BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

DAWN DRAKE,

Claimant,

vs.

CEDAR RAPIDS COMMUNITY SCHOOL DISTRICT,

Employer,

and

EMC INSURANCE COMPANIES,

Insurance Carriers,
Defendants.

File No. 5051095

ARBITRATION DECISION

Head Note Nos.: 1803; 2500; 3000; 4100; 4800

STATEMENT OF THE CASE

Dawn Drake, claimant, filed a petition in arbitration seeking workers' compensation benefits against Cedar Rapids Community School District, employer, and EMC Insurance Companies, insurer, for a work injury date of December 22, 2010.

This case was heard on January 7, 2016, in Des Moines, Iowa. The case was considered fully submitted on January 28, 2016, upon the simultaneous filing of briefs.

The record consists of claimant's exhibits 1-9, defendants' exhibits A-K, claimant's testimony and the testimony of Sue Wilber and Leigh Ann Sheeney.

ISSUES

The extent of claimant's industrial disability;

Whether claimant is considered permanently disabled under the odd-lot doctrine;

Whether there is a causal connection between claimant's injury and the medical expenses claimed by claimant;

The rate of compensation; and

Whether claimant is entitled to penalty benefits under Iowa Code section 86.13 and, if so, how much.

STIPULATIONS

The parties agree that the claimant sustained an injury on December 22, 2010, which arose out of and in the course of her employment. Entitlement to temporary benefits is no longer in dispute.

The parties further agree claimant's injury was the cause of some permanent disability that is industrial in nature. The commencement date for permanent partial disability benefits was February 20, 2012.

At the time of her injury, claimant's gross earnings were $705.34 per week. She was married and entitled to 2 exemptions. Based on those numbers, the claimant's weekly benefit rate is $469.77.

Prior to the hearing, claimant was paid 212 weeks of compensation at the rate of $469.77.

FINDINGS OF FACT

Claimant was a 57-year-old person at the time of hearing. She had a high school education and a few classes from Kirkwood Community College. Her work history includes factory work as a machinist and assembler. She also waited tables and hauled sand, dirt, rock and snow before taking a position as a school bus driver in 1987. On December 10, 2010, claimant was injured while trying to assist a wheelchair passenger in boarding the bus. The wheelchair hit a patch of snow and ice and began to tip over and the claimant attempted to catch it, taking most of the weight with her left arm.

She completed her workday and the next, driving with one hand and completing other tasks with the assistance of another bus attendant. Over the Christmas break she hoped the pain would resolve, but, when it did not, she sought out medical attention.

Her past medical history involves right shoulder and neck pain.

On April 15, 2005, she was seen for right shoulder pain and neck pain. (Exhibit D, page 33) She reported at that time that she had some neck pain that had occurred 10 to 20 years prior. (Ex. D, p. 33)

On January 20, 2007, claimant underwent surgery to address tendinitis in her right shoulder and mild adhesive capsulitis in the same. (Ex. B, p. 3)

Claimant began treating for her left shoulder on January 10, 2011, with Shirley J. Pospisil, M.D. at Work Well Clinic. (Ex. 8, p. 1) Dr. Pospisil ordered an MRI. The MRI

revealed a very small partial bursal surface tear of the infraspinatus tendon. (Ex. B, p. 2)

On January 14 and January 21, 2011, she returned to Dr. Pospisil reporting an improvement in the left hand but increased pain in the left shoulder. (Ex. C, p. 2) She was resistant to use of her left shoulder during therapy. (Ex. C, p. 2)

On March 10, 2011, claimant underwent shoulder surgery. (Ex. 9) By April 4, 2011, claimant reported she was feeling fine and that her pain was under control. She was referred for additional physical therapy. (Ex. D, p. 18)

Lisa M. Coester, M.D., recommended EMG studies of the left upper extremity and an MRI of the claimant cervical spine in response to claimant's complaints in May 2011. These EMG studies were performed on May 26, 2011 and were deemed normal. The MRI showed a central and right paracentral disc protrusion at C6 – 7 and diskovertebral changes at C-5 – 6. (Ex. D, p. 17) Following this, claimant was referred to Kevin R. Eck, M.D., who saw claimant on June 9, 2011. His assessment was intermittent cervicalgia and that the disc herniation was on the opposite side of the claimant's predominant pain complaints. (Ex. 7, pp. 6-7) He did not believe that the claimant's ongoing left elbow, forearm, and hand complaints were related to her cervical spine issues.

Claimant returned to Dr. Coester on July 6, 2011, reporting symptoms related to cubital tunnel syndrome. (Ex. D, p. 15) Dr. Coester performed an injection and referred her to Peter D. Pardubsky, M.D., who specializes in nerve entrapments. (Ex. J, Ex. 7) Dr. Pardubsky diagnosed cubital tunnel syndrome of the left arm and recommended an ulnar nerve neuropathy. (Ex. 7, p. 13) When she continued to have problems, Dr. Pardubsky recommended the ulnar neurolysis at the elbow with possible transposition. (Ex. 7) On January 3, 2012, claimant underwent a left ulnar nerve transposition. (Ex. 9, p. 3)

She had ongoing complaints and received a second opinion on June 29, 2012, from Dr. Hart along with an evaluation by Dr. Abernathy as it relates to her neck. David Hart, M.D. suggested that her hand symptoms were related to the recovering ulnar nerve compressive neuropathy. (Ex, D, p. 8) In a subsequent visit, he noted that her shoulder was normal and that she be seen at a pain clinic. (Ex. D, p. 5) He, like Dr. Abernathy, saw claimant back in 2007 for the right shoulder injury. (Ex. D, p. 30)

Dr. Abernathey saw claimant on November 20, 2006 for chronic history of neck and right shoulder pain. He was asked to provide a neurosurgical opinion. For that injury, he recommended a steroid injection. (Ex. G, p. 2) He saw her again on July 11, 2012 for the neck pain and left shoulder pain. (Ex. G, p. 1) He concluded that the majority of her symptoms originated in the shoulder joint, but did not believe that a surgery would be helpful. (Ex. G, p. 1)

She was seen by Dr. Pardubsky for further evaluation on August 2, 2012. (Ex. D, p. 12) Her primary complaint was anterior left shoulder pain radiating into her left arm along with pain in the elbow and numbness in the ring and small finger. Because of the lack of pathology for her pain and discomfort, Dr. Pardubsky recommended she be seen by the pain clinic and undergo an FCE. (Ex. D, p. 3) She underwent a trigger point injection on August 16, 2012. (Ex. H, p. 4) This provided significant relief and she had a subsequent injection on December 5, 2012. (Ex. H, p. 1)

On January 2, 2013, claimant underwent a functional capacity evaluation (FCE). The evaluation lasted approximately five hours. (Ex. 5, p. 1) Claimant was deemed to demonstrate consistent effort and the results placed claimant in the light physical demand level. (Ex. 5, p. 1) She was not able to return to her position as a bus driver due to the lifting requirements. (Ex. 5, p. 1) Her pain level was 2 at the start of the examination, but left the clinic expressing an increase in pain levels to the extent that she may not return to work. (Ex. 5, p. 11)

Jeffrey A. Westpheling, M.D. rendered an opinion regarding claimant's impairment on January 16, 2013, at the request of the defendants. (Ex. 8, p. 2) He recommended no lifting or carrying greater than 20 pounds and no overhead work with the left upper extremity. He also asked that she be allowed to alternate positions as needed for comfort. (Ex. 8, p. 2) With regards to the impairment, he assigned 6 percent for the reduced flexion and extension, 6 percent for reduced abduction, and 1 percent for reduced external rotation for a total of 13 percent. For the elbow, he placed her in grade 3 due to a 50 percent involvement, but with no motor deficits for 4 percent of the upper extremity. Together those ratings are a 16 percent upper extremity impairment rating. (Ex. 8, p. 2)

On November 18, 2013, she was seen by Lee A. Kral, RPH, for the rash, which the claimant associated with her prescription use. Dr. Kral believed, based on the representations from the claimant, that acetaminophen may be the trigger. (Ex. 6, p. 8) Claimant reported her rash resolved on January 13, 2014 "with a decrease in narcotic medications." (Ex. 6, p. 11)

On November 18, 2013, she was seen at UIHC by Foad Elahi, M.D. (Ex. 6, p. 3) Her shoulder pain was 5-6 on a 10 scale and increased with movement. She also complained of burning left elbow pain, pain into her 4th and 5th digits and aching in her left hand. (Ex. 6, p. 2) She was tender to palpation, had decreased range of motion and aborted tests due to pain. He recommended that she consult with orthopaedics for an evaluation, encouraged her to do home therapy, and referred her to a pain psychologist. (Ex. 6, p. 4)

She received an injection for the bicipital tendinitis and left shoulder capsulitis. (Ex. 6, p. 10)

Claimant was seen for her shoulder pain again on February 11, 2014, and another injection was administered to treat the shoulder pain. (Ex. 6, p. 16) She reported that her pain went from 8/10 to 2-3/10 after the nerve block. (Ex. 6, p. 21) Claimant was then referred to James Nepola, M.D. for further treatment. Dr. Nepola began care of claimant on April 15, 2014. She sought acupuncture therapy in August of 2014 for the left arm. She noted some improvement but did not continue after two months. (Ex. 10, p. 2) She also tried a TENS unit without success. (Ex. A, p. 19)

To Dr. Nepola, claimant reported left elbow pain present from the time of the injury, along with neck and shoulder pain. On examination, she had reduced active extension and active abduction (90 degrees). Her MRI and radiographs showed no tears or acute injuries. Dr. Nepola wrote, "she did not receive any relief of symptoms with subacromial, acromioclavicular, glenohumeral injections. She is encouraged to return to the pain clinic." (Ex. 6, p. 21) A year later claimant presented for left shoulder pain radiating into the left upper extremity. (Ex. A, p. 9) Dr. Nepola recommended a spine specialist to follow up on the neck pain, but noted that there was no structural abnormality in the shoulder that could be resolved via surgery. (Ex. A, p. 12) A subsequent MRI of the cervical spine was normal with some degeneration at C5-7. (Ex. A, p. 7-8)

On March 3, 2015, Dr. Nepola issued the following restrictions:

> No lifting/carrying over 20 pounds, no overhead work with the left arm, and alternate positions as needed.

(Ex. A, p. 14)

On February 11, 2015, claimant returned to UIHC and was seen by Tejinder S. Swaran Singh, M.D. (Ex. 6, p. 26) Her complaints were shoulder pain with a pain rating of 3/10, along with numbness and tingling on the left side of the hand and occasional radicular symptoms down the left upper extremity along the arm and forearm. (Ex. 6, p. 26) It was recommended that she try aqua therapy, TENs unit, massages and other pain relief modalities.[1]

On March 12, 2015, claimant was seen by Matthew J. Bollier, M.D. at UIHC for a second opinion. (Ex. 6, p. 31) On examination:

> She is cooperative with exam. She holds her left arm in a very guarded position. She is nontender over the a.c. joint. She is nontender midline cervical spine. She has near full neck range of motion without

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[1] She was off work when she saw Dr. Nepola back in February of 2014. At that time, her condition did not appear as severe as she presented at hearing. Her condition seemed to worsen despite not working.

> significant pain today. She is [*sic*] 5 out of 5 strength in the left upper extremity. She has full passive motion left upper extremity without significant pain. She's tender over the biceps muscle belly and bicipital groove. Also tenderness in the medial side of the elbow. No obvious skin changes. No swelling. No hypersensitivity to light touch.

(Ex. 6, p. 35) Dr. Bollier did not believe that the pain was due to "one specific shoulder pathology." He did not know the exact etiology of her pain but recommended a diagnostic shoulder ultrasound by Dr. Hall to rule out a biceps tendon or rotator cuff tear. (Ex. 6, p. 35)

Dr. Hall performed a diagnostic ultrasound, which showed a normal biceps, moderate effusion with mild degeneration, along with a small posterior effusion in the glenoumeral joint and history of a bursal-sided tear. (Ex. A, p. 2)

At the request of the defendants, Dr. Bollier reviewed the secretarial job description and believed that claimant could perform the work of an elementary school secretary with appropriate accommodations. (Ex. 6, p. 54) Claimant was seen once more by Dr. Bollier on October 1, 2015, for her left shoulder and left upper extremity pains. She reported no new trauma, but also no improvement. (Ex. 6, p. 58) After the examination, Dr. Bollier concluded that claimant's condition was unchanged since his April 2015 examination. He had no other treatment options to offer.

> I think she has nerve mediated pain and chronic pain. Very difficult situation. No specific shoulder pathology to address. I do not think she has adhesive capsulitis. Even though she has stiffness with shoulder abduction this is because of her extreme pain. Not because of capsular thickening and inflammation. She has relatively normal external rotation and internal rotation. These would be decreased considerably in frozen shoulder or adhesive capsulitis.

(Ex. 6, p. 59)

He agreed with Marc E. Hines, M.D.'s suggestions that injections into the elbow appeared reasonable and a mental health professional to help manage her depression would be useful. (Ex. 6, p. 59) He continued to believe that claimant could perform an elementary school secretary position with accommodations. (Ex. 6, p. 59)

On April 8, 2015, claimant was seen by Valerie Keffala, Ph.D., who noted that claimant's Pain Catastrophizing Scale (PCS) indicated significant pain catastrophizing and had scores consistent for moderate risk of developing chronic pain. (Ex. 6, p. 37) Claimant reported regular pain, sleep disturbance with pain, and pain-related fatigue. She reported that the pain was affecting her ability to concentrate and her motivation. (Ex. 6, p. 38)

She participated in a course of physical therapy that did not provide improvement. (Ex. I)

Dr. Hines concluded that her multiple physical and psychological problems were either the direct or indirect results of the injury that occurred on December 22, 2010.

Claimant underwent a second IME with Mark C. Taylor, M.D., an occupational medicine doctor, on March 2, 2015. (Ex. 2, p. 6)

She described her current conditions as follows:

- Left sided pain from neck into the shoulder and down to the elbow
- Pain levels from 2-7 on a ten scale
- Trouble sleeping as a result of pain.
- Headaches
- Difficulty with travel, personal hygiene, typing, standings, sitting, reclining, walking, lifting, pushing, pulling, and feeling fingers, gripping, grasping and intimacy.

Left Shoulder range of motion:

	Abduction	Flexion	Extension	Int. Rotation	Ext. Rotation
Taylor	65	90			
Hines	90	110			
FCE	59	97	42	85	45

Dr. Hines' examination revealed her left shoulder was below the right in all positions. She had multiple points of tenderness in the upper left extremity and shoulder region. She exhibited some reduction in range of motion on the left side, but her strength was 4/5 in most tests. (Ex. 1, p. 14) Similarly, Dr. Taylor assigned a grade of 4 for strength on her left side and noted that "she appeared to have good strength of the intrinsic muscles of both hands." (Ex. 2, p. 14)

She did not appear to have significant sensory deficits. (Ex. 1, p. 13; Ex. 2, p. 14) Both physicians agreed she had tenderness in her elbow, shoulder and neck.

Dr. Hines assigned a 10 percent impairment as a result of the anxiety disorder, 10 percent due to the migraines, 5 percent for the cervical myofascial pain, 25 percent to the upper right extremity for pain and discomfort in the shoulder, 30 percent upper

extremity impairment due to lack of grip strength, for a total of 40 percent of the whole person. (Ex. 1, p. 15) Dr. Taylor assessed an 18 percent impairment due to lack of range of motion for the upper extremity and then another 4 percent for ulnar nerve dysesthesias. (Ex. 2, p. 16) No impairment was given for loss of strength because "it was significantly difficult to assess her strength due to her pain and substantial loss of motion." (Ex. 2, p. 16) No cervical spine rating was given either as the pain in the spine is likely associated with the shoulder pain. Dr. Taylor's whole person impairment rating was 13 percent.

Dr. Hines also concluded that claimant would not be able to use her left hand for any conceivable useful work due to the pain and limits to her shoulder range of motion; however, he based her primary problems as recurring headaches, cervical myofascial pain and difficulties with anxiety. (Ex. 1, p. 16) He did not recommend she return to employment. (Ex. 1, p. 17)

Dr. Taylor's restrictions affirmed the previous restrictions of a 20-pound lifting limit, preferably between knee and waist level, a 15-pound lifting limit between waist and chest level on the right, and 5 pounds or less between waist and chest level with the left. (Ex. 2, p.16) He also noted that she should not use her left arm above her shoulder, keep it close to her body when lifting, and avoid any gripping or grasping. (Ex. 2, p. 16)

The claimant sought out the opinion of Mark Mittauer, M.D. regarding her mental state. (Ex. 3) Dr. Mittauer concluded that while she had significant depressive symptoms in the winter of 2014, at the time of the examination, she was experiencing only periodic episodes of depression and Dr. Mittauer did not find them to be "significant or disabling and do not interfere with her functioning." (Ex. 3, p. 13) He did agree that claimant suffered from anxiety disorder and that the condition had a good likelihood of improving or resolving. (Ex. 3, p. 13) He also believed that her panic attacks were infrequent, short in duration and not "too disabling. I do not feel that this diagnosis would have a substantial impact on her employability." (Ex. 3, p. 14)

Mr. Mittauer concluded "Ms. Drake's main symptom that interferes with full-time, competitive employment is her chronic pain and associated disability symptoms, including fatigue and limitations regarding the use of her left hand." (Ex. 3, p. 14)

On August 10, 2015, Kent Jayne, M.A., provided a vocational report. (Ex. 4) The report included many cut and pasted articles on chronic pain, a topic on which Mr. Jayne has no medical training. Those portions of the report are disregarded as are any opinions Mr. Jayne renders that relies on those portions. Mr. Jayne is not a medical doctor, but a vocational specialist. His continued attempts to render medical opinions and conclusions convert him from unbiased expert to advocate, thus making it challenging to afford any of his opinions credibility and weight.

Mr. Jayne wrote that claimant has not been able to return to any work since March 28, 2014. This is not accurate. The claimant retired and has not pursued work, believing herself to be incapable of holding a full time position. Claimant reported to Mr. Jayne that she was only able to tolerate 5 minutes of keyboarding. (Ex. 4, p. 11) Her reported pain was in excess of 7 on a 10 scale and fatigue was cited as a limiting factor. (Ex. 4, p. 13)

According to Mr. Jayne, claimant was in severe pain and distress after 3 ½ hours of sedentary testing and assessments and that her pain level was not supportive of full time work in the labor market at any level of physical capacity. (Ex. 4, p. 17)

> Considering her physical restrictions as well as her current residual test scores, it is unlikely that Ms. Drake would be competitive [*sic*] employable in the labor market at the present time. Her lack of coordination, finger dexterity and manual dexterity, which would preclude her from performing sedentary accommodated clerical work at entry level, customer service work, or bench assembly type work. Ms. Drake's severe pain, fatigue, and physical restrictions as understood would preclude her from competitive work in any reasonably stable branch of the labor market.

(Ex. 4, p. 17)

Claimant was informed on August 21, 2011, that defendant was voluntarily paying a 2 percent permanent partial disability as a result of the December 22, 2010, injury. (Ex. 17, p. 1) On January 31, 2012, she was informed that defendants would pay the impairment rating issued by Dr. Westpheling of 16 percent. On December 2, 2014, there was correspondence between the parties over the rate. Defendant believed that they had underpaid the rate by $50.39 and that claimant would be entitled to additional benefits due to the underpayment. (Ex. 17, p. 4) On October 28, 2015, another letter was issued in which the claimant was informed that the insurer "made the decision to bring the Claimant up to date on permanent disability benefits" and an additional amount of 102 weeks was issued. (Ex. 17, p. 12)

Claimant began work as an elementary school principal's secretary in July of 2013. (Ex. K, p. 3) Her pay was less per hour but she received a couple different benefits including a $455-per-month contribution to health plan.

She testified (and relayed to her medical providers) that the elementary secretarial position was painful and she decided to retire. (Ex. K, p. 1) Since her retirement she has not looked for employment and believes she is unemployable.

CONCLUSIONS OF LAW

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 Rule of Appellate Procedure 6.14(6).

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).

A personal injury contemplated by the workers' compensation law means an injury, the impairment of health or a disease resulting from an injury which comes about, not through the natural building up and tearing down of the human body, but because of trauma. The injury must be something that acts extraneously to the natural processes of nature and thereby impairs the health, interrupts or otherwise destroys or damages a part or all of the body. Although many injuries have a traumatic onset, there is no requirement for a special incident or an unusual occurrence. Injuries which result from cumulative trauma are compensable. Increased disability from a prior injury, even if brought about by further work, does not constitute a new injury, however. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); Ellingson v. Fleetguard, Inc., 599 N.W.2d 440 (Iowa 1999); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995); McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985). An occupational disease covered by chapter 85A is specifically excluded from the definition of personal injury. Iowa Code section 85.61(4)(b); Iowa Code section 85A.8; Iowa Code section 85A.14.

In Guyton v. Irving Jensen Co., 373 N.W.2d 101 (Iowa 1985), the Iowa court formally adopted the "odd-lot doctrine." Under that doctrine a worker becomes an odd-lot employee when an injury makes the worker incapable of obtaining employment in any well-known branch of the labor market. An odd-lot worker is thus totally disabled if the only services the worker can perform are "so limited in quality, dependability, or quantity that a reasonably stable market for them does not exist." Id., at 105.

Under the odd-lot doctrine, the burden of persuasion on the issue of industrial disability always remains with the worker. Nevertheless, when a worker makes a prima facie case of total disability by producing substantial evidence that the worker is not employable in the competitive labor market, the burden to produce evidence showing availability of suitable employment shifts to the employer. If the employer fails to produce such evidence and the trier of facts finds the worker does fall in the odd-lot category, the worker is entitled to a finding of total disability. Guyton, 373 N.W.2d at 106. Factors to be considered in determining whether a worker is an odd-lot employee include the worker's reasonable but unsuccessful effort to find steady employment, vocational or other expert evidence demonstrating suitable work is not available for the worker, the extent of the worker's physical impairment, intelligence, education, age, training, and potential for retraining. No factor is necessarily dispositive on the issue. Second Injury Fund of Iowa v. Nelson, 544 N.W.2d 258 (Iowa 1995). Even under the odd-lot doctrine, the trier of fact is free to determine the weight and credibility of evidence in determining whether the worker's burden of persuasion has been carried, and only in an exceptional case would evidence be sufficiently strong as to compel a finding of total disability as a matter of law. Guyton, 373 N.W.2d at 106.

The parties agree that claimant sustained an injury that resulted in permanent restrictions arising out of and in the course of her employment. They disagree as to the extent of the injury. Claimant asserts that she is completely disabled. Because of her permanent work restrictions, claimant cannot return to driving a bus. Claimant applied for and received the full-time secretarial position but her pay dropped from $17.00 per hour to $14.00 per hour. The job was stressful and less flexible. She was required to ensure that the classrooms were staffed each day, handle payroll issues, order supplies, enroll students, greet parents, fill out forms, and perform keyboarding tasks.

The job description does require secretaries to move up to 50 pounds at various times. While this position was within her restrictions, mostly lifting that weight was beyond claimant's physical abilities. The school principal made sure that someone handled these moving tasks for the claimant. In addition to the lifting and moving, claimant had a difficult time with keyboarding. She can only keyboard with her right-hand and it was physically painful. Claimant testified that she had to work overtime because she could not keep up with the workload due to interruptions that her pain caused. She also took work home at night in an effort to keep up.

Her husband did the household chores and she found herself weak and exhausted at night, unable to keep up with the rigors of her position. Ultimately, in

February 2004, the claimant retired. She testified she was not able to overcome her pain and headaches and did not feel that she could continue working. She has not looked for employment since her retirement.

Today claimant maintains that she has left arm, and neck and head pain as a result of her work injury. She also has cramping and tingling in her fingers. She cannot reach overhead and she has difficulty sleeping for long periods of time due to her pain. Her work restrictions vary from doctor to doctor, but generally claimant is not to lift more than 20 pounds, no use of the left upper extremity above shoulder or chest level, no repetitive or forceful gripping with the left hand or arm and claimant should be allowed the ability to adjust as necessary.

Some doctors, such as Dr. Heinz, have gone further and recommended that she not use her left hand for "conceivable useful work." (Ex. 1, p. 16)

Since her retirement, claimant's ordinary day consists of taking a bath, completing a few chores, resting, playing puzzles and computer games. She cannot sit for long periods of time and she has difficulty gripping with her left hand. She reports that she has lost strength in her left hand. This last report is not consistent with her medical tests.

The evidence supports that the claimant has sustained left shoulder and left upper extremity chronic pain arising out of her work injury in December 2012. The pain appears to be largely non-anatomic and has a wide variance. The claimant, on any given day, reports a pain level of 2 on a 10 scale all the way up to 8 or higher on a 10 scale. Despite numerous tests, there is no objective evidence of her injury.

Some of her complaints such as loss of strength in her left hand, are not consistent with the testing at either the functional capacity examination or even in her treating physicians examination rooms.

Claimant has been referred to multiple doctors and has undergone conservative treatment including injections, painkillers, TENS unit, physical therapy, acupuncture and aqua therapy. Despite leaving employment, it does not appear the claimant's condition has improved. Dr. Bollier, who treated claimant for her left shoulder, believed that she could continue to do the secretarial position with some modifications. Dr. Hines, on the other hand, believes the claimant is not capable of employment, but part of his opinion rests on claimant's report of serious headaches, a condition that did not appear to be significant during her three plus years of care.

Vocational expert Kent Jayne provided an opinion that claimant was unemployable due to her pain condition. Mr. Jayne's opinion was addressed above and given low weight.

Dr. Hines and the vocational expert, Mr. Jayne, were both of the opinion claimant was essentially disabled from regular work. This is not consistent with her other physicians, the medical tests, or the functional capacity evaluation (FCE). Her earning ability is drastically reduced, but her left hand is usable per the FCE.

Claimant was retrained to do clerical work. Unfortunately, per the claimant, she cannot do this work because it is too painful for her. The defendant employer objects to this characterization as the claimant never complained or requested an accommodation. However, claimant did consistently report her pain, discomfort and lack of function to her medical providers. And, consistently her examinations reveal a distinct lack of function in her left arm.

Her right arm is fully functioning, as is her right hand. She is able to drive, travel, and watch her grandson. She has made no efforts to find new employment. Dr. Taylor, an IME doctor retained by the claimant, did not find her unemployable and instead, his impairment ratings were more consistent with Dr. Westpheling and the others. The outliers in this case are Dr. Hines and Mr. Jayne. In fact, Dr. Hines notes that claimant's primary problems are recurring headaches, cervical myofascial pain and difficulties with anxiety, not her shoulder and elbow pain. Dr. Mittauer, claimant's expert, did not find that her anxiety limited her ability to work.

While claimant sustained an injury and has had ongoing pain with that injury, physically she is capable of sedentary work. Further, she has the work experience and training necessary to do clerical work.

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.

Based on claimant's high school education, her work history, her significant, but not disabling physical condition, her recent experience and job retraining, it is found that claimant's disability is 90 percent.

Claimant does not qualify as an odd-lot employee as she is capable of working within the clerical field or other sedentary positions.

Claimant seeks a finding of penalty benefits based on two reasons:

1) Underpayment of rate

2) Underpayment of permanency

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. Robbennolt v. Snap-on Tools Corp., 555 N.W.2d 229 (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 also 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 commissioner shall impose a penalty in an amount up to 50 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.

The parties stipulated the claimant's wage rate was $469.77. Prior to the hearing, claimant was paid approximately 35 weeks of temporary total disability and 50 weeks of permanent partial disability at the lower rate of $418.38. In 2014, attorney for the defendant noted that there was an error in the rate and issued a check to bring the claimant up to date.

While it is admirable of the defendant to correct the error, the statute requires the imposition of a penalty when there is a delay without cause or excuse. There is no reason provided for the underpayment of rate and therefore a penalty of 5 percent is awarded for the total amount that was due of $6,178.46.

The claimant also argues that the underpayment of voluntary permanent partial disability benefits was so low as to be unreasonable. Initially the defendant had paid a total rating of 10 percent based on the January 16, 2013 rating from Dr. Westpheling. An additional payment was made on July 21, 2015 and then again on July 28, 2015 and October 28, 2015.

Claimant retired voluntarily in 2014. Claimant argues that based upon her work conditions, defendant employer should have known that her permanent disability was much higher than that which had been paid. Further, they continue to authorize treatment.

However none of claimant's medical records indicated that there was anything structurally wrong with her left shoulder or her neck. The defendants did not hesitate in providing claimant multiple medical examinations and second opinions. They voluntarily increased their permanent partial disability payments after subsequent reviews of the file. There was a good faith issue of fact as to the extent of the claimant's disability. Her medical providers could find no reason for her ongoing pain and discomfort.

No penalty will attach for the voluntary payments of permanent partial disability benefit.

The next issue is that of medical expenses. Expenses at issue include dermatological treatment and pain management. The treatment that she received was from medical providers recommended and referred to by her authorized treating physicians. The acupuncture treatment was recommended by Dr. Coester in 2011, but claimant did not attempt the recommended therapy until 2014. The delay in time does not erase Dr. Coester's recommendation for an ongoing problem Dr. Coester treated claimant for several years. The medical expenses shall be reimbursed, including the acupuncture.

Finally, the claimant request repayment of the independent medical examination of Dr. Heinz and a vocational expert report of Kent Jayne. The claimant argues that because Mr. Jane is not a medical provider, the determination in Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839 (2015) does not apply. The undersigned does not agree.

Des Moines Area Regional Transit Authority v. Young allows for one independent medical examination. Rule 4.33 allows for the award of a report in lieu of live testimony. Further, only one medical examination is allowed under Iowa Code section 85.39 and only the reports are allowed under rule 4.33. If a medical examination is deemed to be

appropriate under section 85.39, the claimant cannot recover the report costs under rule 4.33 as well.

Claimant obtained the services of more than one examiner: Dr. Taylor, Dr. Mittauer, and Dr. Hines. Defendants did not argue that Dr. Hines' examination was disallowed under § 85.39 because one IME was already paid for. Instead, they argued "the claimant may be entitled to a report cost, but not the cost for the entire IME." Dr. Hines was an independent medical examiner and his examination is more appropriately covered under § 85.39. From the record presented, there is no evidence that this is the sole examination for which the claimant sought reimbursement and it is the claimant's burden to prove entitlement to the costs and fees sought to be reimbursed.

If the examination was meant to be an IME, the costs of even the report cannot be recovered under § 85.39 according to Young.

> Accordingly, we reject Young's argument that hearing costs include the expenses of an independent examination because the examination is necessary to obtain a report on the results of the examination for a hearing. We agree that a physician's written report of an examination and evaluation under section 85.39 would be a reimbursable expense under section 85.39, just as an unreimbursed written report of an examination and evaluation, like deposition testimony and witness fees, could be taxed as hearing costs by the commissioner. Yet, a physician's report becomes a cost incurred in a hearing because it is used as evidence in lieu of the doctor's testimony. The underlying medical expenses associated with the examination do not become costs of a report needed for a hearing, just as they do not become costs of the testimony or deposition. The logic of Young's argument is not supported by the language of the governing statutes or the overall workers' compensation scheme.

Young, at 846.

Accordingly, claimant is entitled to the costs of the report of Mr. Jayne. The reporting and supporting documentation per the attached documents was $390.00. The cost of Dr. Hines report in the amount of $750.00 cannot be awarded due to the lack of underlying evidence.

ORDER

THEREFORE, IT IS ORDERED:

That defendants are to pay unto claimant four hundred twenty-five (425) weeks of permanent partial disability benefits at the rate of four hundred sixty-nine and 77/100 dollars ($469.77) per week from February 20, 2012.

That defendants shall pay accrued weekly benefits in a lump sum.

That defendants shall pay interest on unpaid weekly benefits awarded herein as set forth in Iowa Code section 85.30.

That defendants are to be given credit for benefits previously paid.

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

That defendants shall pay the three hundred ninety and 00/100 dollars ($390.00) in costs in addition to the cost of the transcript, filing and service fees pursuant to rule 876 IAC 4.33.

That defendants shall pay a penalty of five (5) percent of six thousand one hundred seventy-eight and 46/100 dollars ($6,178.46) for the underpayment of rate.

Signed and filed this 18th day of April, 2016.

JENNIFER S. GERRISH-LAMPE
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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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.