BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

LESLIE LYNN HARROD, Claimant, vs. ADVANCE SERVICES, INC., Employer, and ACE AMERICAN INSURANCE COMPANY, Insurance Carrier, Defendants.	FILED JUL 6 2018 WORKERS' COMPENSATION File No. 5048596 APPEAL DECISION Head Note Nos.: 1803, 4000.2

On March 20, 2018, Joseph S. Cortese II, Iowa Workers' Compensation Commissioner, delegated authority to the undersigned to issue the final agency decision on the intra-agency appeal currently pending before this agency.

Claimant filed an original notice and petition seeking workers' compensation benefits as a result of a stipulated September 30, 2013 work-related injury. The case was heard on April 25, 2016 and considered fully submitted to the presiding deputy workers' compensation commissioner on June 15, 2016. The presiding deputy issued a proposed decision on September 12, 2016, whereby he found claimant sustained a 40 percent industrial disability as a result of the stipulated work injury, entitling claimant to 200 weeks of permanent partial disability benefits, commencing on July 15, 2014 and payable at a weekly rate of $367.96. The presiding deputy awarded claimant alternate medical care with a spinal specialist for determination of potential treatment. The presiding deputy also awarded claimant penalty benefits in the amount of $4,500.00 on the basis of delayed payment of the treating physician's impairment rating.

Defendants filed a timely appeal from the arbitration decision. Claimant responds to the appeal. Defendants assert on appeal that the deputy erred in finding claimant sustained a 40 percent industrial disability and argue the award should be reduced to a level commensurate with the evidence. Defendants also assert the deputy erred in awarding alternate medical care with a spinal specialist and argue the care

offered to claimant was not unreasonable. Finally, defendants assert the deputy erred in awarding penalty benefits and argue the evidentiary record fails to establish a delay in payment of benefits.

Claimant asserts on appeal that the arbitration decision should be affirmed in its entirety.

Those portions of the proposed agency decision pertaining to issues not raised on appeal are adopted as a part of this appeal decision.

Having performed a de novo review of the evidentiary record and the detailed arguments of the parties, pursuant to Iowa Code sections 86.24 and 17A.15, I disagree with the presiding deputy commissioner's findings and analysis. Therefore, the arbitration decision is modified in part and reversed in part.

FINDINGS OF FACT

Claimant was 22 years of age on the date of evidentiary hearing. She resides in Sioux Rapids, Iowa. Claimant graduated high school in 2011. During her junior and senior years, claimant participated in construction courses at a local community college, as she initially intended to pursue construction as a career. During high school, claimant received some welding training. (Hearing Transcript pp. 6-8; Ex. 7, p. 2) In 2012, claimant completed the requisite coursework to work as a CNA; however, she did not earn a certificate after failing to pass the written exam. (Hrg. Tr. p. 17)

Claimant's work history began in 2007 and includes various tasks at convenience stores, including cook, cashier, stocker, and cleaner. She possesses experience as a restaurant cook and server. Claimant, on multiple occasions, worked as a dietary cook/dietary aide at care centers. The remainder of claimant's work history consists of general labor, including skinning game animals, operating a milking machine, and packing fishing bait. Claimant's work history is largely part time, seasonal, or temporary positions; she has received job placements on multiple occasions through temporary staffing agencies. (Hrg. Tr. pp. 9-15, 56; Ex. 7, pp. 3-8) In June 2013, claimant began work part-time as a waitress at Keglers Kitchen. She earned $6.50 per hour, plus tips. (Ex. 7, pp. 6-8)

Claimant denied any relevant health issues prior to her stipulated work injury of September 30, 2013. (Hrg. Tr. pp. 20-21)

In August 2013, claimant accepted a temporary job placement through defendant-employer. The job was as a seasonal part-time grain handling assistant at a grain elevator. Her duties revolved around handling incoming, binned, and outgoing grain, and specifically involved unloading grain trailers and trucks, cleaning old grain from bins, cleaning up grain spills, and patching holes. The job description noted a physical demand of lifting up to 60 pounds. (Hrg. Tr. pp. 15-16, 50; Ex. 7, p. 6; Ex. 9, p. 1) Claimant earned $12.00 per hour in this placement. (Hrg. Tr. p. 18; Ex. 7, p. 6)

While working as a grain handling assistant, claimant developed numbness of her arms while unloading trailers. She also developed pain of her right shoulder, down the right arm. (Hrg. Tr. pp. 22-23) The parties stipulated claimant sustained a work related injury with a date of injury of September 30, 2013. (Hrg. Tr. p. 50)

Defendants referred claimant for treatment with Bruce Feldman, M.D. At a follow up appointment on November 6, 2013, Dr. Feldman noted continued right shoulder pain and upper extremity paresthesias. He prescribed Flexeril and a course of physical therapy. Dr. Feldman also continued claimant's light duty restrictions of a 15-pound lift and avoidance of overhead activities. (Ex. 1, p. 2)

Claimant continued to follow up periodically with Dr. Feldman. On November 27, 2013, Dr. Feldman described claimant's improvement as slow, but showing significant recent improvement. He opined claimant was nearing maximum medical improvement (MMI). Dr. Feldman discontinued claimant's physical therapy and advised her to perform a home exercise program. He imposed a restriction of a maximum 25-pound lift with the right arm. (Ex. 1, p. 5)

On December 11, 2013, claimant returned to Dr. Feldman with complaints of worsening pain of her right shoulder. Accordingly, Dr. Feldman ordered an MRI of claimant's right shoulder. (Ex. 1, p. 7)

Claimant underwent the ordered right shoulder MRI on December 12, 2013. The radiologist read the results as relatively unremarkable, with no indication of a full-thickness rotator cuff tendon tear, significant partial surface tear, or tendinopathy. The radiologist also noted no presence of gross labral tear or pathology. A handwritten sentence on the MRI report notes Dr. Feldman ordered orthopedic evaluation. (Ex. C, p. 1)

Pursuant to Dr. Feldman's referral, on December 20, 2013, claimant presented to Alexander Pruitt, M.D., of Orthopaedics, P.C. Claimant expressed complaints of right shoulder pain and tingling of the bilateral arms. Dr. Pruitt reviewed the right shoulder MRI report, but indicated he desired to review the MRI itself. Following examination, he assessed a probable labral tear of the right shoulder. Dr. Pruitt initiated a course of conservative care, including Naprosyn, physical therapy, and a 20-pound lifting restriction. He also performed a right shoulder subacromial injection. (Ex. 3, pp. 2-5)

Claimant returned to Dr. Pruitt on January 10, 2014. Dr. Pruitt reviewed the right shoulder MRI. Thereafter he performed a repeat subacromial injection. Dr. Pruitt continued prescriptions for physical therapy and Naprosyn. He left the 20-pound lifting restriction in place. (Ex. 3, pp. 6-7)

On January 31, 2014, claimant returned to Dr. Pruitt in follow up. Following examination, Dr. Pruitt assessed right bicipital tendonitis and performed a bicipital groove injection. He ordered continued physical therapy and imposed a 40-pound lifting restriction. (Ex. 3, pp. 9, 11)

Claimant returned to Dr. Pruitt for examination on February 14, 2014. Due to claimant's complaints and examination findings, Dr. Pruitt noted a question of possible involvement of claimant's neck. He prescribed a Medrol Dosepak, ordered physical therapy, and left claimant's restrictions in place. Dr. Pruitt ordered cervical spine x-rays be taken at claimant's next appointment. (Ex. 3, p. 13)

On February 21, 2014, claimant returned to Dr. Pruitt. Claimant underwent cervical spine x-rays and Dr. Pruitt again noted a potential neck etiology for claimant's condition. Accordingly, he ordered an MRI of claimant's cervical spine. (Ex. 3, p. 16)

Claimant underwent the recommended cervical spine MRI on February 28, 2014. The radiologist read the results as revealing minor spondylosis at C5-C6 and C6-C7; C5-C6 mild diffuse disc bulge, with flattening of thecal sac; and C6-C7 moderate diffuse disc bulge. (Ex. 4, pp. 2-3; Ex. B, pp. 1-2)

Following the cervical spine MRI, claimant returned to Dr. Pruitt on March 3, 2014. Dr. Pruitt opined the MRI revealed a problem at C6-C7 with some flattening of the thecal sac at C5-C6. He prescribed Mobic and further physical therapy; he also imposed work restrictions of a 25-pound lift, and no repetitive bending, lifting, or twisting. (Ex. 3, pp. 20, 22)

On March 21, 2014, claimant returned to Dr. Pruitt for examination. Dr. Pruitt noted claimant had recently suffered a flare in symptoms due to a job placement after the imposition of new restrictions. Dr. Pruitt ordered a Medrol Dosepak and left the existing work restrictions in place. (Ex. 3, pp. 23-24)

Claimant returned to Dr. Pruitt on March 28, 2014 with continued complaints. Dr. Pruitt noted claimant had not experienced improvement with previous physical therapy or injections. Claimant indicated she did not want to proceed with neck injections and did not want to attempt epidural steroids, which Dr. Pruitt described as "probably the next step" in claimant's treatment. As a result, Dr. Pruitt recommended physical therapy with cervical traction and strengthening exercises, as well as Mobic. He advised claimant to follow up in four to six weeks and noted that if claimant did not desire to undergo further treatment, he may consider her at MMI. In the event claimant did not wish to proceed with further intervention, Dr. Pruitt indicated he could send her for a second opinion; however, he cautioned that physican would also inform claimant she needed to exhaust conservative measures prior to considering further action. (Ex. 3, p. 27)

While on light duty, defendant-employer placed claimant in various positions at another grain elevator, an animal shelter, and at Goodwill. She remained at Goodwill until approximately March 2014, when her assignment ended due to Goodwill's inability to provide claimant with 40 hours per week of light duty work. (Hrg. Tr. pp. 39-42)

After this placement ended, claimant continued to work part time as a waitress at Keglers Kitchen. She ultimately lost this job in March 2014 when the restaurant closed. (Hrg. Tr. pp. 43, 56-57; Ex. 7, pp. 6-8)

The evidentiary record lacks Dr. Pruitt's medical notes from March 28, 2014 to July 15, 2014; however, claimant testified she remained under Dr. Pruitt's treatment during this period. Specifically, claimant testified she underwent three epidural injections of her neck during this period, under Dr. Pruitt's care. The injections helped temporarily, with the third injection providing 2 ½ to 3 months of relief; thereafter, her pain returned. (Hrg. Tr. pp. 61-62)

Dr. Bansal's summary of claimant's medical care provides some detail as to claimant's ongoing care during this period. Specifically, Dr. Bansal noted claimant presented for a return appointment with Dr. Pruitt on May 23, 2014. Dr. Bansal's summary indicates claimant underwent an epidural steroid injection at C7-T1 on May 5, 2014, with some relief. She then returned to Dr. Pruitt for evaluation on May 23, 2014. At that time, Dr. Pruitt indicated claimant may require as many as three epidural steroid injections. He ordered a second epidural steroid injection, to occur at C5-C6. Dr. Pruitt commented MMI typically would be achieved approximately six weeks following completion of the ESI series. (Ex. 5, p. 4)

The written record does contain one statement of work restrictions, authored by Dr. Pruitt on May 23, 2014. By this document, Dr. Pruitt imposed a 25-pound lifting restriction. (Ex. A, p. 1)

On July 15, 2014, Dr. Pruitt authored a medical note, by which he opined claimant had achieved MMI for her neck condition as of July 11, 2014. Dr. Pruitt opined claimant suffered a work related injury to her neck, resulting in an exacerbation of spondylosis at C5-C6 and C6-C7 with resultant disc bulge at C6-C7. On the basis of a specific injury and abnormality on claimant's MRI, Dr. Pruitt opined claimant fell in DRE Cervical Category II, warranting a permanent impairment of 5 percent whole person. (Ex. 3, p. 29; Ex. A, p. 2)

On August 26, 2014, claimant's counsel authored correspondence to defendants' counsel. Claimant's counsel represented claimant complained of increased symptoms, including bilateral arm numbness. Claimant's counsel represented claimant sought authorization to see a physician, "but not Doctor Pruitt." (Ex. 8, p. 1) Claimant's counsel issued a follow up letter on September 8, 2014. (Ex. 8, p. 4) Defendants' counsel authored a responsive letter on September 5, 2014. Thereby, defendants' counsel represented defendants had no interest in sending claimant to another physician, particularly a physician of claimant's choosing. (Ex. 8, p. 3)

At the referral of claimant's counsel, on October 29, 2014, claimant presented to board certified occupational medicine physician, Sunil Bansal, M.D. for independent medical examination (IME). Dr. Bansal issued a report containing his findings and opinions on January 7, 2015. Dr. Bansal performed a medical records review and physical examination. (Ex. 5, pp. 1-5, 8) Dr. Bansal also interviewed claimant and took a history of injury and current symptoms. Claimant expressed complaints of numbness and tingling of her bilateral arms; constant aching right shoulder pain; occasional sharp, shooting pain of the right shoulder; occasional popping and clicking of the right shoulder; severe headaches; constant aching neck pain with sharp pain on turning her

head or looking up/down, and radiation of this sharp pain down her arms. Claimant rated her neck pain as an average level 3, but reaching to a level 6, on a 10-point scale. She rated her right shoulder pain as an average level 2, but reaching a level 6 to 7, on a 10-point scale. (Ex. 5, pp. 6-7)

Following records review, interview, and examination, Dr. Bansal assessed neck conditions of a C6-C7 disc herniation and a C5-C6 disc bulge. With respect to claimant's right shoulder, Dr. Bansal assessed right biceps and rotator cuff tendinitis. However, he opined claimant's shoulder-area symptomatology represented referred pain from her neck condition. Dr. Bansal opined claimant achieved MMI on July 15, 2014. Based upon radicular complaints and a disc herniation at C6-C7 which causes mass effect on the ventral thecal sac, with loss of relevant reflexes and strength, Dr. Bansal opined claimant fell within DRE Cervical Category III, warranting a permanent impairment of 15 percent whole person. (Ex. 5, pp. 9-10) Dr. Bansal recommended restrictions of: maximum lift of 25 pounds occasionally and 10 pounds frequently with either arm; 10 pounds maximum over shoulder level; no frequent over shoulder level activity; and avoidance of repeated neck motion or placement of the neck in a posturally flexed position for greater than 15 minutes. In terms of further care, Dr. Bansal recommended "maintenance" care and indicated claimant would benefit from additional medications, epidural injections or nerve ablation, physical therapy, TENS unit, or other treatment as recommended by a pain specialist. (Ex. 5, p. 11)

On December 16, 2014, claimant's counsel authored correspondence to defendants' counsel. Thereby, claimant's counsel represented Dr. Pruitt had rated claimant's permanent impairment in July 2014, but claimant had not received payment for these benefits. Accordingly, claimant's counsel represented that penalty benefits and interest entitlement were at issue. Counsel also inquired if defendants would authorize a second opinion examination. (Ex. 8, p. 5) Defendants' counsel replied and indicated defendants would not refer claimant for additional evaluation. (Ex. 8, p. 6)

In December 2014, claimant began work at Hobby Lobby. She initially worked setting up the new store, but later transitioned into a cashier position. She earned $10.00 per hour. Claimant testified she was physically capable of performing her duties, but left the position in April 2015 as she only received 12 to 22 hours of work per week. (Hrg. Tr. pp. 43-44, 54; Ex. E, p. 1)

In April 2015, claimant began work at Rembrandt Enterprises. Prior to beginning employment, claimant passed a preemployment physical. (Hrg. Tr. p. 55) Claimant's duties involved packaging, labeling, and stacking boxes containing egg products. In her position rotation, claimant would at times be required to lift boxes weighting 30 to 40 pounds; claimant described this part of the rotation as difficult. (Hrg. Tr. p. 45) Claimant earned $10.50 per hour and worked 40 hours per week. (Hrg. Tr. pp. 52-53; Ex. G, p. 10) On June 23, 2015, claimant's production line was temporarily laid off due to a regional outbreak of bird flu. Claimant testified she subsequently received a call-back to work, but declined to return. Claimant testified she believed the stacking duties were too difficult and she admitted to disliking a supervisor. (Hrg. Tr. pp. 46-47; Ex. G, p. 10)

Also in April 2015, claimant was hired at the Humane Society of Northwest Iowa (Humane Society). She initially worked part time while she maintained employment at Rembrandt Enterprises. Following her layoff from Rembrandt Enterprises in June 2015, claimant increased her hours at the Humane Society. Her duties involved providing care to small animals at the facility, including exercising, feeding, and cleaning the animals' enclosures. (Hrg. Tr. pp. 18, 36, 47) Claimant earned $8.75 per hour. (Hrg. Tr. p. 18)

Claimant testified she continues to suffer with symptoms she relates to the September 30, 2013 work injury. She reported daily pain of the bilateral shoulders, right greater than left. On a bad day, her shoulder pain can reach a level 3 to 5 on the left and level 5 to 7 on the right, both on a 10-point scale. She also continued to experience numbness of her bilateral arms. Claimant also reported experiencing neck pain and headaches. She self-treats with use of over the counter ibuprofen, utilizing 800 mg twice daily. (Hrg. Tr. pp. 26-28, 47-48) Claimant testified she is unable to perform repetitive or overhead lifting. (Hrg. Tr. p. 30) Claimant testified her symptoms have worsened since her release by Dr. Pruitt in July 2014. (Hrg. Tr. p. 57) She expressed desire to be seen by a physician capable of treating her spinal injury. (Hrg. Tr. pp. 32-33)

On the date of evidentiary hearing, claimant testified she remained employed at the Humane Society of Northwest Iowa. She continued to earn $8.75 per hour and indicated her employment future at the facility was largely dependent on whether she received a wage increase in her rate of pay. (Hrg. Tr. p. 32)

Claimant testified she would like to pursue a career as a veterinarian, but she has thus far been unable to afford to pursue further education. She initially desired to provide services for both small and large animals. (Hrg. Tr. p. 16) However, since the September 30, 2013 work injury, claimant testified she has ruled out working with large animals. (Hrg. Tr. pp. 31-32)

Review of Internal Revenue Service documentation reveals claimant earned the following wages: $3.553.00 in 2009 (Ex. 6, pp. 1-2); $1,057.00 in 2011 (Ex. 6, p. 4); $8.721.00 in 2012 (Ex. 6, pp. 6, 9-10, 12-14); and $13,088.00 in 2013 (Ex. 6, pp. 15, 17-18, 20-22). Claimant's earned $6,801.00 at defendant-employer in 2013. (Ex. 6, pp. 18, 21)

CONCLUSIONS OF LAW

The first issue for consideration is the extent of claimant's industrial disability.

The party who would suffer loss if an issue were not established has the burden of proving that issue by a preponderance of the evidence. Iowa R. App. P. 6.14(6).

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 parties have stipulated claimant's disability shall be evaluated industrially.

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

Functional impairment is an element to be considered in determining industrial disability which is the reduction of earning capacity, 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.

Claimant suffered a stipulated work-related injury on September 30, 2013. Her injury was initially treated as right shoulder pathology. Following a timely and reasonable course of treatment and evaluation which included conservative care of the right shoulder and a right shoulder MRI, a possible neck etiology for claimant's complaints was investigated by Dr. Pruitt. Dr. Pruitt ordered a cervical spine MRI which revealed pathology at C5-C6 and C6-C7. Dr. Bansal diagnosed the conditions as a C6-C7 disc herniation and C5-C6 disc bulge.

The evidentiary record is incomplete with respect to Dr. Pruitt's treatment records between March 28, 2014 and July 15, 2014, with the exception of one work restriction status sheet dated May 23, 2014. However, the record does support a finding that claimant continued conservative treatment with Dr. Pruitt during these months. Claimant personally testified she underwent three cervical epidural injections during this period. Her testimony is buttressed by the medical records summary authored by Dr. Bansal which noted claimant underwent one injection on May 5, 2014, would be scheduled for another, and potentially would require three injections. Claimant testified she received approximately 2 ½ to 3 months of relief following the third injection. Although the precise date of the third injection is unknown, given the sequence of three injections, it likely took place in June 2014.

Dr. Pruitt placed claimant at MMI on July 15, 2014, mostly likely during the period claimant received relief following the third epidural steroid injection. At that time, Dr. Pruitt opined claimant fell within DRE Cervical Category II, warranting a permanent impairment rating of 5 percent whole person. Dr. Pruitt's last work restrictions report imposed a 25-pound lift limit. However, claimant testified her symptoms worsened following her release from Dr. Pruitt's care. Dr. Bansal subsequently examined claimant and opined she fell within DRE Cervical Category III, warranting a permanent

impairment rating of 15 percent whole person. He recommended permanent restrictions of: maximum lift of 25 pounds occasionally and 10 pounds frequently with either arm; 10 pounds maximum over shoulder level; no frequent over shoulder level activity; and avoidance of repeated neck motion or placement of the neck in a posturally flexed position for greater than 15 minutes.

Dr. Pruitt and Dr. Bansal's differing opinions as to the extent of claimant's permanent impairment and need for work restrictions may easily be reconciled with acknowledgement that claimant's symptoms worsened following her release by Dr. Pruitt. The presiding deputy did not making a specific finding regarding claimant's credibility; however, based upon de novo review of the evidentiary record and claimant's consistent testimony, I find claimant is a credible witness. Claimant credibly testified her symptoms worsened following her July 2014 release; she never returned to Dr. Pruitt for further evaluation. As Dr. Pruitt did not have the opportunity to consider claimant's subsequent worsening, I find Dr. Bansal's opinions as to the extent of claimant's permanent impairment and need for work restrictions to be more persuasive.

Claimant was 22 years of age on the date of evidentiary hearing. She graduated high school in 2011; a portion of her high school coursework involved construction trade classes at a local community college. Despite this training, claimant did not pursue a career in the construction trades post-high school. Claimant subsequently took the requisite courses to earn a CNA certification, but did not pass the written exam. Claimant has successfully completed coursework in diverse subject matters; however, she failed the written exam necessary to earn her CNA certification. Claimant testified she desires further education in a field related to animal care, likely in the veterinary sciences. Given what I know of her educational background, claimant has shown the ability to successfully manage post-secondary coursework and her young age lends itself well to further training and education. However, her inability to pass the CNA certification examination does raise some question as to her likelihood of success in further training.

Claimant's work history began in 2007 and has included 11 employers, mostly part-time or of temporary duration. Her experience includes cook, cashier, stocker, dietary aide, server, and laborer positions; these positions are generally unskilled to semi-skilled in nature. The permanent restrictions outlined by Dr. Bansal would preclude claimant's employment in her preinjury position as a grain assistant, as the position required lifting up to 60 pounds. This position brought claimant her highest hourly wage in her working career: $12.00 per hour. Following the work injury, claimant showed motivation to continued employment. She accepted each light duty assignment and independently obtained employment at Hobby Lobby, Rembrandt Enterprises, and the Human Society. The hourly wages claimant earned in these positions was $10.00, $10.50, and $8.75, respectively. Accordingly, it is evident claimant suffered some degree of wage loss following the work injury. Claimant testified to some difficulty performing the lifting and standing required in her position at Rembrandt; however, she was capable of passing a preemployment physical and working for two months prior to

layoff. It is unclear based on the record whether claimant would have been physically capable of maintaining this position long-term.

Upon consideration of the above and all other relevant factors of industrial disability, it is determined claimant sustained a 25 percent industrial disability as a result of the stipulated work-related injury of September 30, 2013. Accordingly, I modify the deputy's award with respect to the extent of claimant's industrial disability. The award of 25 percent industrial disability entitles claimant to 125 weeks of permanent partial disability benefits (25 percent x 500 weeks = 125 weeks), commencing on July 15, 2014 and payable at the weekly rate of $367.96.

The next issue for consideration is whether claimant is entitled to an award of alternate medical care pursuant to Iowa Code section 85.27.

The employer shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance, and hospital services and supplies for all conditions compensable under the workers' compensation law. The employer shall also allow reasonable and necessary transportation expenses incurred for those services. The employer has the right to choose the provider of care, except where the employer has denied liability for the injury. Section 85.27. Holbert v. Townsend Engineering Co., Thirty-second Biennial Report of the Industrial Commissioner 78 (Review-Reopening October 1975).

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

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

An application for alternate medical care is not automatically sustained because claimant is dissatisfied with the care he has been receiving. Mere dissatisfaction with the medical care is not ample grounds for granting an application for alternate medical care. Rather, the claimant must show that the care was not offered promptly, was not reasonably suited to treat the injury, or that the care was unduly inconvenient for the claimant. Long v. Roberts Dairy Co., 528 N.W.2d 122 (Iowa 1995).

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 1975).

As an initial matter, claimant contests defendants' right to appeal the award of alternate medical care to the commissioner in this case. Claimant argues defendants' proper recourse would be judicial review to the district court. Claimant's argument is rejected, as it confuses the appeal procedure for an expedited alternate medical care petition under section 85.27 and the appeal of the issue of entitlement to alternate medical care raised in an arbitration hearing. In this matter, the parties raised the issue of alternate medical care for determination in the arbitration hearing. The deputy subsequently issued a proposed decision in the arbitration matter. No final agency action has yet been taken with respect to the issue of alternate medical care and as such, judicial review is unavailable and inappropriate.

At the time of arbitration hearing, claimant requested an award of alternate medical care by way of referral to a pain specialist and an orthopedist. In his arbitration decision, the deputy reasoned claimant remained in pain and Dr. Pruitt's care had been ineffective. The deputy expressed belief Dr. Pruitt was not a spine specialist and therefore determined claimant required additional treatment from a spine specialist in order to determine what care may be necessary. Following review of the entirety of the evidentiary record, I disagree and reverse the deputy's award of alternate medical care with a spinal specialist.

Following the stipulated work injury, claimant received prompt and reasonable medical evaluation. As noted *supra*, claimant's complaints were initially believed to be related to her right shoulder. However, following reasonable conservative treatment and evaluation, in February 2014, Dr. Pruitt raised a potential neck etiology for claimant's complaints. A cervical MRI on February 28, 2014 confirmed Dr. Pruitt's suspicions. Dr. Pruitt then began a course of conservative treatment of claimant's neck.

At an appointment on March 28, 2014, Dr. Pruitt identified the next step in claimant's care as injections and cervical steroids; claimant declined the recommended care. As a result, Dr. Pruitt continued with other conservative treatment measures. He recommended additional follow up, at which point he may consider claimant at MMI should she continue to decline treatment. Dr. Pruitt also noted another physician would also require claimant to exhaust conservative measures prior to recommending further intervention.

Claimant argues Dr. Pruitt abandoned claimant's care at this point or shortly thereafter. This argument is not supported by the facts in evidence. Although Dr. Pruitt's medical notes are not in evidence, claimant herself testified to ongoing conservative care with Dr. Pruitt and her testimony is supported by the medical records summary of Dr. Bansal. Therefore, Dr. Pruitt's July 15, 2014 release should not be considered an abrupt abandonment of care; rather, it appears that at the time this opinion was authored, claimant was in a period of symptom relief following epidural steroid injections.

After Dr. Pruitt's release, claimant did request further evaluation. However, she placed conditions upon her request; specifically, claimant indicated she did not want to see Dr. Pruitt. Claimant's displeasure with Dr. Pruitt is insufficient to support an award of alternate medical care. Dr. Pruitt provided claimant with prompt and reasonable medical care; there are no medical opinions which would indicate to the contrary. Dr. Bansal subsequently issued a number of recommendations with respect to treatment modalities which could benefit claimant; however, the suggestions are not unlike the conservative measures previously recommended by Dr. Pruitt. Nevertheless, claimant never sought authorization for the treatments recommended by Dr. Bansal and never independently sought treatment of her ongoing complaints.

I find defendants provided claimant reasonable care of her work-related injury. As such, an award of alternate medical care is unwarranted and the deputy's award of alternate medical care with a spinal specialist is reversed. Although claimant has not established entitlement to an award of alternate medical care via this proceeding, claimant suffered a stipulated work related injury and remains entitled to causally related reasonable and necessary medical treatment, including into the future.

The final issue for consideration is whether claimant is entitled to an award of penalty benefits pursuant to Iowa Code section 86.13.

Iowa Code 86.13, as amended effective July 1, 2009, states:

> 4. 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.
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> b. The workers' compensation commissioner shall award benefits under this subsection if the commissioner finds both of the following facts:
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> (1) The employee has demonstrated a denial, delay in payment, or termination of benefits.
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> (2) The employer has failed to prove a reasonable or probable cause or excuse for the denial, delay in payment, or termination of benefits.
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> c. In order to be considered a reasonable or probable cause or excuse under paragraph *"b"*, an excuse shall satisfy all of the following criteria:
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> (1) The excuse was preceded by a reasonable investigation and evaluation by the employer or insurance carrier into whether benefits were owed to the employee.

(2) The results of the reasonable investigation and evaluation were the actual basis upon which the employer or insurance carrier contemporaneously relied to deny, delay payment of, or terminate benefits.

(3) The employer or insurance carrier contemporaneously conveyed the basis for the denial, delay in payment, or termination of benefits to the employee at the time of the denial, delay, or termination of benefits.

The deputy awarded penalty benefits on the basis of a delay in payment of Dr. Pruitt's impairment rating from the time of its issue on July 15, 2014 until December 19, 2014. In order to be entitled to an award of penalty benefits, claimant bears the burden of proving the occurrence of a delay in payment. In this case, the evidentiary record is devoid of any evidence regarding the dates defendants issued payment of indemnity benefits. The sole written document regarding any delay was authored by claimant's counsel on December 16, 2014; however, this document contains an assertion by claimant's counsel as opposed to evidence of a delay. The record contains no payment logs, bank records, cancelled checks, envelopes, or even testimony regarding the specific dates of payment. The deputy appears to have utilized the payment date of December 19, 2014 based solely upon its reference in a disputed issue on the hearing report. On these facts, claimant has failed to prove a delay in payment of benefits and no award of penalty benefits is warranted. Accordingly, the deputy's award of penalty benefits is reversed.

ORDER

IT IS THEREFORE ORDERED that the arbitration decision of September 12, 2016 is modified in part and reversed in part.

Defendants shall pay unto claimant one hundred twenty-five (125) weeks of permanent partial disability benefits commencing July 15, 2014 at the weekly rate of three hundred sixty-seven and 96/100 dollars ($367.96).

Defendants shall pay accrued weekly benefits in a lump sum.

Defendants shall receive credit for benefits paid.

Defendants shall pay interest on unpaid weekly benefits awarded herein as set forth in Iowa Code section 85.30. Defendants shall pay accrued weekly benefits in a lump sum together with interest at the rate of ten percent for all weekly benefits payable and not paid when due which accrued before July 1, 2017, and all interest on past due weekly compensation benefits accruing on or after July 1, 2017, shall be payable at an annual rate equal to the one-year treasury constant maturity published by the federal reserve in the most recent H15 report settled as of the date of injury, plus two percent. See Gamble v. AG Leader Technology, File No. 5054686 (App. Apr. 24, 2018).

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

The parties shall share equally the costs of the appeal, including the costs of preparation of the hearing transcript.

Signed and filed this 6th day of July, 2018.

Erica J. Fitch

ERICA J. FITCH
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

COPIES TO:

Willis Hamilton
Attorney at Law
P.O. Box 188
Storm Lake, IA 50588-0188
willis@hamiltonlawfirm.com

Timothy W. Wegman
Attorney at Law
6800 Lake Dr., Ste. 125
West Des Moines, IA 50266-2504
Tim.Wegman@peddicord-law.com