



### **ISSUES**

- Whether claimant sustained an injury on September 26, 2016, to October 11, 2016, which arose out of and in the course of employment;
- Whether the alleged injury is a cause of temporary disability and, if so, the extent;
- Whether the alleged injury is a cause of permanent disability and, if so, the extent;
- The appropriate commencement date of permanent disability benefits;
- Whether claimant is entitled to Second Injury Fund benefits and, if so, the amount of benefits;
- Whether claimant is entitled to reimbursement of medical expenses itemized in Exhibit 11;
- Whether claimant is entitled to penalty benefits under Iowa Code section 86.13 and, if so, how much; and
- The assessment of costs.

### **STIPULATIONS**

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

The parties agree that at the time of the alleged injuries, claimant was an employee of defendant-employer. Further, claimant was single and entitled to one exemption. Her gross weekly earnings were \$551.51 per week. Based on the foregoing numbers, the weekly benefit rate is \$346.18.

The claimant and defendant-employer and insurer agree that the commencement date for permanent partial disability benefits for the right upper extremity, if any are awarded, is July 19, 2017.

The defendants waive all affirmative defenses. While the parties do not agree on the causal connection between the medical bills and the injury, defendants would further stipulate that the fees and prices charged by the providers in the disputed medical expenses were fair and reasonable, that the treatment was reasonable and necessary, that they will not offer any contrary evidence as to the reasonableness of the

fees and/or treatment, and although the causal connection of the expenses to the work injury cannot be stipulated, the parties agree that the listed expenses are at least causally connected to the medical condition upon which the claim of injury is based.

### **FINDINGS OF FACT**

At the time of the hearing, the claimant was a 58-year-old person. Her educational history includes a high school diploma, an associate of applied science degree from Kirkwood Community College, a medical transcription certificate from Hamilton College, and a customer contact training certificate from Kirkwood Community College.

She currently lives in an apartment complex for senior citizens, age 55 and older. She lives alone but her mobility has become an issue. Her hobbies and activities include reading, gathering with other residents, playing games and participating in other organized activities at the complex. She has cousins in a nearby city that travel to assist her from time to time.

Claimant has a diagnosis of genetic cerebral palsy due to a damaged tendon in her brain. It affects the muscles and nerves in her body. She has had to undergo various corrective surgeries to her right and left legs.

In 1968 she underwent right leg surgery which stretched her tendons and ligaments. Her left foot is weak and she has tendency to drag it. In 1970 she had left leg surgery. She admits to muscle weakness in both legs.

In 1978, she had major surgery to the right hip. The cerebral palsy is described as mild, affecting her bilateral lower extremities, her left arm and her speech. She has an unsteady gait and uses a walker. She admits that she cannot walk without an assistive device. The use of the walker inhibits her ability to carry things, stand in place for longer than 10-15 minutes, navigate stairs, crouch or kneel. In her early 50s, she used a cane but as she has aged she has migrated to the walker.

She has a handicap sticker related to her cerebral palsy and has had that sticker for approximately 20 years.

Her work history includes working for the State of Iowa from approximately 1981 to 1997 in medical coding and abstracting for the oncology department at the University of Iowa. In 1998 she was working at the state health registry department for the University of Iowa but was terminated due to the quality of her work. She began working for the defendant-employer in September 2006, was promoted to first level supervisor in spring of 2016, and was laid off effective June 1, 2017. Her job duties for defendant-employer included handling telephone calls, computer work such as accessing scripts, typing notes, and using her mouse to navigate around various screens. She performed this work for eleven years, eight hours a day, five days a week.

She then went to work for Avedyne Health on September 5, 2017, in the customer service help department. She involuntarily resigned after there were complaints about her speech. Some had reported it was difficult to understand her. She did not work with any restrictions or accommodations at Avedyne Health and testified she could physically do the work but left on October 25, 2017, because of speech issues.

She does not believe that she could return to medical coding as the system has changed dramatically. She has attended some continuing education classes but is not familiar with the current systems. Physically, she is not sure that she could manage the large facility due to her cerebral palsy.

She is able to drive and drove herself to the hearing.

Claimant was deemed eligible for Social Security Disability on September 10, 2018, effective November 2017. (Claimant's Exhibit 9:2) She listed both carpal tunnel syndrome and cerebral palsy as her disabling conditions. A medical report was completed for the Social Security Disability application by Mark C. Taylor, M.D. on July 19, 2018. (CE 13:51) The primary thrust of the medical report was that claimant had cerebral palsy which had progressed over the years to the point that she required the full-time use of a walker even within her apartment. The cerebral palsy prohibited claimant from performing material handling type jobs or any jobs that required standing or walking. Her voice was also impacted and would limit her ability to perform a sedentary job if it required any type of communication. (CE 13:55) Her original application was denied but approved after a request for reconsideration.

On June 1, 2016, claimant went to Melanie Stahlberg, M.D. for hypertension, numbness in her fingers, and bronchitis. (JE 1:2) At that time, claimant had good grip strength in both hands along with normal range of motion in her neck. (JE 1:2) There were some signs of abnormal bilateral edema, greater on the left. (JE 1:2) Her finger numbness was to be followed up on. (JE 1:3) On July 12, 2016, she was seen by Meiyong Kuo, M.D., for the bilateral carpal tunnel syndrome that had been ongoing for 4-5 years, with the right side being more symptomatic. (JE 2:4) There is a mention of claimant's cerebral palsy, noting that it is mild with left arm and right leg weakness. (JE 2:4) EMG studies were conducted on July 13, 2016, which showed severe bilateral median mononeuropathies across the wrists with the symptoms more severe on the right as opposed to the left. (JE 2:8)

Claimant testified that her symptoms gradually worsened but that she did not notice the symptoms in her hands until June 2016. Her fingers began tingling on or about that time. Dr. Kuo recommended surgery on the right hand which took place on September 26, 2016. (JE 3:32) Claimant reported some improvement with reduced numbness and tingling on the right. By October 11, 2016, claimant was ready to return to work. Dr. Kuo released claimant to return to work without restrictions. (JE 2:13-15) Claimant returned to the same position she held before surgery.

On October 26, 2016, Dr. Kuo wrote an opinion letter stating that with some degree of medical certainty the claimant's work activities may have contributed to the development of carpal tunnel syndrome. (JE 2:16) Dr. Kuo ruled out cerebral palsy as a causation factor. (JE 2:16) In a follow-up letter on July 24, 2017, Dr. Kuo imposed no restrictions and no permanent impairment of the right hand. (JE 2:23)

In a follow-up visit on November 8, 2016, claimant was six weeks' post-surgery. (JE 2:17) In the subjective portion, the claimant was noted to be doing "relatively well." (JE 2:17) Claimant still had numbness in the right thumb, index, and long fingers but indicated that the symptoms were not as noticeable following the surgery. (JE 2:17) Claimant was released without restrictions and instructed to follow up when the claimant was ready for a left carpal tunnel release. (JE 2:18)

On November 12, 2018, Dr. Kuo provided an updated opinion stating, "Ms. Bowman's work duties as a customer service representative may be a contributing factor to her development of right carpal tunnel syndrome. However, I cannot state that it was the major contributory cause since this condition is multifactorial." (Defendants' Exhibit F:40-41) Dr. Kuo assigned a 5 percent impairment to the left upper extremity should claimant not undergo surgery. (DE F:41)

A year later, claimant reported doing well with only slight numbness in the hand with right overuse. She was interested in pursuing surgery in the left hand but not until she found employment. (JE 2:20)

On April 11, 2019, claimant returned to Dr. Kuo for the left carpal tunnel release. (JE 2:24) Surgery took place on July 18, 2019. (JE 4:34) In the follow-up visit that took place on August 2, 2019, claimant reported incisional pain, resolution of her palmar hand numbness, but continued numbness in her digits. (JE 2:30) Dr. Kuo has not officially released claimant but instead anticipated that claimant would be at MMI in April 2020.

Claimant underwent an independent medical evaluation (IME) with Mark C. Taylor, M.D. on February 27, 2019. Dr. Taylor documented claimant's current symptomatology. (CE 1:3) At the time of the IME, claimant reported near constant numbness and tingling in the left hand. The right hand symptoms occurred only on an occasional basis but were generally much improved compared to prior to surgery. She had pain in the knees which she attributed to arthritis and difficulty with weakness in her ankles. (CE 1:3-4) She reported only being able to lift a gallon of milk and avoids repetitive gripping and grasping with her hands.

Dr. Taylor concluded the following:

1. Please address whether or not Ms. Bowman's injuries are consistent with her 9/26/2016 injury?

Ms. Bowman denied a history of diabetes or thyroid-related issues. She denied prior trauma to the wrists and reports no history of rheumatoid arthritis. Her non-occupational risk factors include age, obesity (at borderline between overweight and obese by NIH standards) and female gender. Her job functions entailed extensive use of the keyboard. She did not have an ergonomic keyboard for the vast majority of the time that she was employed with General Dynamics. Her wrists were in an extended and ulnar-deviated position. I am aware that keyboarding activities, in and of themselves, may not represent the majority cause for conditions such as carpal tunnel syndrome. In Ms. Bowman's case, her ergonomic setup was not ideal. Given this history, it is more likely than not that her work activities represented a significant, more than minor, contributing factor to her development of bilateral carpal tunnel syndrome. Dr. Kuo also indicated that Ms. Bowman's work factors may have contributed. I will also note that her condition was ultimately accepted by the workers' compensation insurance carrier.

(CE 1:6) For the right side, Dr. Taylor assessed a 5 percent right upper extremity rating due to the residual moderate carpal tunnel syndrome evidence on the NeuroMetrix study. (CE 1:6) For the left, claimant is not yet at maximum medical improvement per Dr. Taylor and therefore no impairment was assigned for the left. Id.

As for the maximum medical improvement date, Dr. Taylor opined that for the right it was July 19, 2017. (CE 1:7)

For the Fund claims, Dr. Taylor determined that claimant had bilateral lower extremity weakness greater on the left than the right. (CE 1:7) It was difficult for Dr. Taylor to determine the extent of the weakness due to lack of motion. (CE 1:7) Nonetheless, based on his measurements, Dr. Taylor assessed a 20 percent impairment for the right lower extremity and 35 percent impairment for the left lower extremity. (CE 1:7) He also assigned an 18 percent impairment for the right ankle and a 16 percent impairment for the left ankle. (CE 1:7) In total, claimant's right-sided lower extremity impairment would be 34 to 36 percent and the left lower extremity impairment would be 47 to 48 percent in Dr. Taylor's opinion. (CE 1:8) Due to the impairments of the lower extremities, Dr. Taylor would restrict claimant to lifting only 15 pounds on a very rare basis, avoidance of uneven and slippery surfaces, stairs and ladders, no squatting or kneeling. (CE 1:8) Due to claimant's need for a walker, she would be limited in lifting and carrying. (CE 1:8)

Dr. Taylor conducted a follow up evaluation on August 14, 2019. (CE 1:11) Claimant's left hand pain had improved but she still had numbness and tingling in the fingers of the left hand, especially the index and long fingers. (CE 1:11) Dr. Taylor still maintained claimant had not reached maximum medical improvement for the left side but anticipated that claimant would have a similar rating of 5 percent once she had completed her healing process. (CE 1:12)

Claimant denies that there is anything in her personal life that would account for development of carpal tunnel syndrome. There are no activities that she does during her free time that could be described as repetitious. She agrees that the surgeries have been beneficial.

Claimant has some strength issues with gripping on the right. She has numbness in the left index finger and tenderness on the palm at the incision. She wears a splint when using the walker. Dr. Kuo anticipates that claimant will be able to use the walker without a splint at some point in the future.

Exhibit 11 contains medical bills for the left hand.

In the last three years of her employment, she used an ergonomic keyboard. However, there are no other accommodations made for her carpal tunnel syndrome symptoms.

The cost of the case includes the filing fee and a deposition fee. (Ex 12:49)

### **CONCLUSIONS OF LAW**

The claimant maintains that she injured her right and left upper extremities on or about September 26, 2016, as a result of work related activities. She further asserts that she is entitled to benefits from the Second Injury Fund of Iowa as a result of a right lower extremity injury on January 1, 1968 or, in the alternative, a qualifying loss to the left lower extremity on January 1, 1970. Defendant-employer and insurer paid for the right carpal tunnel release in 2016 but maintain that the bilateral carpal tunnel syndrome was not the result of the claimant's work activities.

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

The claimant has the burden of proving by a preponderance of the evidence that the alleged injury actually occurred and that it both arose out of and in the course of the employment. Quaker Oats Co. v. Cihã, 552 N.W.2d 143 (Iowa 1996); Miedema v. Dial Corp., 551 N.W.2d 309 (Iowa 1996). The words "arising out of" referred to the cause or source of the injury. The words "in the course of" refer to the time, place, and circumstances of the injury. 2800 Corp. v. Fernandez, 528 N.W.2d 124 (Iowa 1995). An injury arises out of the employment when a causal relationship exists between the

injury and the employment. Miedema, 551 N.W.2d 309. The injury must be a rational consequence of a hazard connected with the employment and not merely incidental to the employment. Koehler Electric v. Wills, 608 N.W.2d 1 (Iowa 2000); Miedema, 551 N.W.2d 309. An injury occurs “in the course of” employment when it happens within a period of employment at a place where the employee reasonably may be when performing employment duties and while the employee is fulfilling those duties or doing an activity incidental to them. Ciha, 552 N.W.2d 143.

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 experts in the case both acknowledge that the cause of claimant’s carpal tunnel syndrome is multifactorial. Dr. Kuo, the treating surgeon, did not come to a definitive conclusion, opining only that the claimant’s work may have been a contributing cause but was not a major contributing cause. Because Dr. Kuo does not support causation, claimant suggests that Dr. Kuo’s opinion should be given “little weight, if any weight at all.” It is unclear why an opinion that is not supportive of causation should be given little to no weight. Dr. Kuo is a carpal tunnel specialist who performed two surgeries on claimant and has followed claimant’s course of recovery since 2016. From an experience and treatment standpoint, Dr. Kuo’s opinions may carry more weight. That her opinion is not consistent with the claimant’s does not make it less valuable. Dr. Taylor is not a board-certified surgeon but rather a board-certified occupation and environmental medicine doctor. (CE 1:13) It is his opinion, based on two evaluations, that claimant’s work was a significant contributing cause.

Defendants argue that Dr. Taylor's opinion is flawed because he presumes that the defendant-employer accepted the claim. Defendants initially shouldered the responsibility for the right carpal tunnel syndrome injury and then later closed their file. In the present case, defendant-employer and insurer deny liability for any injuries.

Dr. Taylor's opinion that the work duties were a significant contributing factor to the claimant's development of carpal tunnel syndrome is based on a number of observations including the lack of diabetes or thyroid-related issues, no history of rheumatoid arthritis, claimant's extensive use of the keyboard, the lack of ergonomic accommodations, and, as an additional note, that the defendants had accepted the workers' compensation claim.

Claimant underwent a right carpal tunnel release on September 26, 2016 which was paid for by the defendant-employer. In the answers to interrogatories, defendants answered that they accepted the claimant's right wrist injury as compensable but because the claimant was placed at maximum medical improvement with no restrictions and zero impairment, the claim was closed after claimant found new employment. (CE 5:25) She sought additional medical treatment for her bilateral carpal tunnel symptoms in April 11, 2019 and by that time the claimant had already filed a petition to which General Dynamics responded by filing an answer with a full denial of the claim.

The assumption that the defendants had accepted the workers' compensation claim related to the carpal tunnel syndrome does not reduce the weight to be afforded Dr. Taylor's opinions.

The greater weight of the evidence supports a finding that the claimant's repetitive use of her keyboard, mouse, and telephone were a significant or substantial factor in the development of bilateral carpal tunnel syndrome. Claimant testified that there were little activities that she undertook at home that were repetitive in nature. She worked for the defendant-employer for approximately 11 years, in the customer support call center where she would handle 5,200 calls a day. During each call she would type in notes as well as use her mouse to access various menus.

There were no home hobbies or activities that required the same type of repetitive motion for the same amount of time as her work duties. It is not the claimant's responsibility to prove her case beyond a reasonable doubt, only a preponderance of the evidence. While both experts maintain some reservation about the causal connection between the claimant's symptoms and her work duties, they have both agreed that the was, or may be, a factor in the claimant's development of carpal tunnel syndrome. Alone, Dr. Kuo's opinions would probably fall within the "possible" category of causes but buttressed with Dr. Taylor's opinions as well as the lack of other causative factors and claimant's own testimony, the greater weight falls in favor of the claimant.

It is determined that claimant has sustained bilateral carpal tunnel syndrome arising out of her work-related duties for the defendant employer. Because of that

finding, claimant is also entitled to reimbursement and/or payment of the medical bills in Exhibit 11.

The claimant seeks a finding of permanency for the right upper extremity and a running award for the left upper extremity.

Section 85.34(1) provides that healing period benefits are payable to an injured worker who has suffered permanent partial disability until (1) the worker has returned to work; (2) the worker is medically capable of returning to substantially similar employment; or (3) the worker has achieved maximum medical recovery. The healing period can be considered the period during which there is a reasonable expectation of improvement of the disabling condition. See Armstrong Tire & Rubber Co. v. Kubli, Iowa App 312 N.W.2d 60 (1981). Healing period benefits can be interrupted or intermittent. Teel v. McCord, 394 N.W.2d 405 (Iowa 1986). Claimant did return to work on October 12, 2016, and continued to work without restrictions until she was laid off for non-medical reasons. She did not request and was not provided any accommodations due to her carpal tunnel syndrome and she left a subsequent similar position due to her issues with her declining speech abilities.

She was fully released for her right carpal tunnel injury on July 19, 2017, by Dr. Kuo and was not assigned any permanent restrictions or impairment. Claimant underwent surgical repair for the left-sided carpal tunnel syndrome on July 18, 2019. She has not been released by Dr. Kuo at this time, however, claimant is not undergoing any treatment nor has any treatment been recommended for her since her last visit with Dr. Kuo. It is anticipated claimant will be released in April 2020, following the same timeline as her healing period for the right upper extremity.

Healing periods are defined not by the maximum medical improvement release date but when there is a reasonable expectation of improvement. Claimant improved some between her release to work without restrictions on October 12, 2016, and the official maximum medical improvement date provided by Dr. Kuo on July 19, 2017, but not dramatically and not in a way that affected claimant's ability to work. Claimant took approximately two weeks to heal from the right hand surgery before she was capable of returning to work full time. For the left hand, she was seen on August 2, 2019, following the July 18, 2019, surgery, and reported some residual numbness and manageable incisional pain. The plan was to follow up in 4 weeks. However, to this date, there is no expert opinion as to when claimant's period of improvement for the left hand can be determined. It may be that the date is September 2, 2019, which is four weeks after the last medical record of Dr. Kuo, but that is only speculation. For the left hand, there is not sufficient evidence to determine claimant's maximum medical improvement date.

Thus, the appropriate periods of temporary benefits would be September 26, 2016, through October 11, 2016, for the right and a running award for the left beginning on July 18, 2019. It is possible that the healing period for the left upper extremity would be modified following a return to Dr. Kuo in 2020.

The extent of permanency depends in large part on whether the Second Injury Fund of Iowa is implicated.

Section 85.64 governs Second Injury Fund liability. Before liability of the Fund is triggered, three requirements must be met. First, the employee must have lost or lost the use of a hand, arm, foot, leg, or eye. Second, the employee must sustain a loss or loss of use of another specified member or organ through a compensable injury. Third, permanent disability must exist as to both the initial injury and the second injury.

The Second Injury Fund Act exists to encourage the hiring of handicapped persons by making a current employer responsible only for the amount of disability related to an injury occurring while that employer employed the handicapped individual as if the individual had had no preexisting disability. See Anderson v. Second Injury Fund, 262 N.W.2d 789 (Iowa 1978); 15 Iowa Practice, Workers' Compensation, Lawyer, Section 17:1, p. 211 (2014-2015).

The Fund is responsible for the industrial disability present after the second injury that exceeds the disability attributable to the first and second injuries. Section 85.64. Second Injury Fund of Iowa v. Braden, 459 N.W.2d 467 (Iowa 1990); Second Injury Fund v. Neelans, 436 N.W.2d 355 (Iowa 1989); Second Injury Fund v. Mich. Coal Co., 274 N.W.2d 300 (Iowa 1970).

Claimant suffers from cerebral palsy. In an agency decision of Connors v. Dubuque Community School District, File No. 5014903 (May 31, 2007), preceding the George case, the deputy held that deficits in the arm and leg resulting from cerebral palsy were not first qualifying injuries.

Claimant argues that regardless of this whole body condition, she is entitled to benefits from the Fund based on the decision in Gregory v. Second Injury Fund of Iowa, 777 N.W.2d 395 (Iowa 2010). In Gregory, the injured worker sustained bilateral upper extremity injury resulting in surgeries to both arms and shoulders and an award of permanent benefits on an industrial basis. Id. at 396. The holding in Gregory did not rest upon the interpretation that industrial losses that have a scheduled number component are considered qualifying Fund losses. Id. at 400. Instead, it focused on the bilateral loss.

Given our decision in George that a subsequent injury to an enumerated member is not disqualified as a second injury merely because it occurred simultaneously with an injury to another enumerated member, we believe it would be senselessly inconsistent to conclude a first qualifying injury cannot likewise occur simultaneously with an injury to another such member.

Id. at 400. The Iowa Supreme Court stated that the focus must be whether the injured worker sustained a partial permanent loss of at least two enumerated members in

successive injuries. The difficulty here is that the claimant's cerebral palsy did not begin with a scheduled member loss. It is a brain issue that has affected her speech and her extremities. This is not a case where the claimant has sustained traumatic or even cumulative injuries to a scheduled member that has developed into a whole body industrial loss. Instead, it is a whole body genetic condition that happens to affect, among other things, the extremities. Despite the finding in Gregory that supports bilateral scheduled member losses that extend into the whole body as qualifying injuries, the specific holdings in Gregory do not support a finding that a nervous system injury that affects the whole body or a brain trauma injury that results in the loss of use of an arm or leg can be a qualifying injury for the Fund.

Therefore, it is determined that claimant is not entitled to benefits from the Second Injury Fund of Iowa.

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

The courts have repeatedly stated that for those injuries limited to the schedules in Iowa Code section 85.34(2)(a-t), this agency must only consider the functional loss of the particular scheduled member involved and not the other factors which constitute an "industrial disability." Iowa Supreme Court decisions over the years have repeatedly cited favorably the following language in the 83-year-old case of Soukup v. Shores Co., 222 Iowa 272, 277; 268 N.W. 598, 601 (1936):

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

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

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

compensation payable in those cases wherein the loss is something less than that provided for in the schedule. Blizek v. Eagle Signal Co., 164 N.W.2d 84 (Iowa 1969).

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

The right of a worker to receive compensation for injuries sustained which arose out of and in the course of employment is statutory. The statute conferring this right can also fix the amount of compensation to be paid for different specific injuries, and the employee is not entitled to compensation except as provided by statute. Soukup, 222 Iowa 272, 268 N.W. 598.

Only the right upper extremity is at maximum medical improvement and entitled to a finding of permanency. Claimant was returned to work without restrictions and worked for several months before being laid off. When she found a new position, she left because of her worsening speech and not issues related to her right upper extremity. Dr. Kuo assessed no permanent impairment and Dr. Taylor assigned 5 percent due to residual carpal tunnel syndrome symptoms. Claimant's testimony is that she has weakness in her right hand and has difficulty gripping. She did not testify that the injury impacted her ability to type, handle the mouse or telephone or any other duties that pertained to her work as a customer service individual. Her inability to do prior jobs was related to her inability to maneuver around larger areas with her walker and her poor gait.

Based on the foregoing, it is determined claimant has sustained a 5 percent right upper extremity loss.

The next issue for consideration is whether claimant is entitled to penalty benefits.

If weekly compensation benefits are not fully paid when due, section 86.13 requires that additional benefits be awarded unless the employer shows reasonable cause or excuse for the delay or denial. 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. Robbenolt, 555 N.W.2d at 238. Defendants argue that Dr. Kuo's opinion which placed the causation in the possible rather than probable category was sufficient basis upon which to deny the claim. However, this was never communicated to the claimant. Further, defendants did not explain why they denied the right upper extremity or when that was denied. It was unclear what investigation, if any, they undertook to determine whether claimant's carpal tunnel syndrome was related to her work duties. It was not clear from the evidence whether defendants had undertaken any investigation, including but not limited to, the acquisition of medical records.

A reasonable or probable cause or excuse must satisfy the following requirements:

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.

(Iowa Code section 86.13(4)(c)).

Defendants have the burden to show compliance with this statutory provision in order to avoid the mandatory assessment of a penalty. The inquiry under the current provision of Iowa Code section 86.13 requires more than a reasonable or probable cause or excuse at the time the case comes to hearing. The law requires proof of a prompt investigation and that factual basis be provided to the injured worker at the time of the denial, delay, or termination of benefits. Herein, defendants must show a timely investigation of claimant's report of a carpal tunnel syndrome, that the denial of the carpal tunnel syndrome is based on the results of that timely investigation, and that there was a timely communication to claimant of the reasons for the denial. The only evidence of any investigation comes from the testimony of claimant that when she contacted defendants for authorized treatment of the left upper extremity, she was denied. There was no explanation for the denial and there was no written decision that was provided to the claimant.

Defendants gloss over the timeframe in their brief. Claimant underwent right carpal tunnel release on September 26, 2016 which was paid for by the defendant-employer. Claimant was then placed on maximum medical improvement on July 24, 2017 and returned to work without any restrictions. Defendants' full denial occurred on May 22, 2018 in the Answer to the complaint, nearly a full year following the claimant being placed on maximum medical improvement for the right upper extremity.

There is no showing that an investigation was actually conducted, no showing that the denial of benefits was based on that investigation, and no showing that the reasons for the denial were contemporaneously communicated to claimant or her legal counsel. Therefore, due to the failure of defendants to make any attempt to provide evidence of compliance with Iowa Code section 86.13, a 50 percent penalty shall be assessed.

## ORDER

### THEREFORE, IT IS ORDERED:

That defendants are to pay unto claimant twenty-five (25) weeks of permanent partial disability benefits at the rate of three hundred forty-six and 18/100 dollars (\$346.18) per week from October 12, 2016.

That defendants are to pay unto claimant a running award for the left upper extremity beginning July 18, 2019, at the rate of three hundred forty-six and 18/100 dollars (\$346.18).

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

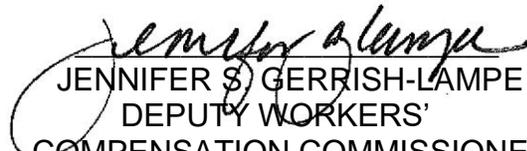
That defendants shall pay interest on unpaid weekly benefits awarded herein as set forth in Iowa Code section 85.30.

That defendants shall pay the medical bills in Claimant's Exhibit 11.

That defendants shall pay fifty (50) percent of the late-paid benefits, both temporary and permanent.

That defendants shall pay the costs of this matter pursuant to rule 876 IAC 4.33.

Signed and filed this 23<sup>d</sup> day of January, 2020.

  
JENNIFER S. GERRISH-LAMPE  
DEPUTY WORKERS'  
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Emily Anderson (via WCES)

Abigail A. Wenninghoff (via WCES)

Meredith Cooney (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.