

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

LANA KRAMER,

Claimant,

vs.

KRAFT FOODS GROUP, INC.,

Employer,

and

INDEMNITY INSURANCE CO., N.A.,

Insurance Carrier,  
Defendants.

**FILED**

SEP 30 2016

WORKERS COMPENSATION

File No. 5052150

ARBITRATION DECISION

Head Note Nos.: 1100, 1402.30,  
1801.1, 1803

STATEMENT OF THE CASE

Claimant Lana Kramer filed a petition in arbitration on January 20, 2016, alleging she sustained a traumatic or cumulative injury to her right shoulder and body as a whole while working for the defendant, Kraft Foods Group, Inc. ("Kraft") on April 14, 2013. Kraft and the defendant, Indemnity Insurance Company of North America ("Indemnity Insurance"), filed an answer on February 9, 2015, admitting Kramer sustained a work injury to her right shoulder only. On May 25, 2016, Kraft and Indemnity Insurance filed an amended answer alleging Kramer's injury could not have occurred as she described it and they denied liability.

An arbitration hearing was held at the Division of Workers' Compensation in Des Moines, Iowa on June 6, 2016. Attorney Corey Walker represented Kramer. Kramer appeared and testified. Jean Hauan, Mike Hauan, Greg Subbert, Michael Subbert, and John Michel testified on behalf of Kramer. Attorney Peter Thill represented Kraft and Indemnity Insurance. Kerry Stripling, Brian Strong, Clinton Payne, and John Hasley testified on behalf of Kraft and Indemnity Insurance. Exhibits 1 through 22 and A through I were admitted into the record. The record was left open through July 25, 2016, for the receipt of a deposition and post-hearing briefs. The deposition was not submitted. The parties' post-hearing briefs were received on July 8, 2016, and the record was closed.

Before the hearing the parties completed a hearing report listing stipulations and issues to be decided. Kraft and Indemnity Insurance withdrew all affirmative defenses.

STIPULATIONS

1. An employer-employee relationship existed at the time of the alleged injury.

2. If Kramer has sustained a work-related injury, the disability is an industrial disability and the commencement date for permanent partial disability benefits, if any are awarded, is November 13, 2015.
3. At the time of the alleged injury, Kramer's gross earnings were \$1,342.33 per week, Kramer was single and entitled to one exemption, and her weekly benefit rate is \$775.10.
4. Medical benefits are no longer in dispute.
5. Prior to the hearing Kramer was paid 28 weeks of compensation at the rate of \$775.10 per week and Kramer received her first permanent partial disability payment on March 11, 2016.

### ISSUES

1. Did Kramer sustain an injury on April 14, 2013, which arose out of and in the course of her employment?
2. If Kramer sustained an injury arising out of and in the course of her employment, did the alleged injury cause a temporary disability during a period of recovery?
3. Is Kramer entitled to temporary partial disability payments?
4. If Kramer sustained an injury arising out of and in the course of her employment, did the alleged injury cause a permanent disability?
5. If Kramer sustained a permanent disability, what is the nature and extent of her disability?
6. Is Kramer entitled to penalty benefits?

### FINDINGS OF FACT

Kramer grew up in Evansville, Indiana, and graduated from high school in 1983. (Transcript, pages 22-23, 56) At the time of the hearing she was 51. (Tr., pp. 22-23) Kramer is right-hand dominant. (Exhibit C-9) Kramer is single and is the parent of three adult children. (Tr., p. 23) When she was in high school Kramer earned average grades. (Tr., p. 23) Kramer has not received any additional education or training beyond high school. (Tr., p. 24) Kramer has worked as a stocker, cashier, assistant store manager, store manager, customer service representative, bank teller, secretary, order picker in a warehouse, and as a manufacturing production worker. (Tr., pp. 56-57; Ex. 9, pp. 85-86)

In 1998 Kraft hired Kramer to work at its Mason City location. (Tr., p. 24) Kraft manufactures ready-to-eat refrigerated Jell-O gelatin and pudding products. (Tr., p. 141) Kramer has worked as a packaging case packer sleever operator and as a

quality operator in the quality control lab. (Ex. C-4-C-5) The lab conducts quality control tests of the pudding and gelatin. (Ex. C-17-C-19) At the time of her alleged injury in April 2013, Kramer was working as a case packer sleever operator for line 5 and as a quality operator. (Ex. C-5)

On April 14, 2013, Kramer was operating sleever number 5. (Tr., pp. 25, 33) Kramer had been operating sleever number 5 for a few months. (Tr., p. 25) The sleever machine has a back pressure plate, which weighs 13.8 pounds, that keeps the sleeves tight. (Tr., pp. 111, 138) Kramer would lift a bar or handle attached to the pressure plate to load additional sleeves. (Ex. C-8) Kramer reported, "the sleeves fall down the hopper, then the cups get put into the sleeves and the sleeves go down the line to the north field which goes to the case pack room." (Tr., p. 26)

During her deposition, Kramer testified, "I was loading sleeves on sleever 5, and there is a bar that holds the sleeves in place; and I went to lift that bar to load the other sleeves, and I dropped the bar, felt a pop in my arm (indicating), and it landed on my right finger, and it's hurt ever since." (Ex. C-8) During the hearing Kramer testified, "I was holding the sleeves and I picked up the bar to lift over the sleeves and my shoulder popped and I dropped the bar, and when I did, the handle area fell on my hand." (Tr., p. 27) Kramer testified at hearing that when the bar dropped "[i]t popped and it just shot a real piercing pain through my arm." (Tr., p. 28) Kramer reported when she dropped the bar the handle fell on her right index finger. (Tr., p. 28)

Kramer's past medical history includes a hip replacement in 2010 related to a childhood injury, and she fractured her foot in 2011. (Tr., pp. 43-44) Kramer sliced her right finger in 1997, but she has had no other prior injuries to her right arm, finger or shoulder. (Ex. C-9)

Kramer does not recall when she was trained to use sleever number 5, but recalls being trained on sleever numbers 3 and 4, which operate similarly to sleever number 5. (Tr., pp. 30-31) Kramer testified she generally used her right arm to lift the bar or handle for sleever number 5 because she is right-hand dominant and it is easier for her to use her right hand. (Tr., p. 31) Kramer testified she was never trained to use her left hand to lift the bar or handle. (Tr., pp. 31-32) When the bar or handle for sleever number 5 is extended upward, the bar or handle is between 74 and 75 inches off the ground. (Tr., p. 30; Ex. 21, p. 180) Kramer is five feet and five inches, or 65 inches tall. (Tr., p. 30)

Kramer testified she never felt anything similar in her shoulder before April 14, 2013. (Tr., p. 32) After she felt the pop, Kramer walked over to a coworker and told him she hurt her shoulder and asked if he thought she should report it. (Tr., p. 32) Kramer's coworker told her to report it. (Tr., p. 32) At the end of her shift, Kramer went to her coach's office to report the incident, but her coach, Eric Stoychoff, had left for the day, so she reported it to Brian Strong, the coach who was coming on duty, and Strong told her to report it to Stoychoff in the morning. (Tr., pp. 32-33, 72)

The next day Kramer reported the incident to Stoychoff. (Tr., p. 33) Stoychoff, prepared an Investigation Report, which documents, "[e]mployee was loading sleeves onto the sleeve conveyor. When raising the back pressure plate to hold the sleeves in place, she felt a 'pop' in her right shoulder which caused her to release the plate which then fell on her right finger." (Ex. 17) Kramer testified that at the time of her injury there was no platform in place. On the Investigation Report, Stoychoff documented under "Cause Analysis," "[s]leeve conveyor is too high – needs to have a platform installed" and "overexertion." (Ex. 17, p. 137) The Investigation Report was prepared by Stoychoff, not by Kramer. No other plant officials signed the Investigation Report. (Ex. 17, p. 137) Kramer testified that after a period of time, Kraft added a platform to sleever number 5. (Tr., p. 34)

Exhibit 21 contains photographs of sleever number 5 taken on June 1, 2016. (Tr., pp. 25-26) Page 170 of Exhibit 21 shows a loading stand or platform for sleever number 5. Kramer testified the loading stand or platform for sleever number 5 was not present on the date of her injury, April 14, 2013. (Tr., pp. 27, 72) Page 171 of Exhibit 21 shows a man operating sleever number 5. Kramer testified,

At the time this scissor lift was not there, so we had a table in between the two machines. So you would have to take the sleeve box off the conveyor, flip it onto the table. Then I would take – there's two stacks. So I would take a stack, throw it up onto the sleeve hopper. I would hold it with my left hand, because I'm right-handed, pick the bar up with my right hand, move it over, and then compress it tight.

(Tr., p. 27) Exhibit 21, page 176, shows two inches of clearance between the bar and the table. Kramer testified her right hand was right underneath the bar when she dropped it. (Tr., p. 28) Exhibit 21, page 174, shows the table is 55 inches off the ground. (Tr., pp. 28-29) And the sleeves pictured in Exhibit 21, page 175, are 62 inches off the ground. (Tr., p. 29)

Kramer testified that on the date of her injury, she was working with a six pack of sleeves, and the photographs taken during the June 1, 2016 visit depict a four pack of sleeves. (Tr., p. 29) Kramer noted that a six pack of sleeves is two inches taller than a four pack of sleeves. (Tr., pp. 29-30) During cross-examination Kramer acknowledged that if the plant records indicated she was working with a four pack of sleeves, then she was working with a four pack of sleeves at the time of her injury. (Tr., pp. 70-71) Kraft's records support Kramer was working with a four pack of sleeves on the date of her injury. (Tr., pp. 134, 145)

Kramer did not receive immediate medical treatment and continued to work full duty. (Tr., p. 74) On May 2, 2013, Kraft sent Kramer to Healthworks Occupational Health ("Healthworks"), where she saw Sherman Jew, D.O. (Ex. 1, p. 1) Kramer complained of pain, mild numbness, and tingling in her right shoulder, and pain in her right finger. (Ex. 1, p. 1) Dr. Jew documented, "[t]he right index finger reveals residual edema and some mild palpable pain over the proximal one-third of the index finger. Range of motion is within normal limits. Upper extremity pulses and reflexes were

within normal limits.” (Ex. 1, p. 1) Dr. Jew assessed Kramer with right shoulder pain with positive impingement syndrome and a right index finger contusion. (Ex. 1, p. 2) Dr. Jew ordered Kramer to apply ice and heat to her shoulder twice per day, to take ibuprofen, and for Kraft to rotate Kramer’s work so that her tasks would not exacerbate her symptoms. (Ex. 1, p. 2) X-rays of Kramer’s right shoulder and finger did not reveal a fracture or dislocation. (Ex. 2, pp. 3-4)

Kramer returned to Healthworks on May 15, 2013, and was examined by Thomas Spragg, M.D. (Ex. 1, p. 6) Kramer complained of pain in her shoulder and right index finger. (Ex. 1, p. 6) Dr. Spragg examined Kramer’s finger and noted, “[i]n its resting state, there is a 30-degree flexion of the digit, which appears to be secondary to swelling at the proximal interphalangeal joint, second index finger. Similarly, the patient has weakness in gripping with the index finger.” (Ex. 1, p. 6) Dr. Spragg ordered shoulder strengthening, mobility exercises, and physical therapy twice per week for three weeks. (Ex. 1, p. 6) Dr. Spragg provided no formal restrictions, but recommended Kramer avoid above shoulder activity. (Ex. 1, p. 8)

During a follow-up appointment with Dr. Spragg on May 31, 2013, Kramer complained of right anterior shoulder pain exacerbated by lifting. (Ex. 1, p. 10) Dr. Spragg noted Kramer’s symptoms had not improved with physical therapy. (Ex. 1, p. 9) Dr. Spragg diagnosed Kramer with “[b]icipital tendinitis, right impingement, right shoulder,” and a right index finger soft tissue injury. (Ex. 1, p. 10) Dr. Spragg referred Kramer to orthopedics for a shoulder injection and ordered Kramer’s restrictions should continue. (Ex. 1, pp. 10-11)

Eric Potthoff, D.O., an orthopedic surgeon, examined Kramer on June 11, 2013. (Ex. 2, p. 24) Dr. Potthoff noted Kramer had been experiencing right shoulder pain since mid-April 2013, “when she was at work loading sleeves on to a bar when she had a popping sensation in the shoulder, which caused the bar to drop secondary to her immediate pain.” (Ex. 2, p. 24) Dr. Potthoff listed an impression of right shoulder pain, possibly secondary to partial-thickness tearing of the long head biceps tendon. (Ex. 2, p. 25) Dr. Potthoff prescribed Mobic, administered a cortisone injection into Kramer’s shoulder, and “offered to give her restrictions at work, but she declines those, stating her employer would not follow them anyway.” (Ex. 2, pp. 25-26)

On June 19, 2013, Kramer attended a follow-up appointment at Healthworks with Stephen Holmes, M.D. (Ex. 1, p. 12) Kramer reported her condition was worse and her right elbow was numb and tingling with constant pain. (Ex. 1, p. 12) Dr. Holmes prescribed Naproxen, and told Kramer to use Tylenol and Biofreeze, as needed. (Ex. 1, p. 13) Dr. Holmes noted, “[r]estrictions – She is presently working in a lab area and/or she is not working with anything above her waist, so it is kind of a waist on down; and she has minimal lifting, sedentary with lifting none, carrying up to 10 pounds, pushing or pulling. We will continue to keep her in this capacity until she is seen again in one week by her provider.” (Ex. 1, p. 13)

Kramer attended a follow-up appointment with Dr. Spragg at Healthworks on June 26, 2013, complaining of right shoulder pain and tingling in the posterior aspect of

her right arm. (Ex. 1, p. 15) Dr. Spragg continued with the same restrictions and requested magnetic resonance imaging of Kramer's shoulder. (Ex. 1, p. 15)

During her appointment with Dr. Potthoff on July 9, 2013, Kramer reported she did not receive much relief from the cortisone injection. (Ex. 2, p. 27) Dr. Potthoff noted Kramer "is presently on work restrictions where she was not really doing any lifting with the right upper extremity." (Ex. 2, p. 27) Dr. Potthoff recommended Kramer continue with her restrictions, prescribed Mobic, and requested magnetic resonance imaging of Kramer's right shoulder. (Ex. 2, pp. 28-29)

Following the imaging, the radiologist listed an impression of:

1. Small intrasubstance partial tear of the supraspinatus tendon just before its tuberosity insertion. No full thickness components are seen.
2. Subacromial/subdeltoid bursal fluid. Consider underlying bursitis.
3. Intact long head of biceps tendon.
4. Deformity and intermediate signal change diffusely involving the anterior glenoid labrum with partial infolding in to the joint, best seen on the axial images. This is consistent with the old chronic tear. No paralabral cyst formation.
5. Developing subchondral cyst formation involving the superior glenoid bony rim.

(Ex. 1, p. 17)

On August 29, 2013, Kramer returned to Healthworks and saw Steven Drake, M.D. (Ex. 1, p. 20) Based on the imaging, Dr. Drake listed an impression of a rotator cuff tear and transferred Kramer's care to Dr. Potthoff in orthopedics. (Ex. 1, p. 20) Dr. Drake restricted Kramer to sedentary work with restrictions of no lifting, no carrying, pushing, or pulling above 10 pounds, and prescribed 800 milligrams of ibuprofen. (Ex. 1, p. 21)

Kramer's care was transferred to Darron Jones, M.D., who works in the same office as Dr. Potthoff. During an appointment on October 18, 2013, Dr. Jones noted physical therapy and a previous injection had not relieved Kramer's pain, but he did not believe she was a surgical candidate. (Ex. 2, pp. 29-A-29-B) Dr. Jones ordered cuff and periscapular strengthening Thera-Bands. (Ex. 2, p. 29-B)

Kramer returned to Dr. Jones on December 18, 2013. (Ex. 2, p. 30) Dr. Jones found Kramer had full range of motion of her shoulder, with diffuse pain. (Ex. 2, p. 30) Dr. Jones noted he did not have anything further to offer Kramer and Kramer requested another opinion. (Ex. 2, p. 31)

John Kuhnlein, D.O., conducted an independent medical examination of Kramer in May 2014, and issued a report on June 12, 2014. (Ex. 3) Dr. Kuhnlein reviewed Kramer's medical records, and examined her. (Ex. 3, p. 52) Dr. Kuhnlein diagnosed Kramer with chronic left shoulder pain with small intrasubstance supraspinatus tear and bursitis and a right index finger contusion. (Ex. 3, p. 58) Dr. Kuhnlein recommended an orthopedic consultation, noting, "[i]t is uncertain why she has such painful behaviors given the pathology." (Ex. 3, p. 59) Dr. Kuhnlein opined it is more likely than not that the rotator cuff tear, bursitis, and right index finger contusion are directly and causally related to the April 14, 2013, incident. (Ex. 3, p. 58) Dr. Kuhnlein found that Kramer reached maximum medical improvement on December 18, 2013. (Ex. 3, p. 59)

Using the Guides to the Evaluation of Permanent Impairment, (AMA Press, 5<sup>th</sup> Ed. 2001) ("AMA Guides"), Dr. Kuhnlein found:

In this particular instance, I would use the passive motion values rather than the active motion values, given the examination. Turning to Figures 16-40, 16-43 and 16-46, and when comparing the right to the unaffected left shoulder, she has a total of 4% right upper extremity impairment for decrements in range of motion. At this time, there are no other objective bases upon which to assign impairment. Turning to Table 16-3, page 439, this would convert to a 2% whole person impairment. The sensory examination is not objective for the purposes of impairment rating. There is no impairment for the right finger injury.

(Ex. 3, p. 59) Dr. Kuhnlein recommended restrictions of lifting 20 pounds occasionally from floor to waist level or above shoulder level, and 40 pounds occasionally between waist and shoulder level "as long as weights are kept close to the axial plane of her body. If she is lifting more than an elbow's distance away from her body, she should lift 20 pounds occasionally from waist to shoulder." (Ex. 3, p. 59) With respect to nonmaterial handling, Dr. Kuhnlein opined Kramer could work occasionally at or above shoulder height. (Ex. 3, p. 59)

On July 21, 2014, Kramer attended a follow-up appointment with Dr. Jones, complaining of severe pain in her right shoulder. (Ex. 2, p. 32) Dr. Jones administered an injection and noted the only additional treatment he could offer would be a magnetic resonance arthrogram. (Ex. 2, p. 33)

Kramer received a magnetic resonance arthrogram and magnetic resonance imaging with contrast of the right shoulder on September 22, 2014. (Ex. 2, p. 37) The radiologist listed the following impression:

1. SLAP tear involving the peel back region. Abnormal signal and contrast is noted to extend into the superior/posterior labral quadrant.
2. Small partial tear of the supraspinatus tendon measuring 2-3 mm in size at its anterior footplate insertion. The tear appears to be

predominantly intrasubstance but articular surface extension is likely represent [sic]. Remainder of the cuff tendons are unremarkable.

3. Subacromial/subdeltoid bursal fluid, which may reflect reactive bursitis.
4. No evidence for rotator cuff muscle edema or atrophy.
5. Intact inferior glenoid labral ligamentous complex.

(Ex. 2, pp. 39-40)

After receiving the results of the magnetic resonance imaging, Dr. Jones diagnosed Kramer with superior glenoid labrum lesions, and recommended a shoulder arthroscopy, biceps tenotomy, and treatment of the rotator cuff, as indicated. (Ex. 2, p. 42) Dr. Jones performed a right shoulder mini open rotator cuff repair and right shoulder arthroscopy, debridement, and biceps tenotomy on Kramer on November 6, 2014. (Ex. 1-1) Following the surgery Kramer was taken off work for six weeks and then returned to a light-duty position. (Tr., p. 38) Kramer testified her right shoulder did not improve after she received surgery. (Tr., p. 78)

During Kramer's appointment with Dr. Jones on June 15, 2015, Kramer reported she had returned to work, but she was still experiencing pain after performing activities "that require kind of chronic use of the arm," including mowing and pulling weeds. (Ex. 2, p. 43) Dr. Jones recommended Kramer continue with cuff and periscapular strengthening exercises, and "to continue work with the current restrictions, which include like 30 pounds." (Ex. 2, p. 44)

On November 12, 2015, Kramer slipped on some steps at her home and fractured her foot. (Ex. C-6) Kramer attended a follow-up appointment with Dr. Jones on November 13, 2015, and complained of a foot injury. (Ex. 2, p. 44-A) Kramer informed Dr. Jones she was coming down a stair, twisted her foot, and she sustained a fifth metatarsal shaft fracture. (Ex. 2, p. 44-A) Dr. Jones released Kramer to work without restrictions with respect to her right shoulder, but ordered "no work until further notice" for approximately two months with respect to the metatarsal fracture. (Ex. 2, p. 44-B)

On November 20, 2015, Dr. Jones issued an opinion finding Kramer had sustained a permanent impairment of four percent to her upper extremity. (Ex. 2, p. 45) Dr. Jones did not list any work restrictions. (Ex. 2, p. 45)

Mark Taylor, M.D., who practices with Dr. Kuhnlein, performed a second independent medical examination of Kramer in January 2016, and issued a report on January 29, 2016. (Ex. 6) Dr. Taylor diagnosed Kramer with a right shoulder injury with a rotator cuff tear resulting in surgery. (Ex. 6, p. 75) Dr. Taylor agreed with Dr. Kuhnlein that Kramer's right shoulder injury is directly and causally related to her April 14, 2013 work incident. (Ex. 6, p. 75) Dr. Taylor also agreed with Dr. Jones that



Kramer reached maximum medical improvement on November 20, 2015. (Ex. 6, p. 75)  
Using the AMA Guides, Dr. Taylor opined:

Turning to Figures 16-40, 16-43 and 16-46, on pages 476-479, and compared to her unaffected left upper extremity, I would assign a 7% right upper extremity impairment rating related to decrements in range of motion. She also demonstrated mild weakness and as per Table 16-35, on page 510, I would assign an additional 3% upper extremity impairment related to her weakness. This results in a 10% right upper extremity impairment rating. As per Table 16-3, on page 439, this converts to a 6% whole person impairment rating.

(Ex. 6, p. 75) Dr. Taylor recommended lifting restrictions of 20 pounds occasionally from floor to waist level or above shoulder level and 30 pounds occasionally between waist and chest/shoulder level, only occasional overhead work, to avoid any repetitive or sustained activities at or above shoulder level with the right upper extremity, and agreed with Dr. Kuhnlein that when lifting, Kramer should keep her right arm close to her body. (Ex. 6, p. 76)

Dr. Jones released Kramer to full duty on February 9, 2016. (Tr., p. 38-39; Ex. C-7) Kramer testified after she returned to work she operated sleever number 5 and worked overtime. (Tr., p. 41)

Dr. Jones reviewed Dr. Taylor's report, and issued a letter on February 17, 2016, agreeing with Dr. Taylor's work restrictions, and finding:

In regard to an impairment rating, I have evaluated his impairment rating and would disagree slightly with that. I do not have any disagreements or question his 7% based on range of motion. However, using the American Medical Association Guide to Evaluation of Permanent Impairment, Fifth Edition, Page 508, under paragraph 16.8A (principles), in the first paragraph it states that, "Decreased strength (cannot) be rated in the presence of decreased motion, painful conditions, deformities, or absence of parts (e.g. thumb amputation) that prevent effective application with maximal force in the region being evaluated." Therefore, I do not feel that it would possible to add a 3% impairment due to weakness. Therefore, I would agree basically with a 7% impairment.

(Ex. 2, p. 46)

Kramer testified that after she returned to work, the business unit manager asked her to come to his office and sent her home because Kraft had received work restrictions for her. (Tr., pp. 41-42) Kramer reported that since February 2016, Kraft has assigned her to light-duty work, including checking hoses for leaks, labeling items, removing labels, sanitation, cleaning, and filing and clerical work. (Tr., p. 42) Kramer testified she did not perform these duties before her injury and the duties are not part of a regular position at Kraft. (Tr., p. 42)

Kramer testified she can perform all the duties of the lab operator position. (Ex. C-20) Kramer reported she is concerned she is not working in a regular position and she has requested Kraft allow her to perform the quality lab operator position. (Tr., p. 51) Since February 2016, Kramer has not worked overtime. (Tr., p. 42)

Kramer's attorney sent a letter to Dr. Jones on May 5, 2016, attaching a copy of the quality lab operator position, which requires lifting up to 23 pounds. (Ex. 2, pp. 49-51) Dr. Jones responded to the letter on May 13, 2016, opining the position "would seem to fit exactly within the parameters of the capabilities of her shoulder." (Ex. 2, p. 48)

Kraft and Indemnity Insurance retained Lana Sellner to conduct a vocational assessment. (Ex. G) Sellner reviewed Kramer's medical records, but did not meet with her. (Ex. G-1) Sellner opined that when considering the restrictions imposed by Dr. Jones on February 17, 2016, Kramer "is capable of working in a light physical demand levels [*sic*] based on the Dictionary of Occupational Titles." (Ex. G-7) Sellner conducted a labor market survey in the Mason City area, and found Kramer would be able to perform the available positions of security officer, cashier, customer service representative, hostess, store team member, production worker, front desk worker, and order processing technician. (Ex. G-7-G-8) The wages for the positions range between \$8.78 and \$16.86 per hour. (Ex. G-10) At the time of the hearing Kraft was paying Kramer \$23.72 per hour, which is a higher rate than she earned at the time of her injury. (Tr., p. 46) Kramer testified that if she lost her job with Kraft she does not believe she would be able to find a job that pays as well as her current position. (Tr., pp. 49-50)

Hasley replaced Michel and became the plant manager in 2013. (Tr., p. 140) As the plant manager Hasley is responsible for operations, safety, quality, productivity, cost, delivery, and morale. (Tr., p. 141) Kramer testified she believes Hasley would like to see her terminated. (Tr., pp. 51, 81) Kramer reported that Hasley has stated she is a "cancer, that I didn't need to be in the plant." (Tr., p. 81) Kramer has not received any demotions, reprimands, or change in her employment status. (Tr., p. 84) Hasley denies making the above statement, but testified that a few weeks after he started, "Lana came into my office and was quite upset about something and to the point of where conversation really wasn't productive, and I commented on behaviors such as that and attitudes in the plant can be a cancerous behavior" or "cancerous to our culture." (Tr., p. 150)

After Kramer's deposition in February 2016, Hasley conducted an independent investigation of the alleged incident leading to her injury. (Tr., p. 142) Hasley and other Kraft employees did not believe Kramer's injury could have occurred as she reported. Kraft performed the investigation, and did not hire an independent third party to perform the investigation. (Tr., p. 152) Hasley and his employees also prepared a video, Exhibit A. (Tr., p. 142) Hasley testified the man depicted in the video is five feet and 10 inches tall. (Tr., pp. 142-143) As noted above, Kramer is five feet and five inches tall. (Tr., p. 30)

Kramer testified the man in the video is taller than she is, he is using his left hand, as opposed to his right hand to push the bar, he is using a step stool, and he is tipping the 20 pound box of sleeves onto the conveyor. (Tr., p. 35) Kramer testified she was trained to flip the box onto the table and take half of a stack of sleeves at a time and put them up. (Tr., p. 35)

Hasley testified the stand or platform depicted in Exhibit 21 was manufactured, brought to the plant, and installed for sleever number 5 before Kramer's work injury. (Tr., p. 143) The stand elevated the man standing on it eight inches. (Tr., p. 144) Hasley was not employed by Kraft at the time of Kramer's injury. Stripling, the business manager in April 2013, who recently retired from Kraft, could not recall if a platform was in place at sleever number 5 at the time of Kramer's work injury. (Tr., pp. 108-109, 117-118) Kraft did not call any witnesses who testified they saw the stand or platform in place on sleever number 5 at the time of Kramer's April 2013 injury.

Stripling testified he could not see how Kramer could have operated sleever number 5 with her right hand, and believes the injury would have been to her left hand because she would hold the sleeves with her opposite hand. (Tr., p. 112) Stripling also testified he would have a hard time believing an employee's right hand could be trapped and injured under the pressure plate if it were dropped unless the employee had made a fist. (Tr., p. 114) During cross-examination Stripling acknowledged an employee could use his or her right arm to lift up the back pressure plate. (Tr., p. 113)

Strong is the line lead for production lines 9 and 10 at Kraft. (Tr., p. 119) Strong ran sleever number 5 between 1994 and 1996. (Tr., p. 120) Strong testified he has never heard of an employee lifting the back pressure plate with his or her right upper extremity. (Tr., p. 123) When questioned on cross-examination, Strong responded, "I don't know how you could get your hand underneath [the handle] with it being 14 pounds of weight to be able to be from here to down there by the time it went down on its own (indicating). I guess I don't think you could get your hand in there quick enough." (Tr., p. 125) Strong reported Kraft had tried to simulate the injury a week before the hearing, but the employee could not get the employee's hand down in time to cause the injury. (Tr., p. 126)

Payne is the operational risk manager for Kraft, who oversees plant safety, security, environmental, health, and workers' compensation issues, and all secondary processes. (Tr., p. 130) Payne has been employed by Kraft since January 5, 2015. (Tr., p. 130) Payne testified he conducted an independent investigation of Kramer's claim in May 2016. (Tr., p. 130) Payne reported he determined Kramer's testimony was inconsistent with the work injury report as follows:

Well, when you turn and start to read and look at it, it shows that while the employee was raising the plate or lowering the plate, one says, "When raising the plate I felt a pop." The other one says, "Dropped the bar, felt a pop," so there's inconsistencies whether we were coming up, whether we were coming down.

(Tr., pp. 132-133) Payne testified that during the investigation he determined an employee operating the sleever would more likely injure his or her left hand if the employee were using his or her right hand to manipulate the back pressure plate. (Tr., p. 133)

Michel was the plant manager for Kraft from 2001 through May 2013, when he retired. (Tr., p. 100) Michel does not have a social relationship with Kramer outside of work. (Tr., p. 102-103) Michel testified during the time he worked with Kramer she was an average employee. (Tr., p. 101) Kramer worked in the safety program at Kraft, trying to prevent work injuries. (Tr., pp. 101-102) Kramer assisted Michel with plant safety and he considered her to be a trustworthy and honest person. (Tr., p. 101) Michel reported that when he worked with Kramer she was not the type of person who would fake or exaggerate an injury. (Tr., p. 102)

Jean Hauan is a close friend of Kramer and worked with Kramer from 1998 through 2002 and from 2010 through her retirement in 2016. (Tr., pp. 88-89) Hauan testified she considers Kramer to be very honest and reported Kramer had a reputation of being an honest person at Kraft. (Tr., p. 89) Hauan reported that in the three years since Kramer's work injury, she had not seen any signs Kramer has exaggerated her injuries. (Tr., p. 90) Hauan testified she used to golf with Kramer and that after Kramer's work injury she could not participate in golf because of her injury and noted Kramer's arm hurts when she drives a car. (Tr., p. 90)

Mike Hauan has known Kramer for eight years and believes she is a very honest person. (Tr., p. 93) Subbert has known Kramer for 10 years and testified she is a one of the most honest people she knows and she is not the type of person who would fake or exaggerate an injury. (Tr., pp. 97-99)

Kramer testified she has a constant dull pain in her shoulder. (Tr., p. 52) Kramer reported the pain is mostly in her bicep, but when she reaches for a glass or another object, she also has pain in her rotator cuff. (Tr., p. 53) Kramer takes 800 milligrams of ibuprofen for the pain twice per day. (Tr., p. 53)

Kramer reported her shoulder hurts when she vacuums, dusts, mows the lawn, and gardens. (Tr., p. 53) Kramer stated she cannot bowl or play golf like she used to, and when she rolls over on her shoulder at night she wakes up in pain. (Tr., p. 53) Kramer has hired someone to mow her grass. (Tr., p. 54) Kramer reported the vibration of the mower and pushing and pulling the mower back hurts her arm, mostly the bicep. (Tr., p. 54) Kramer also noted that her right index finger sometimes hurts or aches. (Tr., p. 77)

## CONCLUSIONS OF LAW

### I. Arising Out of and in the Course of Employment

Kraft and Indemnity Insurance contend that Kramer's work injury did not arise out of and in the course of her employment because it could not have occurred as she

claims. In support of their argument, Kraft and Indemnity Insurance rely on a video simulation, Exhibit A, and witness testimony. Kramer avers her injury arose out of and in the course of her employment.

Under Iowa Code section 85.3(1),

Every employer, not specifically excepted by the provisions of this chapter, shall provide, secure, and pay compensation according to the provisions of this chapter for any and all personal injuries sustained by an employee arising out of and in the course of the employment, and in such cases, the employer shall be relieved from other liability for recovery of damages or other compensation for such personal injury.

To receive workers' compensation benefits, an injured employee must prove, by a preponderance of the evidence, the employee's injuries arose out of and in the course of the employee's employment with the employer. 2800 Corp. v. Fernandez, 528 N.W.2d 124, 128 (Iowa 1995). An injury arises out of employment when a causal relationship exists between the employment and the injury. Quaker Oats v. Ciha, 552 N.W.2d 143, 151 (Iowa 1996). The injury must be a rational consequence of a hazard connected with the employment, and not merely incidental to the employment. Koehler Elec. v. Willis, 608 N.W.2d 1, 3 (Iowa 2000). The Iowa Supreme Court has held, an injury occurs "in the course of employment" when:

[I]t is within the period of employment at a place where the employee reasonably may be in performing his duties, and while he is fulfilling those duties or engaged in doing something incidental thereto. An injury in the course of employment embraces all injuries received while employed in furthering the employer's business and injuries received on the employer's premises, provided that the employee's presence must ordinarily be required at the place of the injury, or, if not so required, employee's departure from the usual place of employment must not amount to an abandonment of employment or be an act wholly foreign to his usual work. An employee does not cease to be in the course of his employment merely because he is not actually engaged in doing some specifically prescribed task, if, in the course of his employment, he does some act which he deems necessary for the benefit or interest of the employer.

Farmers Elevator Co. v. Manning, 286 N.W.2d 174, 177 (Iowa 1979).

Kraft and Indemnity Insurance allege Kramer's injury could not have occurred as she has described it based on an internal investigation Kraft conducted shortly before the hearing. The dispute raises an issue of credibility. When assessing witness credibility, the trier of fact "may consider whether the testimony is reasonable and consistent with other evidence, whether a witness has made inconsistent statements, the witness's appearance, conduct, memory and knowledge of the facts, and the witness's interest in the [matter]." State v. Frake, 450 N.W.2d 817, 819 (Iowa 1990).

I find Kramer's testimony to be reasonable and consistent with the other evidence I believe. Kramer testified she felt a pop in her shoulder after she lifted the handle or bar of sleeve number 5 on the date of her injury. While Kramer has testified the pop in her shoulder occurred before and after she dropped the bar, she has consistently reported she felt the pop after she lifted the handle or bar. During cross-examination, Kramer was asked, and responded:

Q. So if I could just show a motion, you're claiming that your arms were crossed holding with your right arm the back pressure plate up 75 inches like this, if you could look at me, and you move it over and then your drop the plate when you felt that you injured your shoulder?

A. I was holding the sleeves and I picked the bar up, so I was not crossing myself. I'm holding the sleeves. I pick the bar up and bring it over (indicating).

Q. Now, did you actually lower the bar with your right arm, or did you drop that bar from a height of 75 inches?

A. I dropped it because as I was bringing it down my arm popped and I dropped it.

Q. And this bar in the evidence shows it's between 13 and 14 pounds; and it's on a hinge, and it's controlled by gravity; right? There's not any resistance?

A. Correct.

Q. Is it fair to say based on the measurements that you set forth with your Exhibit 21 that your claim is today that you were holding this bar 75 inches high with your right arm, and your left arm – your left hand, rather, was holding the sleeves in place, you felt a pop in your right shoulder, and then you let go of that silver handle and that back pressure plate fell immediately to the conveyor, which is 55 inches high; correct?

A. As I was bringing it down, my shoulder popped and I dropped it. Who knows how high it was.

Q. Would you agree with me there's no way when you drop something of this design, this weight, that you would also after injuring that right shoulder been able to put your hand underneath that back pressure plate?

A. It fell down. The handle that he's holding right there, I'm holding that handle and I drop it.

(Tr., pp. 64-66)

Kramer has an obvious interest in the outcome of this case. I had the opportunity to observe her testify, under oath. During her testimony Kramer engaged in direct eye contact and did not make any furtive movements. Kramer has consistently reported she

dropped the bar or handle and it fell on her hand. I do not find the inconsistency in her statements when she felt the "pop" to support she is untruthful.

Kramer did not wait several days to report her work injury. She attempted to report it to her coach, Stoychoff, the day it occurred, but he had left for the day, so she reported it to another coach, who told her to report it to Stoychoff the next day. (Tr., pp. 32-33, 72) Kramer followed the coach's instructions and reported her injury to Stoychoff. (Tr., p. 33) Kraft and Indemnity Insurance did not submit any contrary testimony or evidence. The day after Kramer's work injury Stoychoff prepared an Investigation Report, which documents, "[e]mployee was loading sleeves on the sleeve conveyor. When raising the back pressure plate to hold the sleeves in place, she felt a 'pop' in her right shoulder which caused her to release the plate which then fell on her right finger." (Ex. 17)

Hasley testified that before Kramer's injury, the plant had purchased and installed a platform, which would raise the employee eight inches from the floor while working on the machine. (Tr., pp. 143-144) I do not find his testimony convincing. Hasley did not work for the plant at the time of Kramer's injury. Kramer testified that at the time of her injury there was no platform in place. No witness testified on behalf of the defendants that a platform was present on sleeve number 5 at the time of Kramer's injury.

The Investigation Report prepared by Stoychoff supports Kramer's testimony. Stoychoff documented under the "Cause Analysis" section of the report, "[s]leeve conveyor is too high – needs to have a platform installed" and "overexertion." (Ex. 17) The Investigation Report was prepared by Stoychoff, not by Kramer. Kraft and Indemnity appear to contend the Investigation Report should not be given weight because it was not signed by all necessary officials. (Defendants' Brief at 5) Stoychoff, Kramer's coach at Kraft, completed and signed the Investigation Report. Kraft and Indemnity Insurance did not call Stoychoff as a witness during the hearing. At the time of Kramer's deposition of February 22, 2016, Stoychoff continued to work for Kraft. (Ex. C-5) The Investigation Report supports Kramer's testimony.

Stripling, Strong, Payne, and Hasley also testified Kramer's injury could not have occurred as she described, and support their testimony with a video, Exhibit A. I do not find their testimony reasonable and consistent with the other evidence I believe. The video was prepared in-house by Kraft, sometime in mid-May 2016, three years after Kramer's work injury. (Tr., p. 133) Kramer is five feet and five inches tall. (Tr., p. 30) The man depicted in the video is five feet and 10 inches tall. (Tr., pp. 142-143) Certainly, a more accurate depiction would involve a person who is also five feet and five inches tall. Moreover, the man working on sleeve number 5 in the video is standing on a platform, which elevated him another eight inches. (Ex. 21, p. 173; Tr., p. 144) I do not find the video or the testimony of Stripling, Strong, Payne, and Hasley persuasive. I find Kramer credibly testified there was no platform in place on the date of her injury.

Kraft and Indemnity Insurance have not presented an alternate theory for how Kramer injured her right shoulder and hand. Kramer called witnesses, including the

former plant manager who testified Kramer has a reputation as an honest person. Dr. Jones, Kramer's treating physician, also agreed he never suspected Kramer was exaggerating or faking her injuries. (Ex. D-20) I conclude Kramer has established she sustained an injury arising out of and in the course of her employment.

## II. Nature and Extent of Disability

Kramer contends she has sustained a significant industrial disability. Kraft and Indemnity Insurance aver any disability Kramer has sustained is minimal.

The claimant bears the burden of proving the claimant's work-related injury is a proximate cause of the claimant's disability and need for medical care. Ayers v. D & N Fence Co., Inc., 731 N.W.2d 11, 17 (Iowa 2007); George A. Hormel & Co. v. Jordan, 569 N.W.2d 148, 153 (Iowa 1997). "In order for a cause to be proximate, it must be a 'substantial factor.'" Ayers, 731 N.W.2d at 17. A probability of causation must exist, a mere possibility of causation is insufficient. Frye v. Smith-Doyle Contractors, 569 N.W.2d 154, 156 (Iowa Ct. App. 1997). The cause does not need to be the only cause, "[i]t only needs to be one cause." Armstrong Tire & Rubber Co. v. Kubli, 312 N.W.2d 60, 64 (Iowa 1981).

The question of medical causation is "essentially within the domain of expert testimony." Cedar Rapids Cmty. Sch. Dist. v. Pease, 807 N.W.2d 839, 844-45 (Iowa 2011). The deputy commissioner, as the trier of fact, must "weigh the evidence and measure the credibility of witnesses." Id. The trier of fact may accept or reject expert testimony, even if uncontroverted, in whole or in part. Frye, 569 N.W.2d at 156. When considering the weight of an expert opinion, the fact-finder may consider whether the examination occurred shortly after the claimant was injured, the compensation arrangement, the nature and extent of the examination, the expert's education, experience, training, and practice, and "all other factors which bear upon the weight and value" of the opinion. Rockwell Graphic Sys., Inc. v. Prince, 366 N.W.2d 187, 192 (Iowa 1985).

Kramer reported injuries to her right index finger and shoulder. None of the physicians who examined her determined she sustained a permanent impairment regarding her right index finger.

On November 20, 2015, after Kramer's surgical procedure, Dr. Jones issued an opinion finding Kramer had sustained a permanent impairment of four percent to her upper extremity, and did not list any work restrictions. (Ex. 2, p. 45)

Mark Taylor, M.D., who practices with Dr. Kuhnlein, performed a second independent medical examination of Kramer in January 2016, and issued a report on January 29, 2016. (Ex. 6) Dr. Taylor diagnosed Kramer with a right shoulder injury with rotator cuff tears resulting in surgery. (Ex. 6, p. 75) Dr. Taylor agreed with Dr. Kuhnlein that Kramer's right shoulder injury is directly and causally related to her April 14, 2013 work incident. (Ex. 6, p. 75) Dr. Taylor also agreed with Dr. Jones that Kramer reached



maximum medical improvement on November 20, 2015. (Ex. 6, p. 75) Using the AMA Guides, Dr. Taylor opined:

Turning to Figures 16-40, 16-43 and 16-46, on pages 476-479, and compared to her unaffected left upper extremity, I would assign a 7% right upper extremity impairment rating related to decrements in range of motion. She also demonstrated mild weakness and as per Table 16-35, on page 510, I would assign an additional 3% upper extremity impairment related to her weakness. This results in a 10% right upper extremity impairment rating. As per Table 16-3, on page 439, this converts to a 6% whole person impairment rating.

(Ex. 6, p. 75) Dr. Taylor recommended lifting restrictions of 20 pounds occasionally from floor to waist level or above shoulder level and 30 pounds occasionally between waist and chest/shoulder level, only occasional overhead work, to avoid any repetitive or sustained activities at or above shoulder level with the right upper extremity, and agreed with Dr. Kuhnlein that when lifting, Kramer should keep her right arm close to her body. (Ex. 6, p. 76)

Kramer sustained a non-work injury to her foot. Dr. Jones released Kramer to full duty on February 9, 2016. (Tr., p. 38-39; Ex. C-7) Kramer testified when she returned to work she operated sleever number 5 and she worked overtime. (Tr., p. 41)

Dr. Jones reviewed Dr. Taylor's report, and issued a letter on February 17, 2016, agreeing with Dr. Taylor's work restrictions, and finding:

In regard to an impairment rating, I have evaluated his impairment rating and would disagree slightly with that. I do not have any disagreements or question his 7% based on range of motion. However, using the American Medical Association Guide to Evaluation of Permanent Impairment, Fifth Edition, Page 508, under paragraph 16.8A (principles), in the first paragraph it states that, "Decreased strength (cannot) be rated in the presence of decreased motion, painful conditions, deformities, or absence of parts (e.g. thumb amputation) that prevent effective application with maximal force in the region being evaluated." Therefore, I do not feel that it would possible to add a 3% impairment due to weakness. Therefore, I would agree basically with a 7% impairment.

(Ex. 2, p. 46) Dr. Jones agrees with Dr. Taylor's permanent restrictions. Dr. Jones disagrees with Dr. Taylor's assessment of an additional three percent impairment due to weakness. I find Dr. Jones's opinion more persuasive than Dr. Taylor's opinion regarding weakness.

Page 508 of the AMA Guides, provides,

In a rare case, if the examiner believes the individual's loss of strength represents an impairing factor that has not been considered adequately by other methods in the *Guides*, the loss of strength may be rated separately. An example of this situation would be loss of strength due to a severe muscle tear that healed leaving a palpable muscle defect. If the examiner judges that loss of strength should be rated separately in an extremity that presents other impairments, the impairment due to loss of strength *could be combined* with the other impairments, *only* if based on unrelated etiological or pathomechanical causes. *Otherwise, the impairment ratings based on objective anatomic findings take precedence.* Decreased strength *cannot* be rated in the presence of decreased motion, painful conditions, deformities, or absence of parts (eg, thumb amputation) that prevent effective application of maximal force in the region being evaluated.

Dr. Taylor assigned a seven percent impairment rating for shoulder motion impairment under Figures 16-40, 16-43 and 16-46. Dr. Taylor has not explained why he considers Kramer's situation to be a rare case where the loss of strength is not considered adequately by the AMA Guides. Dr. Taylor's opinion does not provide that Kramer's loss of strength is due to an unrelated etiological or pathomechanical cause. Under the Guides, decreased strength cannot be rated in the presence of decreased motion that prevents effective application of maximal force in the region being evaluated.

"Industrial disability is determined by an evaluation of the employee's earning capacity." Pease, 807 N.W.2d at 852. In considering the employee's earning capacity, the deputy commissioner evaluates several factors, including "consideration of not only the claimant's functional disability, but also [his] age, education, qualifications, experience, and ability to engage in similar employment." Swiss Colony, Inc. v. Deutmeyer, 789 N.W.2d 129, 137-38 (Iowa 2010). The inquiry focuses on the injured employee's "ability to be gainfully employed." Id. at 138.

The determination of the extent of disability is a mixed issue of law and fact. Neal v. Annett Holdings, Inc., 814 N.W.2d 512, 525 (Iowa 2012). Compensation for permanent partial disability shall begin at the termination of the healing period. Iowa Code § 85.34(2). Compensation is paid in relation to 500 weeks as the disability bears to the body as a whole. Id. § 85.34(2)(u). When considering the extent of disability, the deputy commissioner considers all evidence, both medical and nonmedical. Evenson, 2016 WL 3125846, at \*9.

Kramer is 51 and is a high school graduate. (Tr., pp. 23, 46) Kramer has not received any additional education or training beyond high school. (Tr., p. 24) Kramer has worked as a stocker, cashier, assistant store manager, store manager, customer service representative, bank teller, secretary to the president of a bank, order picker in a warehouse, and manufacturing production worker. (Tr., pp. 56-57; Ex. 9, pp. 85-86)

Sellner opined that when considering the restrictions imposed by Dr. Jones on February 17, 2016, Kramer "is capable of working in a light physical demand levels [sic] based on the *Dictionary of Occupational Titles*." (Ex. G-7) Sellner conducted a labor market survey in the Mason City area, and found Kramer would be able to perform the available positions of security officer, cashier, customer service representative, hostess, store team member, production worker, front desk worker, and order processing technician. (Ex. G-7-G-8) These positions are consistent with her past relevant work. The wages for the positions range between \$8.78 and \$16.86 per hour, which is lower than her current wage of \$23.72 per hour. (Ex. G-10; Tr., p. 46)

Kramer has worked for Kraft since 1998, on the sleever machines and in the quality lab. Kramer continues to work for Kraft and her hourly wage is higher than at the time of her injury. (Tr., pp. 22-24, 46) As of the date of the hearing Kramer had not returned to her past relevant work as a sleever operator or as a quality operator in the quality lab. Dr. Jones has opined the quality operator position in the lab "would seem to fit exactly within the parameters of the capabilities of her shoulder." (Ex. 2, p. 48)

Kramer is concerned she may lose her job at Kraft because she believes Hasley wants to terminate her employment. There was no evidence presented at hearing that Kramer's position at Kraft is temporary and will not continue. Kramer has not been disciplined since she experienced her work injury and continues to be employed. It would be speculative to assume her job is not permanent, as Kramer's industrial disability must be assessed at the time of hearing. Based on the industrial disability factors, I conclude Kramer has sustained a 25 percent industrial disability.

### III. Temporary Partial Disability Benefits

Kramer contends she is entitled to \$26,813.39 in temporary partial disability benefits. Kramer avers that after allowing Kraft and Indemnity Insurance a \$11,366.46 credit for temporary partial disability benefits paid, she is entitled to \$15,446.93 in additional temporary partial disability payments because after her work injury Kraft did not permit her to work the overtime she was accustomed to working before her injury. Kramer's calculations are set forth in Exhibit 16. Kraft and Indemnity Insurance allege Kramer overstates her entitlement to additional temporary partial disability benefits because she was released to full duty and received overtime pay from December 18, 2013, until her surgery on November 6, 2014, and Kramer failed to include her regular bonus income in calculating her actual gross weekly income.

Iowa Code section 85.33 governs temporary disability benefits. Dunlap v. Action Warehouse, 824 N.W.2d 545, 556 (Iowa Ct. App. 2012). Under the statute,

2. "Temporary partial disability" or "temporarily, partially disabled" means the condition of an employee for whom it is medically indicated that the employee is not capable of returning to employment substantially similar to the employment in which the employee was engaged at the time of injury, but is able to perform other work consistent with the employee's disability. "Temporary partial benefits" means benefits payable, in lieu of

temporary total disability and healing period benefits, to an employee because of the employee's temporary partial reduction in earning ability as a result of the employee's temporary partial disability.

Iowa Code § 85.33(2).

Dr. Jones released Kramer to full duty without restrictions December 18, 2013, finding he had nothing to offer Kramer, and she returned to full duty. (Ex. 2, pp. 30-32) Kramer received shoulder surgery on November 6, 2014. (Ex. I-1) Following the surgery Kramer was taken off work for six weeks and then returned to a light-duty position. (Tr., p. 38)

The record reflects Kramer returned to full duty and received overtime until her surgery. (Ex. 16, pp. 123-124) Any loss in income for the period of January 3, 2014 through October 24, 2014 is not attributable to a temporary partial disability. Given Kramer had returned to her position, full duty without restrictions, she is not entitled to additional temporary partial disability benefits for this period.

The statute provides a formula for calculating temporary partial disability payments. "The temporary partial benefits shall be sixty-six and two-thirds percent of the difference between the employee's weekly earnings at the time of the injury, computed in compliance with section 85.36, and the employee's actual gross weekly income from employment during the period of temporary partial disability." Iowa Code § 85.33(4).

Under Iowa Code section 85.36,

The basis of compensation shall be the weekly earnings of the injured employee at the time of the injury. Weekly earnings means gross salary, wages, or earnings of an employee to which such employee would have been entitled had the employee worked the customary hours for the full pay period in which the employee was injured, as regularly required by the employee's employer for the work or employment for which the employee was employed, computed or determined as follows and then rounded to the nearest dollar.

The term "gross earnings" is defined as,

Recurring payments by employer to the employee for employment, before any authorized or lawfully required deduction or withholding of funds by the employer, excluding irregular bonuses, retroactive pay, overtime, penalty pay, reimbursement of expenses, expense allowances, and the employer's contribution for welfare benefits.

Iowa Code § 85.61(3). The amount of regular annual bonus is divided by 52 to determine the weekly gross income. Cf. id. § 85.36(5) (in the case of an employee paid

on a yearly pay basis, "the weekly earnings shall be the yearly earnings divided by fifty-two").

Kramer received annual bonuses on March 7, 2014, in the amount of \$1,662.00, and on March 6, 2015, in the amount of \$2,217.00, and on February 26, 2016, in the amount of \$4,313.67. (Ex. 16, pp. 131-133) The parties included the bonus income when calculating Kramer's gross weekly earnings for determining her rate in Exhibit 15. (Tr., p. 47) Kraft and Indemnity Insurance aver Kramer's bonus income should be included when determining her entitlement to temporary partial disability benefits.

The record supports that Kramer received annual bonuses. There was no evidence presented at hearing that the bonus income was irregular. Burton v. Hilltop Care Ctr., 813 N.W.2d 250, 265-66 (Iowa 2012) (affirming the commissioner's finding the bonus was regular where the employee received an annual bonus). The bonus income Kramer received following her injury should be included in her actual earnings for purposes of determining her entitlement to temporary partial disability benefits.

The \$1,662.00 March 7, 2014 bonus, divided by 52 weeks is \$31.96 per week, or \$63.92 per bi-weekly paycheck. Kraft and Indemnity Insurance aver this amount should have been included in the pay received for the weeks of May 3, 2013 through February 28, 2014. As analyzed above, Kramer, is not entitled to additional temporary partial disability benefits for the weeks of January 3, 2014 through February 28, 2014. Using Kramer's Exhibit 16, with the inclusion of the bonus income, Kramer is entitled to temporary partial disability payments, as follows:

Date	Exhibit 16 Wages	Bonus Income	Total Wages	AWW (Bi-Weekly)	Difference	TTD (2/3)
5/3/2013	\$2,463.59	\$63.92	\$2,527.51	\$2,684.66	\$157.15	\$104.77
5/17/2013	\$2,646.80	\$63.92	\$2,710.72	\$2,684.66	N/A	\$0
5/31/2013	\$2,759.55	\$63.92	\$2,823.47	\$2,684.66	N/A	\$0
6/14/2013	\$2,563.53	\$63.92	\$2,627.45	\$2,684.66	\$57.21	\$38.14
6/28/2013	\$2,049.23	\$63.92	\$2,113.15	\$2,684.66	\$571.51	\$381.01
7/12/2013	\$1,961.85	\$63.92	\$2,025.77	\$2,684.66	\$658.89	\$439.26
7/26/2013	\$2,049.23	\$63.92	\$2,113.15	\$2,684.66	\$571.51	\$381.01
8/9/2013	\$1,663.06	\$63.92	\$1,726.98	\$2,684.66	\$957.68	\$638.45
8/23/2013	\$1,781.45	\$63.92	\$1,845.37	\$2,684.66	\$839.29	\$559.53
9/6/2013	\$2,429.76	\$63.92	\$2,493.68	\$2,684.66	\$190.98	\$127.32
9/20/2013	\$2,243.73	\$63.92	\$2,307.65	\$2,684.66	\$377.01	\$251.34
10/4/2013	\$1,617.96	\$63.92	\$1,681.88	\$2,684.66	\$1,002.78	\$668.52
10/18/2013	\$1,192.33	\$63.92	\$1,256.25	\$2,684.66	\$1,428.41	\$952.27
11/1/2013	\$2,446.68	\$63.92	\$2,510.60	\$2,684.66	\$174.06	\$116.04
11/15/2013	\$2,083.06	\$63.92	\$2,146.98	\$2,684.66	\$537.68	\$358.45
12/6/2013	\$2,023.86	\$63.92	\$2,087.78	\$2,684.66	\$596.88	\$397.92
12/20/2013	\$2,455.13	\$63.92	\$2,519.05	\$2,684.66	\$165.61	\$110.41
Total						\$5,524.44

The \$2,217.00 March 6, 2015 bonus, divided by 52 weeks is \$42.63 per week, or \$85.26 per bi-weekly paycheck. Kraft and Indemnity Insurance aver this amount should have been included in the pay received for the weeks of March 14, 2014 through

February 27, 2015. As analyzed above, Kramer, is not entitled to additional temporary partial disability benefits for the weeks of March 14, 2014 through October 24, 2014. Using Kramer's Exhibit 16, with the inclusion of the bonus income, Kramer is entitled to temporary partial disability payments, as follows:

Date	Exhibit 16 Wages	Bonus Income	Total Wages	AWW (Bi-Weekly)	Difference	TTD (2/3)
11/7/2014	\$1,707.75	\$85.26	\$1,793.01	\$2,684.66	\$891.65	\$594.43
11/21/2014	\$1,955.00	\$85.26	\$2,040.26	\$2,684.66	\$644.40	\$429.60
12/5/2014	\$1,840.00	\$85.26	\$1,925.26	\$2,684.66	\$759.40	\$506.26
12/19/2014	\$1,702.00	\$85.26	\$1,787.26	\$2,684.66	\$897.40	\$598.26
1/2/2015	\$1,840.00	\$85.26	\$1,925.26	\$2,684.66	\$759.40	\$506.26
1/16/2015	\$1,840.00	\$85.26	\$1,925.26	\$2,684.66	\$759.40	\$506.26
1/30/2015	\$1,840.00	\$85.26	\$1,925.26	\$2,684.66	\$759.40	\$506.26
2/13/2015	\$1,868.00	\$85.26	\$1,953.26	\$2,684.66	\$731.40	\$487.60
2/27/2015	\$1,868.00	\$85.26	\$1,953.26	\$2,684.66	\$731.40	\$487.60
Total						\$4,622.53

The \$4,313.67 February 26, 2016 bonus, divided by 52 weeks, is \$82.95 per week, or \$165.90 per bi-weekly paycheck. Kraft and Indemnity Insurance contend the bonus income should have been included in the pay received for the weeks of March 13, 2015 through November 6, 2015. Using Kramer's Exhibit 16, with the inclusion of the bonus income, Kramer is entitled to temporary partial disability payments as follows:

Date	Exhibit 16 Wages	Bonus Income	Total Wages	AWW (Bi-Weekly)	Difference	TTD (2/3)
3/13/2015	\$1,868.00	\$165.90	\$2,033.91	\$2,684.66	\$650.74	\$433.83
3/27/2015	\$1,868.00	\$165.90	\$2,033.91	\$2,684.66	\$650.74	\$433.83
4/10/2015	\$1,868.00	\$165.90	\$2,033.91	\$2,684.66	\$650.74	\$433.83
4/24/2015	\$1,868.00	\$165.90	\$2,033.91	\$2,684.66	\$650.74	\$433.83
5/8/2015	\$1,868.00	\$165.90	\$2,033.91	\$2,684.66	\$650.74	\$433.83
5/22/2015	\$1,398.65	\$165.90	\$1,564.56	\$2,684.66	\$1,120.09	\$746.73
5/29/2015	\$782.00	\$165.90	\$947.91	\$2,684.66	\$1,736.74	\$1,157.83
6/19/2015	\$1,161.66	\$165.90	\$1,327.57	\$2,684.66	\$1,357.08	\$904.72
7/3/2015	\$2,515.96	\$165.90	\$2,681.87	\$2,684.66	\$2.78	\$1.85
7/17/2015	\$2,699.96	\$165.90	\$2,865.87	\$2,684.66	N/A	\$0
7/31/2015	\$1,616.99	\$165.90	\$1,782.90	\$2,684.66	\$901.75	\$601.17
8/14/2015	\$1,401.00	\$165.90	\$1,566.91	\$2,684.66	\$1,117.74	\$745.16
8/28/2015	\$2,191.98	\$165.90	\$2,357.89	\$2,684.66	\$326.76	\$217.84
9/11/2015	\$2,507.21	\$165.90	\$2,673.12	\$2,684.66	\$11.53	\$7.69
9/25/2015	\$1,911.90	\$165.90	\$2,077.81	\$2,684.66	\$606.84	\$404.56
10/9/2015	\$1,722.06	\$165.90	\$1,887.97	\$2,684.66	\$796.68	\$531.12
10/23/2015	\$2,507.21	\$165.90	\$2,673.12	\$2,684.66	\$11.53	\$7.69
11/6/2015	\$2,399.22	\$165.90	\$2,565.13	\$2,684.66	\$119.52	\$79.68
Total						\$7,575.19

Kramer is entitled to \$17,722.16 in temporary partial disability benefits. Kraft and Indemnity Insurance are entitled to a credit of \$11,366.46 for temporary partial disability

payments paid to Kramer. Thus, Kramer is entitled to \$6,355.70 in additional temporary partial disability payments.

#### IV. Penalty

Kramer contends she should receive penalty benefits because Kraft and Indemnity Insurance failed to properly pay temporary partial disability benefits and failed to timely pay permanent benefits after Kraft and Indemnity Insurance received Dr. Jones's impairment rating. Kraft and Indemnity Insurance allege no penalty should be imposed because Kraft and Indemnity Insurance made temporary partial disability payments to Kramer in good faith.

Under Iowa Code section 86.13(4), if there is a delay in payment absent "a reasonable or probable cause or excuse," the employee is entitled to penalty benefits, of up to 50 percent of the amount of benefits that were denied, delayed, or terminated without reasonable or probable cause or excuse. See also Christensen v. Snap-On Tools Corp., 554 N.W.2d 254, 260 (Iowa 1996) (citing earlier version of the statute). "The application of the penalty provision does not turn on the length of the delay in making the correct compensation payment." Robbennolt v. Snap-On Tools Corp., 555 N.W.2d 229, 236 (Iowa 1996). If a delay occurs without a reasonable excuse, the commissioner is required to award penalty benefits in some amount to the employee. Id.

The statute requires the employer or insurance company to conduct a "reasonable investigation and evaluation" into whether benefits are owed to the employee, the results of the investigation and evaluation must be the "actual basis" relied on by the employer or insurance company to deny, delay, or terminate benefits, and the employer or insurance company must "contemporaneously convey the basis for the denial, delay, or termination of benefits to the employee at the time of the denial, delay, or termination of benefits." Iowa Code § 86.13(4)(a). An employer may establish a "reasonable cause or excuse" if "the delay was necessary for the insurer to investigate the claim," or if "the employer had a reasonable basis to contest the employee's entitlement to benefits." Christensen, 554 N.W.2d at 260. "A 'reasonable basis' for denial of the claim exists if the claim is 'fairly debatable.'" Burton, 813 N.W.2d at 267. "Whether a claim is 'fairly debatable' can generally be determined by the court as a matter of law." Id. The issue is whether the employer had a reasonable basis to believe no benefits were owed to the claimant. Id. "If there was no reasonable basis for the employer to have denied the employee's benefits, then the court must 'determine if the defendant knew, or should have known, that the basis for denying the employee's claim was unreasonable.'" Id.

Benefits must be paid beginning on the 11th day after the injury, and "each week thereafter during the period for which compensation is payable, and if not paid when due," interest will be imposed. Iowa Code § 85.30. In Robbennolt, the Iowa Supreme Court noted, "[i]f the required weekly compensation is timely paid at the end of the compensation week, no interest will be imposed . . . . As an example, if Monday is the first day of the compensation week, full payment of the weekly compensation is due the

following Monday.” Robbenolt, 555 N.W.2d at 235. A payment is “made” when the check addressed to the claimant is mailed, or personally delivered to the claimant. Meyers v. Holiday Express Corp., 557 N.W.2d 502, 505 (Iowa 1996) (abrogated by Keystone Nursing Care Ctr. v. Craddock, 705 N.W.2d 299 (Iowa 2005) (concluding the employer’s failure to explain to the claimant why it would not pay permanent benefits upon the termination of healing period benefits did not support the commissioner’s award of penalty benefits)).

When considering an award of penalty benefits, the commissioner considers “the length of the delay, the number of delays, the information available to the employer regarding the employee’s injuries and wages, and the prior penalties imposed against the employer under section 86.13.” Schadendorf v. Snap-On Tools Corp., 757 N.W.2d 330, 336 (Iowa 2008). The purposes of the statute are to punish the employer and insurance company and to deter employers and insurance companies from delaying payments. Robbenolt, 555 N.W.2d at 237.

The record reflects that Kraft and Indemnity Insurance underpaid temporary partial disability benefits. Kraft and Indemnity Insurance contend they made payments to Kramer in good faith, and it was difficult to determine the amount due because Kramer’s bonus income varied from year-to-year. I conclude this argument lacks merit. Kramer’s attorney sent Kraft and Indemnity Insurance an e-mail on May 6, 2015, inquiring into the temporary partial disability payments. (Ex. 14, p. 117) Kraft and Indemnity Insurance did not pay the requested benefits after receiving the communication. Kraft and Indemnity Insurance underpaid temporary partial disability benefits due to Kramer, over a period of two years. A penalty should be imposed.

On November 20, 2015, Dr. Jones, the authorized treating physician, determined Kramer had reached maximum medical improvement and that she had sustained a four percent impairment to her right upper extremity. (Ex. 2, p. 45) Kramer testified that after she received Dr. Jones’s four percent rating she did not receive any permanent partial disability benefits from Kraft and Indemnity Insurance, or any explanation why she was not receiving benefits. (Tr., p. 55) Kramer’s attorney sent a letter to Kraft and Indemnity Insurance on February 22, 2016, requesting payment. (Ex. 14, p. 118) Kraft and Indemnity Insurance did not issue payment until March 7, 2016. (Ex. 8, p. 82-A)

Kraft and Indemnity Insurance underpaid and delayed paying both temporary and permanent partial disability benefits to Kramer. After being contacted by Kramer regarding the outstanding benefits, Kraft and Indemnity Insurance did not promptly issue payment to Kramer. Kraft and Indemnity Insurance did not communicate the reason for the delays to Kramer. A total penalty of \$4,000.00 is assessed against Kraft and Indemnity Insurance.



ORDER

IT IS THEREFORE ORDERED, that:

Defendants shall pay the claimant seventeen thousand seven hundred twenty-two and 13/100 dollars (\$17,722.13) in temporary partial disability payments, as analyzed above.

Defendants shall pay the claimant one hundred twenty-five (125) weeks of permanent partial disability benefits, commencing on November 21, 2015, at the rate of seven hundred seventy-five and 10/100 dollars (\$775.10).

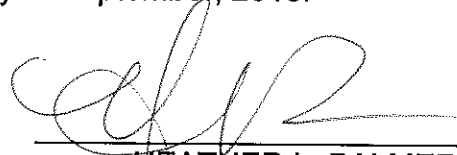
Defendants shall take credit for all temporary and permanent benefits previously paid.

Defendants shall pay accrued benefits in a lump sum, with interest on all accrued weekly benefits pursuant to Iowa Code section 85.30.

Defendants shall pay the claimant a penalty of four thousand and 00/100 dollars (\$4,000.00).

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

Signed and filed this 30<sup>th</sup> day of September, 2016.



HEATHER L. PALMER  
DEPUTY WORKERS'  
COMPENSATION COMMISSIONER

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HLP/srs

**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.