THE IOWA WORKERS' COMPENSATION COMMISSIONER

LINDA C. WOODS,	:	
	:	File No. 5000230; 5000231;
Claimant,	:	5000232; 5000233;
	:	5000234
	:	
	:	A R B I T R A T I O N
vs.	:	
	:	D E C I S I O N
POLK COUNTY DISTRICT COURT,	:	
STATE OF IOWA	:	
	:	
Employer,	:	Head Note No.: 1108; 1701;
Self-Insured,	:	1802;1803; 2209; 2401; 2502; 2501;
Defendant.	:	3000; 3001

STATEMENT OF THE CASE

These are proceedings in arbitration brought by the claimant, Linda C. Woods, against her employer, State of Iowa, self-insured, to recover benefits under the Iowa Workers' Compensation Act as a result of claimed injuries to the right arm, thumb, elbow, and shoulder as a result of use of the extremity at work. Claimant has filed original notices and petitions asserting five potential dates of injury. These are July 18, 2000, January 5, 2001, April 6, 2001, May 24, 2001, and July 2, 2001.

This matter came on for hearing before the undersigned deputy workers' compensation commissioner in Des Moines, Iowa on August 23, 2002. The record consists of the testimony of claimant, Lois Leary, Janet Miller, and Craig Redshaw as well as of claimants exhibits 1 through 22 and defendants' exhibits D through H.

ISSUES

The stipulations of the parties contained within the hearing report filed at the time of hearing are incorporated into this decision by reference.

The issues remaining be determined as to all file numbers are:

1. Whether claimant received an injury, which arose out of and in the course of her employment;

2. Whether claimant gave her employer timely notice of her injury pursuant to section 85.23;

3. Whether a causal relationship exists between the claimed injury and the claimed disability;

4. Whether claimant is entitled to permanent partial disability benefits to the body as whole and the extent of any such entitlement;

5. What is claimant's correct weekly rate of compensation;

6. Whether claimant is entitled to payment of certain medical costs as causally related to the claimed work injury;

7. Whether claimant is entitled to alternate medical care with, apparently, Robert Weatherwax, M.D.

8. Whether claimant is entitled to payment for time lost for medical care pursuant to section 85.27;

9. Whether claimant is entitled to reimbursement for the costs of an independent medical evaluation pursuant to section 85.39; and

10. Whether claimant is entitled to additional benefits under section 86.13 on account of defendant's unreasonable denial of benefits.

FINDINGS OF FACT AND ANALYSIS

The deputy workers' compensation commissioner, having heard the testimony and considered the evidence, finds:

Claimant was 56 years old at time of hearing; her birth date is August 11, 1946. She has a 10th grade education and no other formal training. She had minimal work experience, all in unskilled jobs, before beginning work as an assistant clerk in the Polk County District Court in May 1984. As an assistant clerk, claimant performed a variety of duties dependent upon her particular work position. In 1996 Claimant was transferred to the records department. There, claimant was responsible for disposal and destruction of outdated court files.

Performing these duties required that claimant lift and carry stacks or boxes of files, reach overhead to retrieve files, manually place file contents into a paper shredder, place either non shredded or shredded file contents into a dumpster, and then push the full dumpster from the basement of the court house to its outside pick up location. Additionally, claimant handled exhibits of various sizes, filled weekly supply requests, and, on occasion, assisted in moving boxes of files during remodeling or basement flooding.

Claimant is of modest height, being 5 ft. tall. Her work environment was not ergonomically well suited for her. Consequently, she had to do substantially more above

waist, above shoulder, and overhead lifting to accomplish her tasks than would have a taller person. She is right hand dominant.

On July 13, 2000, Claimant called their family physician and advised that her right elbow was bothering her even though she was wearing her elbow band and wrist brace. She requested a cortisone shot. [This particular family physician, a Dr. Evans, apparently saw claimant over an extended time. Only the office note of July 13, 2000 is in evidence, however. At hearing, defendant sought appropriate relief for its failure to receive all of Dr. Evans' medical records. Defendant's professional statement in this regard acknowledges that defense counsel did not contact the doctor's office seeking these records until July 31, 2002. By that time, defendant's case preparation completion date had passed. The scheduled hearing date was imminent. Any failure to receive the records, then, must be charged to defendant's own dilatoriness, and not to any fault on claimant's part.]

Apparently on Dr. Evans' referral, claimant saw Robert Weatherwax M.D. on July 18, 2000 with complaints of right elbow pain. Claimant reported that she had no serious injury although everything she did seemed to bother the right elbow. Claimant was tender over the lateral epicondyle. The doctor injected that area, provided claimant with stretching exercises, switched her anti-inflammatory from that which Dr. Evans' had been providing, and advised claimant to see him in another month. Claimant did not appear for a scheduled August 14, 2000 appointment.

Claimant did return to see Dr. Weatherwax on September 15, 2000. She then reported that she had excellent relief from the right elbow injection but that her pain had returned in the last week. The doctor performed a second elbow injection, advised claimant to continue stretching and released her to return on an as needed basis. He did not again see claimant until January 5, 2001. The doctor then described claimant as having flared up her right elbow epicondylitis and as being bothered by problems in her right shoulder. Claimant received injections to both areas. On a recheck visit of February 5, 2001, claimant described her right elbow as much improved but reported her shoulder still ached. Claimant next returned on March 5, 2001. Her elbow continued to bother her and she complained of discomfort in her right thumb as well. Dr. Weatherwax injected both the thumb and the right shoulder.

On April 6, 2001, claimant again saw Dr. Weatherwax. She then described her elbow and thumb as doing well but stated that her right shoulder was " giving her fits ". Claimant told Dr. Weatherwax that disposing of files and dumping them into the dumpster was " killing her shoulder ". The doctor imposed a 10 pound lifting restriction and ordered an arthrogram.

Meanwhile back at the office, on April 10, 2001, claimant's immediate supervisor reprimanded claimant for using excessive sick leave. Claimant advised her supervisor that she had missed work because of right elbow, arm and shoulder pain caused by the lifting and other activities required to dispose of files. Claimant also filled out a first report of injury giving a July 18, 2000 date of injury. The supervisor apparently did not

pass the finished first report to her own supervisor. Instead, she placed it in a file drawer with a note stating claimant had filled out the first report after receiving a sick use reprimand and stating that claimant was " not loading or on loading trucks ". It is expressly found that the employer had actual notice of claimant's condition and of claimant's perception that that condition was work-related as of April 10, 2001.

It also is expressly found that claimant's elbow condition's improving after relatively minor medical intervention demonstrates that claimant had no reason to believe she had a serious work related condition when she sought treatment for the elbow in July 2000. Likewise, while claimant initially complained to Dr. Weatherwax about her shoulder in January 2001, she cannot be held to have recognized it as a serious condition until she was aware that minor medical intervention was unlikely to remedy the condition and that the condition likely would have a permanent, adverse impact on her employment.

Additionally, because use of the upper extremity including the shoulder is ubiquitous for both work activities and activities of daily living, claimant cannot be held to have recognized the relation of her complaints to her work immediately. One can reasonably assume that claimant acted as a reasonable person and tried to modify those activities over which she had control to see if so doing alleviated her shoulder symptoms. Only with this type of trial and error can a layperson generally be held to recognize which of the myriad uses of the upper extremity are producing aggravating symptoms. Additionally, an employee is not required to first modify work activities in attempting to ascertain the origins of symptoms. Indeed, work activities are often the activities over which an employee has the least control and, therefore, of necessity last modifies.

It also was reasonable that claimant did not recognize the relationship between her work activities and her unremitting shoulder condition until her April 4, 2001 office visit with Dr. Weatherwax. It is also reasonable that claimant did not recognize the seriousness of her condition before that date. Her elbow complaints had resolved. She reasonably could have expected the shoulder also to resolve. Only when the shoulder complaints did not resolve despite medical treatment consistent with that given for the elbow complains could claimant be held to recognize it was a serious condition likely to have a permanent, adverse impact on her employment. That claimant was losing time from work and received a reprimand for doing so also would have signified to her that her condition was serious enough to adversely impact on her employment. For all these reasons, April 4, 2001 is the pled date of injury that most nearly reflects the manifestation date for claimant's cumulative injury to her right shoulder.

Claimant's thumb and elbow pain have resolved. Dr. Weatherwax has opined that claimant has no permanent impairment on account of the elbow condition although the condition itself was work-related. He has not connected claimant's thumb complaints to her work. It, therefore, is not necessary to consider the cumulative injury manifestation date relative to these conditions. Because the doctor has opined that the elbow problems related to claimant's work, claimant is entitled to payment of medical

costs for treatment of the elbow. Claimant has not lost more than three days of work on account of the elbow condition. She also has no permanent injury on account of her elbow condition. The record, therefore, does not demonstrate that claimant qualifies for lost time payments under section 85.27 as a result of work time missed to receive medical services for the elbow only.

(Defendant may argue that since they did not have notice of claimant's elbow condition before the July 2000 treatment for that condition, they have no liability for expenses related to that treatment. The law as the undersigned understands it would disagree. Using the analysis set forth above, claimant as a reasonable person likely would not have known of the work relatedness of her elbow condition until her discussions with Dr. Weatherwax in April 2001.)

Claimant's individual earnings record of April 4, 2001 reflects base pay of $1,256 and lead worker pay of $50.40. That amount equals $1,306.40, paid on a biweekly basis. That amount divided by 2 equals $653.20. Claimant as single individual entitled to one exemption and having an April 4, 2001 date of injury has a weekly rate of $386.30. Claimant's employer also provides her with benefits by way of a retirement pension contribution, and health, dental and life insurance. These cannot properly be considered part of claimant's weekly earnings. She has no actual access to these amounts, cannot use them as a matter of her own discretion, and they cannot be included fairly in the generally understood definitions of gross salary, wages, or earnings. See Iowa Code section 4.1 (38).

As discussed above, claimant’s shoulder symptoms did not resolve with conservative care. On May 24, 2001, Dr. Weatherwax performed right shoulder decompression with repair of a small rotator cuff tear.

Claimant did not work at all because she was incapacitated after her surgery from May 24, 2001 through June 1, 2001. Claimant then work reduced hours on June 7th, June 8th, June 11th and June 12, 2001 while she recovered from her surgery. Claimant lost 22.75 hours from work from July 25, 2001 through October 3, 2001 either to see Dr. Weatherwax or to participate in physical therapy for her shoulder. Claimant lost work on September 14, 2001 on account of arm pain and because medications made her sick. Claimant was apparently paid benefits under section 85.27 (7) for time taken on June 18, 2001 to see Dr. McCaughy.

On July 2, 2001, Dr. Weatherwax opined that although claimant had no history of a specific right shoulder injury at work, the repetitive activities of loading file boxes, carrying them to a cart, and disposing of them in a dumpster would be a significant stress on her arm and could aggravate her shoulder problems. He also opined that this type of activity was significant enough to cause her impingement, which led to the ultimate tearing of her rotator cuff.

Dr. Weatherwax refined and elaborated on these opinions in his deposition testimony. He explained that claimant's smaller stature required her to reach overhead

with greater frequency than a taller person. He stated that while claimant had not performed these activities continuously and may not have reached or lifted large weights, doing these activities over an extended time produced her shoulder impingement and cuff tear. No contrary medical opinion or evidence is in the record. While defendant has placed great emphasis on the frequency and the amount of weight claimant would have manipulated, nothing suggests that Dr. Weatherwax did not have an accurate understanding of claimant's duties. Additionally, the doctor addressed these concerns in his deposition. He opined that an individual lifting greater weight or doing the activities for greater duration might develop problems more quickly, but that these activities, even if done less frequently or less intensely, albeit over prolonged period, likely would result in problems such as claimant has.

It expressly is found that claimant's right elbow condition was a temporary condition there resulted from her work activities. It also expressly is found that claimant's right shoulder condition and its permanent residuals resulted from her work activities.

In early June 2001, after claimant's returned to work with a light duty release, her immediate supervisor finally forwarded a first report of injury through the administrative chain of command. Craig Redshaw, finance director for the Fifth Judicial District, completed a formal first report of the injury and forwarded it to the state's third-party administrator on June 11 or 12, 2001. Claimant saw Richard C. McCaughey, D.O., a State of Iowa retained physician, on June 18, 2001. Claimant then gave a history of filling six dumpsters per week with boxes of old records between July 2000 and January 2001. She associated her right shoulder pain and stiffness to those activities. Dr. McCaughy agreed with Dr. Weatherwax's light duty work release restrictions that claimant lift no more than 10 pounds and avoid overhead use of her right arm.

Meanwhile, Lois Mullin, claims specialist with the Iowa Department of Personnel, apparently had requested and received Dr. Weatherwax's office notes regarding claimant. Ms. Mullen, on June 20, 2001, via fax asked Dr. Weatherwax if claimant's condition was work-related. The doctor replied, via fax, " No specific reference to work related injury or aggravation. " By letter dated June 21st, 2001, Ms. Mullen advised claimant that she had reviewed claimant's medical [records] and the doctor stated that her condition was not work-related. Claimant returned to Dr. Weatherwax on July 2, 2001. After further conversation with claimant as regards her job duties, Dr. Weatherwax formally revised his opinion as to whether claimant's repetitive work activity had been significant enough to cause her shoulder impingement. The doctor, also on that date, via a copy of a letter to claimant's then current family physician, advised Lois Mullin of the change in his opinion. Ms Mullin disregarded this communication.

Claimant's counsel either through direct communication with Ms Mullin or through letters to defense counsel also advised the state of Dr. Weatherwax's revised opinion as to causation. No one responded on behalf of the state until defendants supplemented their answer to interrogatory 2001. No. 26 on October 12, 2001. The interrogatory answer stated:

> To date we have denied benefits because Ms. Woods had preexisting problems with her arm and shoulder. There is also the issue of causation and whether she gave notice to her employer within the statutory time.

The state provided no evidence supporting its claim that claimant had pre-existing arm and shoulder problems. The state also has provided no evidence refuting Dr. Weatherwax's opinion as to causation. Indeed, the testimony the state has generated regarding claimant's job duties wholly is supportive of the doctor's insights into the mechanism of claimant's injury as he provided in his deposition taken August 5, 2002. The state also has provided no explanation for its failure prior to the August 5, 2002 deposition, to inquire further of Dr. Weatherwax as to why his opinion on causation had changed. Minimally competent claims handling practice would have induced such inquiry shortly after receipt of the doctor's July 2, 2001 revised opinion.

Dr. Weatherwax has opined that claimant has a permanent partial impairment of eight percent of the upper extremity or 5 percent of the body as a whole account of her work condition. He has released claimant from his care. The claimant has made no showing that she has a need for care at this time. Should she need care in the future, the employer, of course, has a right to choose that care if it agrees the needed care relates to her work condition. If claimant then is dissatisfied with that care, she should file a petition for alternate medical care. No justiciable controversy now exists as regards alternate care. Likewise, there is no evidence in this record that claimant has sought an independent evaluation for which reimbursement under section 85.39 would be appropriate.

The parties presented considerable evidence at hearing relative to the stability of claimant's employment with the Fifth Judicial District. Suffice it to say that the evidence would suggest that neither claimant nor her immediate supervisor is a paragon of virtue. Nevertheless, it does not appear that the fifth judicial district's administration has singled claimant out for adverse treatment. Indeed, the district has accommodated claimant's work restrictions since Dr. Weatherwax released her in June 2001. This accommodation is significant because claimant is not performing make-work only for her employer. Her current duties utilize skills she has acquired in her almost two decades of work with the judicial district. Indeed, claimant has acquired a whole bevy of desirable office support staff skills that would transfer to other business settings and would not require that she exceed her work restrictions. Additionally, claimant appears to be a fairly bright individual. Her biggest drawback is her lack of a high school diploma. Nothing in this record suggests that claimant could not obtain a general educational diploma if she chose to pursue it. Is expressly found that claimant has a loss of earnings capacity of 25 percent.

CONCLUSIONS OF LAW

First considered is whether claimant's thumb, elbow, and shoulder conditions constitute an injury or injuries arising out of it in the course of her employment.

The claimant has the burden of proving by of preponderance of the evidence that the alleged injury actually occurred and that it both arose out of and in the course of the employment. Ciha v. Quaker Oats Co. 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. Fernandez v. 2800 Corp. 528 N.W.2d 309 (Iowa 1995). An injury arises out of the employment when a causal relationship exists between the injury and the employment. Miedema v. Dial Corp 551 N.W.2d 3 09 (Iowa 1996). The injury must be a rational consequence of a hazard connected with the employment and not merely incidental to the employment. Wills v. Koehler Electric, 608 N.W.2d 1 (Iowa 2000); Miedina v. Dial Corp., 551 N.W. 2d 309 (Iowa 1996). An injury occurs "in the course of" employment went 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 v. Quaker Oats Co. 552 N.W.2d 143 (Iowa1996).

When the injury develops gradually over time, the cumulative injury rule applies. The date of injury for cumulative injury purposes is the date on which the disability manifests. Manifestation is best characterized as that date on which both the fact of injury and the causal relationship of the injury to the claimant's employment would be plainly apparent to reasonable person. The date of manifestation inherently is a fact based determination. The fact finder is entitled to substantial latitude in making this determination and may consider a variety of factors, none of which is necessarily dispositive, in establishing a manifestation date. Among others, these include missing work when the condition prevents performing the job, or receiving medical care for the condition. For time limitation purposes, the statute of limitations is not tolled until the employee as a reasonable person knows or should know that the cumulative, work-related condition is serious enough to have a permanent, adverse impact on employment. Herrera vs. IBP, Inc, 633 N.W.2d (Iowa 2001); Oscar Mayer Foods Corp. v. Tasler, 483 N.W.2d 824 (Iowa 1992); McKeever Custom Cabinets v. Smith, 379 N.W. 2d 368 (Iowa 1985)

It is concluded that claimant has established her right shoulder condition is a cumulative injury that arose out of in the course of her employment and manifested on April 6, 2001.

The notice issue presents itself for resolution.

Section 85.23 requires an employee to give notice of the occurrence of an injury to the employer within 90 days from the date of the occurrence, unless the employer has actual knowledge of the occurrence of the injury.

The purpose of the 90-day notice or actual knowledge requirement is to give the employer an opportunity to timely investigate the facts surrounding the injury. The actual knowledge alternative to notice is met when the employer, as a reasonably conscientious manager, is alerted to the possibility of a potential compensation claim

through information, which makes the employer aware that the injury occurred, and that it may be work related. Dillinger v. City of Sioux City, 368 N.W.2d 176 (Iowa 1985); Robinson v. Dep't of Transp., 296 N.W.2d 809 (Iowa 1980). The time period for giving notice does not begin to run until the claimant as a reasonable person, should recognize the nature, seriousness and probable compensable character of the injury. The reasonableness of claimant's conduct is to be judged in light of claimant's education and intelligence. Claimant must know enough about the condition or incident to realize that it is both serious and work connected. Positive medical information is unnecessary if information from any source gives notice of the condition's probable compensability. Robinson, 296 N.W.2d at 812.

Failure to give notice is an affirmative defense, which the employer must prove by a preponderance of the evidence. DeLong v. Highway Comm'n, 229 Iowa 700, 295 N.W. 91 (1940).

It is concluded that defendant has not established that claimant failed to give timely notice of her injury.

The causation issue must be considered.

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. Frye v. Smith Doyle Contractors, 569 N.W.2d 154 (Iowa App. 1997); George A. Hormel and Co. v. Jordan, 559 N.W.2d 148 (Iowa 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 Hospital 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 vs. Lauridsen Foods, Inc., 525 N.W.2d 417 (Iowa 1994). Unrebutted expert medical testimony cannot be summarily rejected. Poula v. Siouxland Wall & Ceiling, 516 N.W.2d 910 (Iowa App. 1994).

It is concluded that claimant has established that of causal relationship exists between her right shoulder injury and her permanent limitations on account of that condition.

It is concluded that claimant has established that the elbow condition for which she treated was a work-related condition.

Claimant's weekly rate of compensation is in dispute.

A well-known treatise states the following as regards commutation of weekly rate of compensation:

> Iowa Code Section 85.36 sets out the basis for determining the gross weekly earnings of the employee at the time of the injury. This then forms the basis for determining the "average weekly spendable earnings" and the resulting rate. When salary is paid on a bi-weekly, monthly, or other regular basis, the weekly earnings at the time of the injury are easy to compute. All that is required is to divide the salary into weekly units to arrive at the hourly earnings which form the basis of the rate determination.

Lawyer & Higgs, Iowa Workers' Compensation Law and Practice, Third Edition, sec. 12-1, page 119.

The treatise goes on to say that section 85.13 provides special rules for those other pay situations in which the wage must be an average of the employee's weekly earnings because it otherwise would not be representative. That the weekly earning on which the rate of compensation is based must be representative is premised on the definition of weekly earnings in the first unnumbered paragraph of section 85.36. That unnumbered paragraph defines weekly earnings as the gross salary, wages, or earnings of an employee to which the 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 employer's employee for the work for which the employee was employed.

If it's concluded that claimant has established a weekly rate of $386.30.

The question of the extent of claimant's permanent partial disability entitlement is now decided.

Functional impairment is an element to be considered in determining industrial disability which is the reduction of earning capacity, but consideration must also be given to the injured employee's age, education, qualifications, experience and inability to engage in employment for which the employee is fitted. Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963); Barton v. Nevada Poultry, 253 Iowa 285, 110 N.W.2d 660 (1961).

A finding of impairment to the body as a whole found by a medical evaluator does not equate to industrial disability. Impairment and disability are not synonymous. The degree of industrial disability can be much different than the degree of impairment because industrial disability references to loss of earning capacity and impairment

references to anatomical or functional abnormality or loss. Although loss of function is to be considered and disability can rarely be found without it, it is not so that a degree of industrial disability is proportionally related to a degree of impairment of bodily function.

Factors to be considered in determining industrial disability include the employee's medical condition prior to the injury, immediately after the injury, and presently; the situs of the injury, its severity and the length of the healing period; the work experience of the employee prior to the injury and after the injury and the potential for rehabilitation; the employee's qualifications intellectually, emotionally and physically; earnings prior and subsequent to the injury; age; education; motivation; functional impairment as a result of the injury; and inability because of the injury to engage in employment for which the employee is fitted. Loss of earnings caused by a job transfer for reasons related to the injury is also relevant. Likewise, an employer's refusal to give any sort of work to an impaired employee may justify an award of disability. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980). These are matters, which the finder of fact considers collectively in arriving at the determination of the degree of industrial disability.

There are no weighting guidelines that indicate how each of the factors is to be considered. Neither does a rating of functional impairment directly correlate to a degree of industrial disability to the body as a whole. In other words, there are no formulae, which can be applied and then added up to determine the degree of industrial disability. It therefore becomes necessary for the deputy or commissioner to draw upon prior experience as well as general and specialized knowledge to make the finding with regard to degree of industrial disability. See Christensen v. Hagen, Inc., Vol. 1 No. 3 State of Iowa Industrial Commissioner Decisions 529 (App. March 26, 1985); Peterson v. Truck Haven Cafe, Inc., Vol. 1 No. 3 State of Iowa Industrial Commissioner Decisions 654 (App. February 28, 1985).

Compensation for permanent partial disability shall begin at the termination of the healing period. Compensation shall be paid in relation to 500 weeks as the disability bears to the body as a whole. Section 85.34.

It is concluded that claimant has established an entitlement to permanent partial disability of 25 percent of the body as a whole. Permanent benefits shall commence on January 24, 2002.

Claimant's seeks payment of medical costs and medical mileage expenses related to treatment of her elbow and shoulder conditions.

The employer shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance and hospital services and supplies for all conditions compensable under the workers' compensation law. The employer shall also allow reasonable and necessary transportation expenses incurred for those services. The employer has the right to choose the provider of care, except where the employer has denied liability for the injury. Section 85.27. Holbert v.

Townsend Engineering Co., Thirty-second Biennial Report of the Industrial Commissioner 78 (Review-reopen 1975).

Claimant's medical treatment and her medical mileage expenses are both consistent with the type and dates of treatment the medical evidence demonstrates.

It is concluded that claimant is entitled to payment of medical mileage costs as set forth in claimant's Exhibit 6.

It is concluded that claimant is entitled to payment of medical expenses as set forth in claimant's Exhibit 7. Not withstanding that entitlement, defendant receives credit for amounts the employer-provided health insurance carrier has previously paid and is entitled to the benefit of any payment offsets that the health insurance carrier negotiated in claimant's behalf. Any remaining medical costs should be paid directly to the medical provider. Any of the costs that claimant paid out of pocket should be reimbursed directly to her.

Claimant's requests alternate medical care.

Section 85.27 (4) provides a remedy for a claimant who is dissatisfied with the care defendant is providing. Claimant currently is not in need of care. It is concluded that this record presents no justiciable controversy as regards to whether claimant is entitled alternate medical care.

Claimant seeks payment for time lost from work as a result of her elbow and shoulder conditions.

An employee is entitled to payment of healing period benefits for the time that the employee is totally incapacitated on a account of a work injury that results in permanent disability. Section 85.34 (1).

An employee is entitled to payment of temporary partial disability benefits when the employee is capable of and returns to suitable work during a time when it is not medically indicated that the employee can return to employment substantially similar to that engaged in when injured. Section 85.33.

An employee who is not receiving benefits under section 85.33 or section 85.34 (1) is entitled to be paid an amount equivalent to wages lost at the employee's regular rate of pay for time that the employee is required to leave work for one full day or less to receive medical services related to the work injury. Section 85.27 (7).

While claimant apparently believes all the time she lost from work should be compensated under section 85.27 (7), the record reflects otherwise. Claimant actually had lost time in which she was totally incapacitated from earning, in which she believed she was incapable of performing substantially similar duties but could perform duty for less extended hours, and time when she was required to leave work to receive medical services albeit otherwise working regular duty. Additionally, claimant had loss time in

which she received neither services nor could properly be considered either totally or partially incapacitated from work under the Workers' Compensation Act. She simply believed herself in too much pain and too sick to work. That belief is not supported by any doctor's excuse from work, however. Likewise, no medical information supports claimant's subjective belief that she could not work her full hours in June 2001.

It is concluded that claimant has established entitlement to healing period benefits from May 24th 2001 through June 1, 2001.

It is concluded that claimant has not established entitlement to temporary partial disability benefits for those days on which she worked reduced hours related to recovery from her surgery from June 7, 2001 through June 12, 2001.

It is concluded that claimant has established entitlement to payment for lost time as provided in Section 85.27 (7) for 22.75 hours lost from work to receive medical services from July 25, 2001 through October 3, 2001.

Claimant seeks reimbursement for an independent medical evaluation under section 85.39. This record does not establish that claimant has never sought in independent medical evaluation.

Is concluded that no justiciable controversy exists as to whether claimant is entitled to reimbursement for an independent medical evaluation.

Claimant argues she is entitled to payment of additional benefits under section 86.13 because defendant unreasonably denied her compensation claim.

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 Custom Meats, Inc., 528 N.W.2d 109 (Iowa 1995). It 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). A bare assertion that a claim is fairly debatable is insufficient. If the employer fails to show reasonable cause or excuse for the delay or denial it is mandatory to impose a penalty in an amount up to fifty percent of the amount unreasonably delayed or denied. Christensen v. Snap-on Tools Corp., 554 N.W.2d 254 (Iowa 1996). The factors to be considered in determining the amount of the penalty include the length of the delay, the number of delays, the information available to the employer and the employer's past record of penalties. Robbennolt, 555 N.W.2d at 238.

This writer finds the employer's claims handling practices relative to this claimant egregious and extremely mean-spirited. Claimant's immediate supervisor ignored claimant's initial report of her injury because the supervisor believed she could make the medical judgment call as to the work-relatedness of claimant's condition. The employer's claims administrators and attorneys did not take even minimal steps to ascertain whether claimant had a legitimate work injury after initially denying her claim on June 21, 2001.

Unfortunately, defendant can hinge its denial of benefits on the notice defense. This writer finds notice to be a very bogus issue in this claim. She believes that anyone properly charged with administering or defending workers' compensation claims could not have found a manifestation date for claimant's shoulder injury earlier than April 2001, or a discovery date for claimant's elbow condition earlier than that date. Nevertheless, claimant's counsel has argued that dates earlier than April 2000 could have been considered the appropriate manifestation date. That argument on claimant's counsel's part must be construed as an inference that a reasonable person could find claimant's entitlement to benefits fairly debatable. The undersigned is troubled by this reality. It seems to create a climate where a defendant can deny a claim for the most gossamer of reasons provided the most mere scintilla of evidence or logic supports the denial.

It is concluded that claimant has not established entitlement to penalty benefits on this record.

ORDER

THEREFORE, IT IS ORDERED:

That claimant's claims in File Nos. 5000231, 5000233, 5000234, and 5000230 are dismissed.

That, in File Number 5000232 defendant pay claimant permanent partial disability benefits at the weekly rate of three hundred eighty-six and 30/100 dollars ($386.30) with those benefits to commence on January 24, 2002.

Than defendant pay claimant healing period benefits at the above stated weekly rate from May 24, 2001 through June 1, 2001.

That defendant pay accrued amounts in a lump sum and pay interest pursuant to section 85.30.

That defendant pay claimant benefits pursuant to section 85.27 (7) for 22.75 hours of work time lost between July 25, 2001 and October 4, 2001.

That defendant pay claimant medical expenses and medical mileage costs for those amounts summarized in claimant's exhibits six and seven.

That defendant reimburse claimant directly for any out-of-pocket medical expenses.

The defendant receive credit as section 85.38 (2) provides.

That defendant pay costs of this proceeding pursuant to rule 876 IAC 4.33.

That defendant file subsequent reports of injury for File No. 5000232 as this division requires.

Signed and filed this __30th__ day of September, 2002

_____
HELENJEAN M. WALLESER
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

Copies to:

Ms. Mary Bernabe
Attorney at Law
5971 Highland Circle
West Des Moines, IA 50266

Ms. Kristin W. Ensign
Assistant Attorney General
Special Litigation Division
Hoover State Office Bldg.
Des Moines, IA 50319