BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

CAROLYN SALLIS, Claimant, vs. CITY OF WATERLOO, IOWA, Employer, Defendant.	:	File No. 1643953.01 ARBITRATION DECISION Head Note Nos.: 1803, 1803.01, 2209, 2907, 4000.2

STATEMENT OF THE CASE

Carolyn Sallis, claimant, filed a petition for arbitration against the City of Waterloo, Iowa, as the self-insured employer. This case came before the undersigned for an arbitration hearing on January 19, 2022. Pursuant to an order from the Iowa Workers' Compensation Commissioner, this case was heard via videoconference using CourtCall. All participants appeared remotely via CourtCall.

The parties filed a hearing report prior to the commencement of the hearing. On the hearing report, the parties entered into numerous stipulations. Those stipulations were accepted and no factual or legal issues relative to the parties' stipulations will be made or discussed. The parties are now bound by their stipulations.

The evidentiary record includes Joint Exhibits 1 through 7, Claimant's Exhibits 1 through 8, as well as Defendants Exhibits A through I. All exhibits were received without objection. Claimant testified on her own behalf. No other witnesses testified live at the hearing.

The evidentiary record closed at the conclusion of the arbitration hearing. However, counsel for the parties requested an opportunity to file post-hearing briefs. This request was granted and both parties filed briefs simultaneously on February 25, 2022. The case was considered fully submitted to the undersigned on that date.

ISSUES

The parties submitted the following disputed issues for resolution:

1. Whether the work injury is limited to a scheduled member, right shoulder, injury or includes a sequela injury to the left shoulder or left upper extremity.

2. Whether the injury should be compensated as a scheduled member injury or with industrial disability benefits.

3. The extent of claimant's entitlement to permanent partial disability benefits.

4. The proper commencement date for permanent partial disability benefits.

5. Whether penalty benefits should be awarded for an alleged unreasonable denial of benefit.

6. Whether defendants are entitled to a credit for overpayment of permanent disability benefits.

7. Whether costs should be assessed against either party and, if so, in what amount.

FINDINGS OF FACT

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

Carolyn Sallis, claimant, is a 66-year-old woman who sustained an admitted right arm injury as a result of a fall on ice walking into her workplace with the City of Waterloo on February 4, 2018. As a result of the fall, Ms. Sallis sustained an impacted transverse fracture through the neck of her right humerus, as well as a longitudinal fracture through the base of the greater tuberosity. (Joint Exhibit 2, p. 12-13) The fracture required an open reduction and internal fixation of the right proximal humerus, which was performed by Robert B. Bartelt, M.D., on February 14, 2018. (Joint Ex. 2, pp. 18, 20)

Unfortunately, claimant's right arm did not recover entirely after the February 2018 surgery. Claimant testified that her physical therapy did not start for approximately six weeks after surgery and that she remained in an immobilizer during this time. She then participated in physical therapy for approximately four months but was unable to improve her right shoulder range of motion. Dr. Bartelt recommended a manipulation of the right shoulder under anesthesia. (Joint Ex. 4 p. 43)

Given that the initial surgery and subsequent physical therapy were not extremely beneficial, claimant requested a second opinion before further operative procedures were undertaken. The City of Waterloo consented and authorized a second opinion to be performed by orthopaedic surgeon, Matthew J. Bollier, M.D., at the University of Iowa Hospitals and Clinics. Dr. Bollier evaluated claimant in July 2018. He recommended an arthroscopic release of adhesions and then a manipulation under anesthesia of claimant's right shoulder. (Joint Ex. 7, p. 53) Ultimately, claimant consented to Dr. Bollier's recommendation, and Dr. Bollier took claimant to surgery on August 7, 2018. (Joint Ex. 7, p. 55)

Dr. Bollier's operative note explains that he performed a right shoulder arthroscopy, capsular release, extensive debridement and a subacromial decompression on August 7, 2018. (Joint Ex. 7, p. 55) Ms. Sallis submitted to therapy again after the second surgery and obtained better results, though she did not achieve full resolution of her symptoms or full range of motion of the right shoulder. Claimant describes ongoing pain in the upper, front part of her right shoulder. She testified that

her right shoulder aches and is worse the more she uses it. She testified that she cannot raise her right arm and does not try to do so. Ms. Sallis also testified that she does not try to lift with her right arm. She uses Tylenol every day for her symptoms and described worsening symptoms with weather changes, doing her makeup, blow drying her hair, or when she lifts her right arm. She further explained that it bothers her to reach away from her body and that it is especially bothersome when she reaches over head with the right arm. (Claimant's testimony)

Ms. Sallis was able to return to work at the City of Waterloo's library. She testified that she had difficulties lifting books and had to get assistance from co-workers to complete her job tasks. Ms. Sallis retired from her employment in May 2019, stating that she just was not up to par anymore, that she experienced lots of pain on any given day, and that she was nervous about working through another winter with snow and ice. However, she also testified that it was her intention prior to this injury to work to her full retirement age, or 66, and that she would likely still be working at the time of the hearing but for the injury. (Claimant's testimony)

There is not a dispute about the cause of Ms. Sallis's right shoulder and arm injuries. Claimant clearly sustained the injuries that required two surgeries on her right arm and shoulder. The only stated disputed issue with respect to that injury is the extent of claimant's permanent functional impairment. Dr. Bollier declared claimant to be at maximum medical improvement (MMI) on November 5, 2018. Dr. Bollier also recommended permanent physical restrictions that included no lifting greater than 10 pounds overhead. (Joint Ex. 7, pp. 62, 64) Dr. Bollier opined that claimant sustained a 15 percent permanent functional impairment, or 9 percent of the whole person, as a result of the right shoulder injury. (Joint Ex. 7, p. 62)

Ms. Sallis asserts that she also sustained an injury to the left arm or left shoulder as a result of overusing the left arm while recovering from her right arm and shoulder injury. She testified that her left shoulder symptoms started approximately three months after the first surgery on her right arm and shoulder. She testified that she was using her left arm more and compensating for her right arm. Symptoms started gradually and came and went at first. However, Ms. Sallis testified that the left arm symptoms worsened over time. (Claimant's testimony)

Review of claimant's medical records demonstrates that she was reporting left arm and/or left shoulder symptoms approximately three months after her right shoulder surgery. On May 9, 2018, Ms. Sallis reported to her physical therapist that her left shoulder was getting sore "due to using it more." (Joint Ex. 5, p. 45) Dr. Bollier recorded on September 24, 2018, that claimant reported left upper extremity pain, "which she attributes to overcompensation from the right arm." (Joint Ex. 7, p. 59) On October 12, 2018, claimant reported to a physical therapy assistant that she was experiencing increased pain in her left arm. (Joint Ex. 5, p. 46) She reiterated soreness in both arms and shoulders again on October 17, 2018 and October 23, 2018. (Joint Ex. 5, pp. 47-48) A November 28, 2018 therapy record demonstrates that claimant reported left arm symptoms from her left shoulder down through her left elbow and into her left forearm. At that time, she reported to her therapist that she had been overusing her left arm since her prior right arm injury. (Joint Ex. 3, p. 24)

To investigate the left arm and shoulder claim, defendants authorized an evaluation, performed by Kenneth McMains, M.D., on March 28, 2019. (Joint Ex. 3, pp. 32-33) Dr. McMains noted that claimant was unable to use the right hand due to the work injury and indicated, "Ms. Sallis was essentially a one-handed worker, using her left arm for all activities. Since she used her arm on a daily basis, she reportedly developed pain in her biceps area, going from the shoulder to the distal humeral area of the elbow, but not into the forearm." (Joint Ex. 3, p. 32) Dr. McMains concluded in his March 28, 2019 report that, "It would appear from the history and exam that likely Ms. Sallis' symptoms are the result of overuse of a right-handed person who was unable to use her right arm for an extended period of time, and developed sore muscles in the left biceps." (Joint Ex. 3, p. 32) Dr. McMains recommended an orthopaedic evaluation. (Joint Ex. 3, p. 32)

Defendants thereafter authorized an evaluation with an orthopaedic surgeon, which was performed by Thomas S. Gorsche, M.D. on May 14, 2019. (Defendants' Ex. B) Dr. Gorsche noted that claimant's left upper-extremity pain had persisted for "greater than a year," but noted that "it is getting better." (Defendants' Ex. B, p. 31) Dr. Gorsche opined that claimant had full range of motion of the left arm and that he found "no evidence for any long head biceps tendon fraying or condition." (Defendants' Ex. B, p. 33) Dr. Gorsche diagnosed claimant with a left biceps strain. He concluded that claimant did not need further treatment and released her to return on an as needed basis. (Defendants' Ex. B, p. 35) In a report dated November 23, 2021, Dr. Gorsche clarified his opinions, stating that claimant "did not sustain an injury to her left upper extremity as a result of her February 4, 2018 fall." (Defendants' Ex. B, p. 41) He further opined that claimant sustained no permanent impairment to the left upper extremity and required no permanent work restrictions because of the left arm. (Defendants' Ex. B, p. 41)

Claimant disputes the opinions of Dr. Bollier with respect to the right arm and shoulder and those of Dr. Gorsche with respect to the left arm and shoulder. In response, claimant sought an independent medical evaluation performed by Farid Manshadi, M.D., on June 25, 2019. (Claimant's Ex. 1) Dr. Manshadi noted that claimant reported left arm pain intermittently but confirmed that it was getting better when he evaluated claimant. Dr. Manshadi also noted that the symptoms on the left side were localized to the left biceps tendon and did not include the left shoulder. (Claimant's Ex. 1, p. 2) Dr. Manshadi opined, "I believe the right shoulder and left shoulder injuries are as a result of the work injury of 02/04/18 while she was working for the Waterloo Public Library." (Claimant's Ex. 1, p. 3) He offered a 23 percent permanent impairment of the right upper extremity but declined to offer a permanent impairment for the left arm. Instead, he opined that claimant was not at maximum medical improvement for the left arm injury. (Claimant's Ex. 1, p. 4)

Claimant's attorney followed-up with Dr. Manshadi, clarifying that claimant did not anticipate she would obtain additional treatment for the left arm and shoulder. Accordingly, Dr. Manshadi issued a supplemental report dated March 16, 2020. In that letter, he opined that claimant qualified for a 16 percent permanent impairment of the left upper extremity. (Claimant's Ex. 1, p. 8)

In a second supplemental report dated November 16, 2021, Dr. Manshadi clarified his opinions. Specifically, he explained:

> [T]he mechanism of injury of Ms. Sallis' left-sided shoulder injury is as a result of overcompensation for injury to the right shoulder. It is well documented in the records that she started having issues with left shoulder pain when she was going to therapies, including the visit of 05/09/18. Further , it was a fairly long period of time that Ms. Sallis could not use her right upper extremity, and as a result of overcompensation for the right side, she started having issues with left-sided shoulder pain.

(Claimant's Ex. 1, p. 9)

After claimant's independent medical evaluation occurred, defendants sought a responsive report from Kenneth McMains, M.D. In his August 20, 2019 report, Dr. McMains clarified that he did not believe claimant's left shoulder or left upper extremity complaints are related to the February 14, 2018 fall at work. No explanation is offered why Dr. McMains offered an arguably contradictory assessment in his March 28, 2019 report. Instead, Dr. McMains focused on Dr. Manshadi's opinions and explained, "from her onset of treatment until November of 2018, she had no reported problems with her left upper extremity." (Joint Ex. 3, p. 35) Presumably, this "gap" in symptoms or treatment between the injury date and the first complaints of left arm or shoulder symptoms convinces Dr. McMains that claimant's left shoulder or arm symptoms are not related to the initial fall or overcompensation as a result of not being able to use the right arm.

Unfortunately, Dr. McMains' analysis of the medical evidence is erroneous. Whether he missed the references or did not have the pertinent medical records for review, Dr. McMains' reference to no reported problems with claimant's left upper extremity between the onset of treatment and November of 2018 is simply erroneous. As noted above, claimant's left arm or left shoulder complaints are noted at least 6 times in her treatment records and is noted by more than one provider between May 9, 2018 and November 28, 2018. (Joint Ex. 3, p. 24; Joint Ex. 5, pp. 45-48; Joint Ex. 7, p. 59) Accordingly, I find that the history and assumptions relied upon by Dr. McMains in his supplemental report are erroneous or missing important facts. I am not convinced that Dr. McMains' opinion is complete, and it is not convincing or credible given this misunderstanding or lack of information.

In a supplemental report dated November 23, 2021, Dr. Gorsche addressed permanent impairment of the right upper extremity. He opined that Dr. Bollier's permanent impairment rating was incorrect because it did not include impairment for excision of the distal clavicle. However, he also opined that Dr. Manshadi provided an erroneous permanent impairment rating for the right upper extremity because he did not properly apply the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, for that same distal clavicle excision. Ultimately, Dr. Gorsche opined that claimant sustained 17-18 percent permanent functional impairment of the right upper extremity, or 10-11 percent permanent functional impairment of the whole person. (Defendants' Ex. B, p. 42)

Dr. Gorsche also offered a deposition in this case. In his deposition, Dr. Gorsche reiterates his opinions that claimant did not sustain a work-related left upper extremity or left shoulder injury. He opines that claimant requires no physical restrictions for the left arm or shoulder, that she did not sustain any permanent impairment to the left upper

extremity, and that she requires no further treatment for the left upper extremity. (Defendants' Ex. B, p. 19) He also clarifies that he does not accept claimant's theory of injury as possible. In fact, he testified, "Favoring injuries I don't think exist." (Defendants' Ex. B, p. 21) Interestingly, Dr. Gorsche offers no alternative explanation for why claimant developed left arm and shoulder symptoms.

Ultimately, I do not find the causation opinions of Dr. McMains or Dr. Gorsche convincing with respect to the left arm and left shoulder. Instead, I find Dr. Manshadi's explanation and causation opinion more credible and convincing on the issue of claimant's left arm and shoulder. Therefore, I find that claimant has proven she sustained injuries to the right arm and shoulder as a result of the February 4, 2018 fall at work. As a direct result of those injuries and the inability to use her right arm, claimant developed overuse injuries in the left arm and shoulder.

I accept the permanent impairment ratings offered by Dr. Manshadi for claimant's right arm and shoulder as most convincing as well. Dr. Bollier's impairment rating offers no impairment for the distal clavicle excision and Dr. McMains similarly offers no permanent impairment for the right distal clavicle excision. (Joint Ex. 3, p. 45; Joint Ex. 7, p. 62) Dr. Gorsche did not evaluate the right arm and shoulder but was instructed to evaluate the left upper extremity at his evaluation. (Defendants' Ex. B, p. 34) Any impairment offered by Dr. Gorsche is based solely upon the examinations of other physicians. Without specifically examining the right shoulder, Dr. Gorsche's opinion lacks credibility in this situation to offer his permanent impairment rating relative to the right shoulder and arm. Therefore, I find claimant has proven she sustained 23 percent permanent functional impairment of the left upper extremity as a result of the February 4, 2018 work injury. (Claimant's Ex. 1, p. 4)

With respect to the left shoulder, Dr. Gorsche is skeptical of the alleged injury because he does not believe overcompensation injuries occur. I reject his opinions, including his permanent impairment rating. Dr. McMains appears to rely upon inaccurate medical evidence, and I found his causation opinion pertaining to the left arm and shoulder unconvincing. Therefore, I accept the medical opinion of Dr. Manshadi as most accurate and convincing with respect to the left arm and shoulder.

Certainly, I have some hesitation with respect to Dr. Manshadi's opinions as well. He initially opines that additional treatment is indicated for the left arm and shoulder and declines to offer a permanent impairment rating. He then proceeds to offer the impairment rating without additional treatment at claimant's counsel's request. Nevertheless, no additional treatment occurred after claimant was examined by Dr. Gorsche. I find that Dr. Gorsche was most accurate on the issue of additional treatment for the left shoulder. Claimant has only intermittent symptoms and does not desire to seek additional treatment for that left shoulder condition. Therefore, I find she obtained maximum medical improvement (MMI) for the left arm and shoulder on May 14, 2019, which represents the date of discharge by Dr. Gorsche. (Defendant's Ex. B, p. 33) Nevertheless, I accept Dr. Manshadi's permanent impairment rating and find that claimant has proven a 16 percent permanent functional impairment of the left upper extremity as a result of the residual effects of the February 4, 2018 work injury.

With respect to permanent work restrictions, Dr. Bollier offered reasonable restrictions that included no lifting more than 10 pounds overhead with the right arm.

Dr. McMains concurred with those restrictions. Dr. Manshadi opines that claimant should not lift more than 10 pounds with the right arm, that she should avoid activities that require repetitious reaching or shoulder height activities, and that claimant should avoid excessive pushing or pulling with the right hand. He offers no additional permanent restrictions for the left hand. (Claimant's Ex. 1, p. 4) No other physician recommends restrictions for the left hand and Dr. Gorsche specifically opines no restrictions are necessary for the left arm or shoulder. I find that claimant has proven the need for a 10-pound limit on overhead lifting with the right arm but has not proven the need for specific restrictions related to the left arm or shoulder. Unfortunately, claimant is a right-hand dominant individual.

Ms. Sallis is a high school graduate. She attended Hawkeye Community College in the 1990s and received an associate degree in general studies. She began working at the Waterloo Public Library in 1988 and worked more than one position with the library. From 1974 through 1985, claimant worked at John Deere performing duties related to mail and supplies. For two to three years immediately prior to starting with the City of Waterloo, claimant worked at JC Penny's in their jewelry department. She has no other relevant employment history. (Claimant's testimony; Claimant's Ex. 3, p. 19)

Ms. Sallis returned to work for the City of Waterloo's Public Library after this injury and was able to perform her work duties. She testified that her co-workers provided her assistance, but she ultimately retired of her own accord. She has not sought alternate employment since retiring and does not appear to desire to pursue further employment at this time. While her choice is understandable, her voluntary withdrawal from the work force does not demonstrate significant motivation to continue working at this time. However, claimant testified that it was her intention, prior to the work injury, to work until her "full retirement again," which she indicated meant 66 years of age.

On the other hand, claimant has started a new interior decorating business with her sister. She testified she does not spend a great deal of time working on this business and that most of her current work for the business is computer work. She has not yet earned any income from this interior design business and is unsure what type of income she can expect from that business, if any. She continues some part-time work as a union vice president, working approximately two to ten hours per month.

I find that Ms. Sallis remains employable if she would choose to reenter the workforce. Nevertheless, I find that she has proven the combined effects of her right arm and shoulder and left arm and shoulder injuries have caused permanent disability. Considering claimant's age, proximity to retirement, motivation, the situs and severity of her injuries, her permanent functional impairment, permanent restrictions, employment history, educational background, as well as all other factors of industrial disability outlined by the Iowa Supreme Court, I find that claimant has proven she sustained a 35 percent loss of future earning capacity as a result of the combined effects of her right arm and shoulder and left arm and shoulder injuries resulting from her fall at work on February 4, 2018.

The parties dispute the proper date for commencement of permanent partial disability benefits. I find that claimant achieved MMI for both injuries by May 14, 2019,

the date Dr. Gorsche evaluated claimant, determined that no further left arm or shoulder treatment was indicated, and released claimant from his care. (Defendant's Ex. B, p. 33)

Defendants assert that they have overpaid claimant permanent partial disability benefits and are entitled to a credit. I find that defendants paid claimant the permanent partial disability benefits outlined in Defendants' Exhibit G, page 75. Many of these benefits were paid prior to the date of MMI and, therefore, were paid prematurely.

Defendants paid weekly benefits at the rate of $582.67. Defendants paid 60 weeks of permanent partial disability benefits between November 28, 2018 and January 20, 2020. The parties now stipulate that the applicable weekly rate is $563.65.

Ms. Sallis also asserts a penalty benefit claim against the City of Waterloo. The initial basis for penalty benefits was that the City did not commence permanent disability benefits between the issuance of Dr. Bollier's impairment rating on November 5, 2018 and January 2, 2019. I find this delay was reasonable since claimant did not achieve MMI for all injuries until May 14, 2019. (Defendant's Ex. B, p. 33)

Claimant next asserts a claim for penalty benefits because she asserts permanent disability should have commenced on November 5, 2018, when Dr. Bollier issued his permanent impairment rating. She asserts that all benefits paid thereafter were paid essentially three weeks "late" and should incur a penalty. However, the findings regarding MMI noted above resolve this dispute. Claimant asserts no other basis or claims for penalty benefits. Therefore, I find no unreasonable conduct by defendant in this case that would support a penalty benefit award.

CONCLUSIONS OF LAW

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

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

The initial disputed issue in this case is whether claimant sustained a left shoulder injury and whether that alleged injury is causally related to the initial work-related, right arm injury sustained by claimant on February 4, 2018. Having considered the competing evidence on this issue, I ultimately found the opinions of Dr. Manshadi to be most convincing and credible on the issues of causation and permanent impairment. Accordingly, I found that claimant proved she sustained a left shoulder injury as a result of the overuse of her left arm after her right arm injury on February 4, 2018. Having reached this factual finding, I conclude that claimant has proven the left arm and shoulder injury is causally related to the initial work injury and is compensable.

The next disputed issue is the extent of claimant's entitlement to permanent disability benefits. This case involves an injury to the right arm, as well as the left shoulder. The right arm injury affected claimant's right shoulder and caused reduced ranges of motion in that shoulder, as well as a distal clavicle excision. Ultimately, claimant was not able to use the right arm for an extended period of time and developed symptoms and an injury in the right arm and right shoulder. This combination of injuries is not specifically addressed within the scheduled members itemized in Iowa Code section 85.34(2). Therefore, I conclude that the combined effects of the right arm and shoulder injury and the left arm and shoulder injury should be compensated as an unscheduled injury. Iowa Code section 85.34(2)(v); Anderson v. Bridgestone Americas, Inc., File No. 5067475 (Appeal January 2022); Carmer v. Nordstrom, Inc., File No. 1656062.01 (Appeal December 2021); Martinez v. Pavlich, Inc., File No. 5063900 (Appeal July 2020).

Pursuant to Iowa Code section 85.34(2)(v), an unscheduled injury is compensated on a functional impairment basis if the injured worker returns to work and receives the same or greater salary that the worker earned on the date of injury. However, if the employee no longer works for the employer, permanent disability is payable based upon an industrial disability analysis. Martinez v. Pavlich, Inc., File No. 5063900 (Appeal July 2020). In this instance, claimant retired from the employer in 2019 and no longer works for the City of Waterloo. Therefore, I conclude that claimant has proven entitlement to the use of an industrial disability analysis to determine her entitlement to permanent disability benefits. Id.

Since claimant has an impairment to the body as a whole, an industrial disability has been sustained. Industrial disability was defined in Diederich v. Tri-City Ry. Co., 219 Iowa 587, 258 N.W. 899 (1935) as follows: "It is therefore plain that the Legislature intended the term 'disability' to mean 'industrial disability' or loss of earning capacity and not a mere 'functional disability' to be computed in terms of percentages of the total physical and mental ability of a normal man."

Functional impairment is an element to be considered in determining industrial disability which is the reduction of earning capacity, but consideration must also be given to the injured employee's age, education, qualifications, experience, motivation, loss of earnings, severity and situs of the injury, work restrictions, inability to engage in employment for which the employee is fitted and the employer's offer of work or failure to so offer. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963); Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961).

Compensation for permanent partial disability shall begin at the termination of the healing period. Compensation shall be paid in relation to 500 weeks as the disability bears to the body as a whole. Section 85.34. In addition, as a result of a statutory change in 2017, "A determination of the reduction in the employee's earning capacity caused by the disability shall take into account the permanent partial disability of the employee and the number of years in the future it was reasonably anticipated that the employee would work at the time of the injury." Iowa Code section 85.34(2)(v).

Having considered claimant's age, proximity to retirement, educational background, employment history, ability to return to work for the City of Waterloo, permanent physical restrictions, permanent functional impairment, the situs and severity of the injuries, claimant's motivation, as well as all other relevant factors of industrial disability outlined by the Iowa Supreme Court, I found that claimant proved a 35 percent loss of future earning capacity as a result of the February 4, 2018 work injury. This is equivalent to a 35 percent industrial disability and entitles claimant to 175 weeks of permanent partial disability benefits. Iowa Code section 85.34(2)(v).

The parties also dispute the proper date for commencement of permanent partial disability benefits. Iowa Code section 85.34(2) provides, "permanent partial disability shall begin when it is medically indicated that maximum medical improvement from the injury has been reached and that the extent of loss or percentage of permanent impairment can be determined by use of the guides to the evaluation of permanent impairment." Dr. Gorsche did not evaluate claimant until May 14, 2019 to rule out further treatment of the left shoulder. This is the date claimant achieved MMI. Therefore, I conclude that permanent partial disability benefits should commence in this case on May 15, 2019. Iowa Code section 85.34(2).

Ms. Sallis asserts a claim for penalty benefits. Specifically, she contends that the City should have commenced permanent disability benefits on November 5, 2018 and that the City should be penalized for delaying commencement of permanent disability benefits until January 2, 2019. Claimant's second argument is that the city actually commenced weekly permanent disability benefits under the assumption they should begin on November 28, 2018, making each of the subsequently paid weekly benefits "late" since claimant believes the permanent disability benefits should have commenced on November 5, 2018. Defendant argues that it received Dr. Bollier's impairment rating and promptly started paying permanent disability. Therefore, defendant argues no penalty is owed.

Iowa Code section 86.13(4) provides:

> a. If a denial, a delay in payment, or a termination of benefits occurs without reasonable or probable cause or excuse known to the employer or insurance carrier at the time of the denial, delay in payment, or termination of benefits, the workers' compensation commissioner shall award benefits in addition to those benefits payable under this chapter, or chapter 85, 85A, or 85B, up to fifty percent of the amount of benefits that were denied, delayed, or terminated without reasonable or probable cause or excuse.

b. The workers' compensation commissioner shall award benefits under this subsection if the commissioner finds both of the following facts:

(1) The employee has demonstrated a denial, delay in payment, or termination in benefits.

(2) The employer has failed to prove a reasonable or probable cause or excuse for the denial, delay in payment, or termination of benefits.

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

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

The supreme court has stated:

> (1) If the employer has a reason for the delay and conveys that reason to the employee contemporaneously with the beginning of the delay, no penalty will be imposed if the reason is of such character that a reasonable fact-finder could conclude that it is a "reasonable or probable cause or excuse" under Iowa Code section 86.13. In that case, we will defer to the decision of the commissioner. See Christensen, 554 N.W.2d at 260 (substantial evidence found to support commissioner's finding of legitimate reason for delay pending receipt of medical report); Robbennolt, 555 N.W.2d at 236.
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> (2) If no reason is given for the delay or if the "reason" is not one that a reasonable fact-finder could accept, we will hold that no such cause or excuse exists and remand to the commissioner for the sole purpose of assessing penalties under section 86.13. See Christensen, 554 N.W.2d at 261.
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> (3) Reasonable causes or excuses include (a) a delay for the employer to investigate the claim, Christensen, 554 N.W.2d at 260; Kiesecker v. Webster City Meats, Inc., 528 N.W.2d at 109, 111 (Iowa 1995); or (b) the employer had a reasonable basis to contest the claim—the "fairly debatable" basis for delay. See Christensen, 554 N.W.2d at 260 (holding two-month delay to obtain employer's own medical report reasonable under the circumstances).

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

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

Id.

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

(6) In determining the amount of penalty, the commissioner is to consider factors such as the length of the delay, the number of delays, the information available to the employer regarding the employee's injury and wages, and the employer's past record of penalties. Robbennolt, 555 N.W.2d at 238.

(7) An employer's bare assertion that a claim is "fairly debatable" does not make it so. A fair reading of Christensen and Robbennolt, makes it clear that the employer must assert facts upon which the commissioner could reasonably find that the claim was "fairly debatable." See Christensen, 554 N.W.2d at 260.

Meyers v. Holiday Express Corp., 557 N.W.2d 502 (Iowa 1996).

Weekly compensation payments are due at the end of the compensation week. Robbennolt, 555 N.W.2d 229, 235.

Penalty is not imposed for delayed interest payments. Davidson v. Bruce, 593 N.W.2d 833, 840 (Iowa App. 1999). Schadendorf v. Snap-On Tools Corp., 757 N.W.2d 330, 338 (Iowa `8).

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

In this case, I found that defendants actually commenced permanent disability benefits prior to those benefits being owed. Having concluded that permanent disability benefits should not commence until May 15, 2019, defendants paid benefits prior to that date and actually paid the permanent disability benefits they volunteered prior to those benefits being owed. There was no delay in payment of permanent partial disability benefits established. The commencement date for permanent disability benefits resolves both of claimant's alleged bases for penalty benefits. No other penalty claims or bases for penalty benefits were urged. Therefore, I found no unreasonable conduct by the defendant and conclude that no penalty is justified under this set of facts.

Defendant also asserted a claim for credit for overpayment of benefits. Defendant ultimately paid 60 weeks of permanent partial disability benefits at the weekly rate of $582.67. Defendant now owes 175 weeks of permanent partial disability benefits at the rate of $563.65. Defendant is entitled to a credit for all permanent disability benefits paid to date, but clearly did not "overpay" benefits. I find no basis for a credit for overpayment of benefits but conclude that the defendants should be given credit for all permanent disability benefits actually paid to claimant, including their early payments and overpayment of the weekly rate.

The final disputed issue is whether costs should be assessed against either party. Costs are assessed at the discretion of the agency. Iowa Code section 86.40. In this case, both parties have requested assessment of certain costs. Claimant prevails on the issue of the left shoulder and permanent disability. I conclude it is appropriate to assess claimant's costs in some amount. I deny defendant's request for costs.

Ms. Sallis seeks reimbursement of her filing fee. (Claimant's Exhibit 8, p. 36) This is a cost that is reasonable and reimbursable pursuant to 876 IAC 4.33(7). I conclude the filing fee ($100.00) should be assessed against defendant.

Claimant seeks the cost of an addendum report from Dr. Manshadi dated March 6, 2020. (Claimant's Ex. 8, p. 35) The addendum report in March 2020 provides the permanent impairment rating for claimant's left upper extremity. I found this opinion to be credible and convincing, relied upon this report, and accepted Dr. Manshadi's permanent functional impairment rating for the left arm and shoulder. Accordingly, it would be reasonable to assess the cost of this report.

The request for assessment of Dr. Manshadi's report fee is presumably made pursuant to 876 IAC 4.33(6). The Iowa Supreme Court held that the cost of a written report submitted in lieu of a physician's testimony is a cost that can be assessed pursuant to rule 4.33(6). However, the court concluded that only the cost of the report is taxable. Des Moines Area Regional Transit Authority, 867 N.W.2d 839 (Iowa 2015). In this instance, I conclude the cost of Dr. Manshadi's addendum report ($200.00) should be taxed against defendant.

Finally, claimant seeks assessment of the transcription cost of her deposition. Defendant elected to introduce claimant's deposition transcript into evidence. (Defendant's Ex. A) Transcription costs are taxable pursuant to 876 IAC 4.33(2). I find this to be a reasonable cost request and tax the cost of transcribing claimant's deposition ($120.00). (Claimant's Ex. 8, p. 37)

ORDER

THEREFORE, IT IS ORDERED:

Defendant shall pay claimant one hundred seventy-five (175) weeks of permanent partial disability benefits commencing on May 15, 2019.

All weekly benefits shall be payable at the stipulated weekly rate of five hundred sixty-three and 65/100 dollars ($563.65) per week.

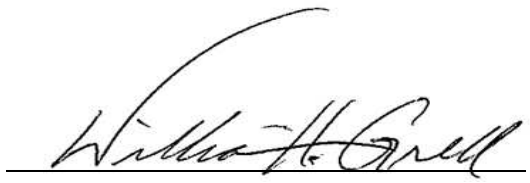
Defendant is entitled to credit for permanent partial disability benefits paid to claimant, including all weekly benefits paid prior to the date permanent disability should have commenced and all benefits paid in excess of the stipulated weekly rate, against the award of permanent partial disability benefits.

If additional weekly benefits are owed after the aforementioned credits are taken and applied, interest shall be payable at an annual rate equal to the one-year treasury constant maturity published by the federal reserve in the most recent H15 report settled as of the date of injury, plus two percent. See Gamble v. AG Leader Technology File No. 5054686 (App. Apr. 24, 2018).

Defendant shall reimburse claimant's costs in the amount of four hundred twenty and 00/100 dollars ($420.00).

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

Signed and filed this __4th__ day of May, 2022.



WILLIAM H. GRELL
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Benjamin Roth (via WCES)

Bruce Gettman (via WCES)

Right to Appeal: This decision shall become final unless you or another interested party appeals within 20 days from the date above, pursuant to rule 876-4.27 (17A, 86) of the Iowa Administrative Code. The notice of appeal must be filed via Workers' Compensation Electronic System (WCES) unless the filing party has been granted permission by the Division of Workers' Compensation to file documents in paper form. If such permission has been granted, the notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 150 Des Moines Street, Des Moines, Iowa 50309-1836. The notice of appeal must be received by the Division of Workers' Compensation within 20 days from the date of the decision. The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or legal holiday.