ORDER

THEREFORE, IT IS ORDERED:

Defendants shall pay claimant permanent partial disability benefits of nine (9) weeks, beginning on the stipulated commencement date of November 16, 2016 until all benefits are paid in full.

Defendants shall be entitled to a credit for all weekly benefits paid to date. The parties have stipulated that defendants are entitled to a credit of four hundred eighty-six and 47/100 dollars ($486.47). (Tr. p. 14)

All weekly benefits shall be paid at the stipulated rate of four hundred forty and 18/100 dollars ($440.18) per week.

All accrued benefits shall be paid in a lump sum.

Defendants shall pay interest on any accrued weekly benefits pursuant to Iowa Code section 85.30

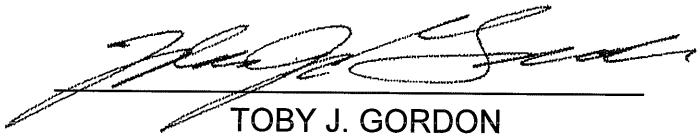
Defendants shall reimburse claimant for his out-of-pocket medical expenses set forth in page numbers 6, 7 & 8, of the attachment to the Hearing Report and shall pay, reimburse, and or otherwise satisfy all remaining medical expenses contained therein, including mileage.

Defendants shall pay costs of one hundred seven and 61/100 dollars ($107.61) for the filing fee and service fee and two thousand three hundred sixteen and no/100 dollars ($2,316.00) for the cost of Dr. Bansal's report.

Defendants shall pay penalty benefits of one hundred and no/100 dollars ($100.00).

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

Signed and filed this 17th day of May, 2018.



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