BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

SENIJA MUMINOVIC,

Claimant,

vs.

FARBER BAG AND SUPPLY,

Employer,

and

TECHNOLOGY INSURANCE COMPANY,

Insurance Carrier,
Defendants.

File No. 5052065

ARBITRATION

DECISION

Head Note Nos.: 1803; 3000; 4000.2

STATEMENT OF THE CASE

Claimant, Senija Muminovic, filed a petition in arbitration seeking workers' compensation benefits from Farber Bag and Supply, employer, and Technology Insurance Company, insurance carrier, both as defendants, as a result of a stipulated injury sustained on September 25, 2013. This matter came on for hearing before Deputy Workers' Compensation Commissioner Erica J. Fitch, on January 22, 2016, in Des Moines, Iowa. The proceedings were translated by Azra Sikiric. The record in this case consists of joint exhibits A through W, claimant's exhibits X and Y, defendants' exhibits 1 and 2[1], and the testimony of the claimant, Meris Muminovic, and Ed Bartolotta. The parties submitted post-hearing briefs, the matter being fully submitted on June 13, 2016.

ISSUES

The parties submitted the following issues for determination:

1. Whether the stipulated work injury is a cause of permanent disability;
2. The extent of claimant's industrial disability, including whether claimant is entitled to permanent total disability benefits under the odd-lot doctrine;
3. The commencement date for permanent disability benefits;
4. The rate of compensation;

[1] Defendants submitted the exhibit post-hearing, marked as defendants' Exhibit A. The undersigned renumbered the exhibit to Exhibit 2, to correspond with defendants' previously offered Exhibit 1 and to avoid confusion with respect to previously admitted joint Exhibit A.

5. Whether claimant is entitled to penalty benefits under Iowa Code section 86.13 and if so, how much; and
6. Specific taxation of costs.

STIPULATIONS

The stipulations of the parties in the hearing report are incorporated by reference in this decision and are restated as follows:

1. The existence of an employer-employee relationship at the time of the alleged work injury.

2. Claimant sustained an injury on September 25, 2013 which arose out of and in the course of employment.

3. The alleged injury is a cause of temporary disability during a period of recovery.

4. If the injury is found to be a cause of permanent disability, the disability is an industrial disability.

5. At the time of the alleged injury, claimant's gross earnings were $357.45 per week and claimant was married.

6. Affirmative defenses were waived.

7. Prior to hearing, claimant was paid weekly benefits from September 12, 2014 at the rate of $259.12 per week; weekly benefits were ongoing as of the date of hearing.

FINDINGS OF FACT

The undersigned, having considered all of the evidence and testimony in the record, finds:

Claimant's testimony was consistent as compared to the evidentiary record and her deposition testimony. Her demeanor at the time of evidentiary hearing gave the undersigned no reason to doubt claimant's veracity. The undersigned observed claimant's posture as consistent with stiffness about her neck and shoulder regions, as well as maintaining her right arm close to her body. Claimant is found credible.

Claimant was 61 years of age at the time of hearing. She is married, a mother to three adult children, and a resident of Dubuque, Iowa. Claimant was born in Bosnia, where she completed the 8th grade. While in Bosnia, claimant did not work outside the home. (Claimant's testimony; Ex. O, p. 124) For purposes of her workers' compensation claim, claimant claimed as dependents her father-in-law, daughter, son-

in-law, grandson, and nephew. (Ex. O, p. 124) Claimant testified she and her husband send funds to these individuals who remain in Bosnia; all are adults. (Claimant's testimony; Ex. 1, Depo. Tr. pp. 9-11)

Claimant's English language skills are limited. Claimant testified she understands some spoken English words and was able to communicate in her employment. She is able to read some English words, but denied significant comprehension. (Claimant's testimony)

Claimant came to the United States as a refugee in November 1997. After one week of transition in Richmond, Virginia, claimant and her family lived in Utica, New York. The family remained in New York for approximately six months; they then moved to Iowa in July 1998. Claimant initially resided in Waterloo from July 1998 to January 1999. While in Waterloo, claimant worked in a meat processing plant, performing packaging duties. Her family moved to Dubuque in January 1999, where claimant took a job packaging at a meat processing plant. She earned $10.20 per hour and worked until June 2000, when the plant closed. (Claimant's testimony; Ex. O, pp. 124, 128)

Following closure of the meat packing plant, claimant secured work at defendant-employer, beginning on February 19, 2001. Claimant's job position was as a "stitcher", sewing bags. She sat in a chair at a work station and utilizing a foot pedal, sewed fabric together with a machine. This was her primary job duty, particularly for the final three years of her employment. (Claimant's testimony)

Claimant described defendant-employer as a small company of under 20 employees. As a result, in her employment, claimant was required to perform multiple duties, including sorting, cutting, sewing and packaging bags. The material of the bags varied and could include paper, plastic, or mesh. She was also, on occasion, required to perform some cleaning duties in the work area. Claimant testified the work was heavy in nature and required her to lift 50 to 75 pounds, albeit with assistance if available. She was also required to work above shoulder height when she stacked bundles on pallets. Claimant earned $8.55 per hour. (Claimant's testimony; Ex. O, pp. 124, 128)

In 2007, claimant testified she suffered from pain of her right arm, shoulder, and shoulder blade. Defendant-employer referred claimant for treatment with David Weber, D.C. Following a course of treatment including physical therapy, claimant returned to work. In 2010, claimant suffered with another flare in symptoms. She was again referred to Dr. Weber and ultimately returned to work. (Claimant's testimony)

The parties have stipulated claimant sustained a work-related cumulative injury with a date of September 25, 2013. Claimant testified at this time, she felt pain of her right shoulder, shoulder blade, and neck. She testified the pain radiated down her right arm and she also experienced tingling of three digits of her right hand. Defendant-employer directed claimant to return to Dr. Weber. (Claimant's testimony)

Claimant presented to Dr. Weber on October 28, 2013. Claimant expressed complaints of constant pain with numbness in the right arm, shoulder, neck, and back. Claimant reported the symptoms had been present for approximately two years, but recently worsened. (Ex. D, pp. 5, 7) Claimant continued to receive chiropractic care from Dr. Weber until November 11, 2013. (Ex. D, pp. 7-9) Thereafter, Dr. Weber ordered a cervical MRI. (Claimant's testimony)

At the referral of Dr. Weber, on February 5, 2014, claimant presented to neurologist, Nicholas Stanek, M.D. Dr. Stanek noted claimant had undergone a cervical MRI, which Dr. Stanek reviewed. Following examination, Dr. Stanek assessed neuropathy, cervical root. He recommended conservative care, including over-the-counter NSAIDs, cyclobenzaprine, physical therapy, and an evaluation by a pain specialist. (Ex. E, pp. 10-11)

Per Dr. Stanek's referral, on March 31, 2014, claimant presented to Timothy Miller, M.D. Dr. Miller performed a cervical epidural steroid injection. (Ex. G, pp. 44-45) Claimant testified the performed injection actually worsened her symptoms. (Claimant's testimony) Thereafter, claimant returned to Dr. Miller in April, May, and June 2014. Dr. Miller suggested EMG testing and issued prescriptions for gabapentin and meloxicam. (Ex. G, pp. 47, 51-52, 54)

From February 25, 2014 through June 24, 2014, claimant also underwent a course of physical therapy. (Ex. F, pp. 15-33)

On July 14, 2014, claimant returned to Dr. Stanek. In connection with the evaluation, claimant underwent an EMG. Dr. Stanek assessed chronic cervical radiculopathy on the right, probably involving the C7 nerve root. He referred claimant to Michael Chapman, M.D., for a surgical opinion. Dr. Stanek also imposed a work restriction of a 20-pound lift. (Ex. E, pp. 13-14)

At the referral of Dr. Stanek, on August 13, 2014, claimant presented to Dr. Chapman for evaluation. Following examination, Dr. Chapman assessed scapulohumeral fibrositis, carpal tunnel syndrome, cervical radiculopathy, and cervical spondylosis. He ordered a saline MRI of claimant's shoulder, ordered additional physical therapy, and commemorated a 20-pound lifting restriction. Dr. Chapman also referred claimant to Edwin Castaneda, M.D. for an opinion regarding carpal tunnel syndrome. (Ex. H, pp. 59, 61)

Claimant testified Dr. Chapman's course of care also included two injections of her right shoulder region. (Claimant's testimony)

On September 11, 2014, claimant worked her final day at defendant-employer. (Ex. O, p. 128) Claimant testified she completed her duties on September 11, 2014 and was then called into the administration office. At that time, Ed Bartolotta informed claimant she had been laid off due to lack of work. Claimant testified she protested, as she was not the least senior employee; however, she was sent home. Claimant

testified on the date of her lay off, she remained in pain and would have continued to work with this pain. (Claimant's testimony) Defendant-employer's records denote claimant was laid off due to lack of work. (Ex. Q, p. 133)

Mr. Bartolotta, plant manager of defendant-employer, testified at evidentiary hearing. Mr. Bartolotta testified defendant-employer employs 17 employees. He testified he served as claimant's supervisor for the entirety of her employment with defendant-employer. During this period, Mr. Bartolotta testified the two were able to communicate in English. He testified he communicated with claimant daily, if not hourly, during her employment. Mr. Bartolotta testified he observed claimant perform her duties and indicated 20 pounds would have been on the upper range of weights she handled in production. (Mr. Bartolotta's testimony)

Mr. Bartolotta confirmed on September 11, 2014, he notified claimant she had been laid off. For the two months preceding the layoff, Mr. Bartolotta testified claimant had been assigned to the shipping department due to lack of production work and defendant-employer's desire to maintain claimant's employment. He described claimant was a very good employee. Ultimately, the decision was made to lay claimant off. At the time, claimant informed Mr. Bartolotta she was able to work and wanted to continue working. Mr. Bartolotta testified claimant has not been replaced and the two new company hires are travelling salesmen. (Mr. Bartolotta's testimony)

Mr. Bartolotta's testimony was clear, professional and consistent with the evidentiary record. His demeanor provided the undersigned no reason to doubt his veracity. Mr. Bartolotta is found credible.

On September 12, 2014, claimant's son, Meris Muminovic, telephoned defendant-employer and spoke with Chuck Seymour. Mr. Muhminovic asked if claimant's layoff was related to an inability to perform her duties. Mr. Muhminovic also inquired as to the impact of the layoff upon claimant's workers' compensation benefits; Mr. Seymour indicated he would look into the status of claimant's workers' compensation claim. (Ex. S, p. 136)

Also on September 12, 2014, claimant placed a call to Mr. Bartolotta. Mr. Bartolotta noted claimant stated "you ask Jim I clean Frank's house and give money to [claimant's husband]." Mr. Bartolotta indicated when he replied "what," claimant hung up the phone. (Ex. R, p. 135) Claimant testified this telephone call was an attempt to collect money she believed she was owed due to cleaning the home of the father of the owner of defendant-employer. (Claimant's testimony)

Following her lay off, claimant received unemployment benefits. (Ex. O, p. 127) Claimant completed a number of applications for employment at various employers, including as a laborer, manufacturing employee, forklift operator, warehouse worker, housekeeping/laundry, customer service, store associate/clerk, cook, maintenance, dietary aide, and meat processor. (Ex. O, pp. 129-130, 132; Ex. W, pp. 182-212)

Claimant testified her son, Meris Muminovic, assisted her in completing the applications. (Claimant's testimony)

Claimant underwent the MRI recommended by Dr. Chapman on September 9, 2014. (Ex. H, p. 62) Following review of the MRI results, on September 17, 2014, Dr. Chapman opined a rotator cuff tear was present and referred claimant to shoulder specialist, Scott Schemmel, M.D. (Ex. H, pp. 63, 65)

Per the recommendation of Dr. Chapman, on October 16, 2014, claimant was evaluated by Dr. Castaneda for carpal tunnel syndrome complaints. Dr. Castaneda noted claimant's EMG was normal, but on examination, he observed some component of cubital tunnel syndrome. Dr. Castaneda also opined it appeared claimant had a double-crush injury with a lesion of the neck placing a small amount of mechanical pressure on the ulnar nerve. Dr. Castaneda opined claimant did not currently require surgical intervention due to normal electrodiagnostic studies. He instead recommended conservative care, including use of elbow pads and nighttime use of a wrist splint. He indicated once claimant's neck and shoulder work-ups had been completed, claimant might require a cubital tunnel release if she remained symptomatic. (Ex. I, pp. 75-76)

Also per Dr. Chapman's referral, on October 28, 2014, claimant presented to Dr. Schemmel for evaluation of right shoulder complaints. Dr. Schemmel opined claimant's MRI showed some evidence of rotator cuff tearing. Accordingly, he opined at least some portion of claimant's pain was likely the result of the rotator cuff pathology. However, he opined the portion of pain attributable to the rotator cuff was likely only a small amount of claimant's overall pain. Dr. Schemmel opined rotator cuff surgery was not likely to result in significant change in claimant's primary complaint of neck and upper back pain. Accordingly, Dr. Schemmel recommended claimant proceed with neck surgery prior to shoulder surgery; he referred claimant back to Dr. Chapman. (Ex. J, p. 77)

On November 13, 2014, claimant returned to Dr. Chapman for evaluation. Dr. Chapman summarized claimant's evaluations to date and opined it was clear claimant likely suffered from multiple pain sources, given the opinions of the evaluating providers. Dr. Chapman noted Dr. Schemmel was unconvinced rotator cuff repair would provide relief of claimant's primary complaint of pain at the base of her neck. He noted Dr. Castaneda felt claimant likely presented with nerve compression, but he was hesitant to perform cubital tunnel release given normal EMG findings. (Ex. H, p. 66)

Dr. Chapman opined one procedure was unlikely to resolve all claimant's symptoms and indicated claimant might require multiple surgeries. With that in mind, Dr. Chapman offered to perform an anterior cervical discectomy and fusion (ACDF) at C5-6 and C6-7. He expressed belief the procedure had a "very good chance" of improving claimant's neck pain. Dr. Chapman again cautioned claimant might subsequently require shoulder and cubital tunnel surgeries. He left the 20-pound lifting restriction in place. (Ex. H, p. 66)

On December 23, 2014, defendants' counsel authored a letter to claimant's counsel advising of his representation. Defendants' counsel also requested various documents and sources of information, as defendants were investigating claimant's claim. Specifically, counsel requested a signed medical waiver, identification of all medical providers, ongoing employment status, and completed discovery requests. (Ex. U, pp. 145-146)

On January 30, 2015, claimant through her son as interpreter, telephoned Dr. Chapman and advised claimant was too nervous to undergo surgery and would like more conservative treatment options. Dr. Chapman ordered a course of physical therapy and referred claimant for a cervical epidural steroid injection. (Ex. H, pp. 68-70)

Defendants' counsel authored a letter to claimant's counsel dated February 25, 2015 regarding objections claimant raised in her discovery responses. Defendants' counsel requested further information regarding the basis of claimant's penalty claim and disclosure of social media activity. (Ex. U, pp. 147-148)

On March 3, 2015, claimant's attorney issued a response to defendants' attorney. By the letter, claimant's attorney identified the basis of claimant's penalty claim as defendants' failure to pay temporary total disability benefits from September 2014 to date. He also indicated defendants were free to review claimant's public social media postings, but should file a motion to compel discovery if greater access was sought. Claimant's counsel cited supportive agency rulings for this position. (Ex. U, pp. 149-150)

Defendants' attorney authored a responsive letter to claimant's counsel dated March 6, 2015. Counsel indicated defendants continued to investigate claimant's entitlement to temporary disability benefits; however, a check would be issued for weekly benefits from September 12, 2014 to date, with weekly benefits to follow. Counsel also requested copies of the agency rulings supporting claimant's position with respect to social media. (Ex. U, pp. 151-152)

On March 23, 2015, claimant's counsel authored correspondence to defendants' counsel advising claimant had not yet received payment of benefits. (Ex. U, p. 153)

In April 2015, claimant submitted an application for Social Security Disability benefits based upon a damaged disc, damaged nerve, rotator cuff tear, cervical radiculopathy, cubital tunnel syndrome, shoulder pain, neck pain, anxiety and stress. (Ex. V, pp. 159-160) In connection with the claim, claimant underwent evaluation by a disability examiner. (Ex. V, pp. 170-176) By a determination of October 19, 2015, claimant was found disabled as of September 11, 2014 and entitled to disability benefits beginning in March 2015. Claimant's monthly benefit was set at $526.00. (Ex. V, pp. 177-181)

From March 24, 2015 through June 11, 2015, claimant participated in a course of physical therapy. (Ex. F, pp. 34-43)

On July 1, 2015, claimant returned to Dr. Chapman and reported continued symptomatology. Dr. Chapman noted he stressed that the recommended neck fusion had a "better than 50-50 chance" of improving claimant's neck pain. He again noted the fusion would not impact claimant's shoulder impingement or cubital tunnel symptoms. Dr. Chapman offered claimant a second opinion with a shoulder or cervical specialist. (Ex. H, p. 72)

Claimant testified she discussed the surgery proposed by Dr. Chapman with her family, but she ultimately chose not to proceed with surgery as there was no guarantee the procedure would be successful. (Claimant's testimony)

A status document dated August 5, 2015 indicates Dr. Chapman recommended claimant proceed with a functional capacity evaluation. He also maintained the existing 20-pound lifting restriction. (Ex. H, p. 73)

At the arranging of claimant's attorney, on November 10, 2015, claimant presented for an independent medical examination (IME) with board certified occupational medicine physician, Richard Kreiter, M.D. Dr. Kreiter issued a report of his findings and opinions the same date. At the time of evaluation, claimant complained of pain of the right shoulder and neck, as well as intermittent hand numbness. Dr. Kreiter reviewed claimant's medical care and performed a physical examination. (Ex. K, pp. 82-83) Following records review, interview, and examination, Dr. Kreiter assessed, in relevant part, degenerative cervical discs at C5-6 and C6-7, with right-sided radiculopathy and chronic pain, and degenerative right acromioclavicular joint with rotator cuff impingement, rotator cuff tearing, and chronic pain. (Ex. K, p. 84)

Dr. Kreiter opined it was difficult to determine the date claimant achieved MMI, as she claimed to be worsening. Dr. Kreiter opined claimant's neck appeared to stabilize over the prior three to four months, but the shoulder had become more symptomatic. Dr. Kreiter recommended further evaluation of claimant's shoulder, particularly for consideration of a clavicle resection repair. He expressed belief the procedure should be performed prior to further worsening and the procedure would remove some of claimant's shoulder discomfort, better allowing for determination of the extent of claimant's neck pain. In the meantime, Dr. Kreiter recommended cervical spine exercises, possible home traction, and use of anti-inflammatories and mild analgesics. (Ex. K, pp. 80-81)

Dr. Kreiter opined claimant sustained permanent impairment of 6 percent whole person due to her neck condition and 10 percent whole person due to her right shoulder condition as a result of the stipulated work injury. Dr. Kreiter recommended restrictions with respect to the right shoulder and neck conditions; however, Dr. Kreiter indicated he would avoid categorizing restrictions as permanent with respect to claimant's right shoulder pending appropriate care. With respect to the shoulder, Dr. Kreiter recommended restrictions of no overhead work or lifting greater than 5 pounds with the right arm, with the elbow at her side, and no repetitive pulling, pushing, or polishing. With respect to the cervical condition, Dr. Kreiter recommended restrictions of no work

requiring frequent side-to-side motion of the neck or upward gaze for a prolonged period, avoidance of continuous forward flexion, and avoidance of riding in bumpy vehicles or jumping. (Ex. K, pp. 80-81)

On November 10, 2015, at the arranging of her counsel, claimant presented for in-person interview with certified rehabilitation counselor, Thomas Magner. Mr. Magner completed a vocational assessment report dated November 20, 2015. In addition to the in-person interview, Mr. Magner reviewed claimant's medical history. (Ex. N, pp. 113-118) Mr. Magner noted claimant possessed an 8th grade education and experienced difficulty understanding English. He also noted claimant was unable to read or write in English. (Ex. N, p. 118) Mr. Magner reviewed claimant's work history, consisting of meatpacking and her work at defendant-employer. (Ex. N, pp. 118-119)

Mr. Magner concluded as a result of claimant's communication difficulties, she would have a "most difficult time with any employment positions." (Ex. N, p. 119) Given this factor and also considering claimant's physical limitations and overall limited use of her right arm, Mr. Magner opined there were "no employment positions available" to claimant. (Ex. N, p. 120)

At the arranging of defendants' on November 30, 2015, claimant presented for in-person interview with Ronald Schmidt, M.S. Mr. Schmidt issued a loss of earning capacity analysis report on December 22, 2015. In addition to the in-person interview of claimant, Mr. Schmidt reviewed various supplied records. (Ex. M, p. 93)

During interview, claimant represented she understood certain English words, but was unable to create sentences. She also reported an inability to read or write in English. Claimant reported her education was limited to completion of the 8th grade in Bosnia. Claimant described her work history and reported she was assigned a permanent restriction of a 20-pound maximum lift. (Ex. M, pp. 94-95)

Mr. Schmidt described claimant's experience as a sewing machine operator as semi-skilled light level work and her packaging experience as unskilled medium level work. He identified transferrable skills claimant would have acquired due to her employment. (Ex. M, p. 96) Mr. Schmidt reviewed the medical restrictions imposed by Dr. Kreiter and Dr. Chapman. (Ex. M, pp. 95-96)

Mr. Schmidt performed an assessment utilizing only the restrictions upon claimant's neck, given Dr. Kreiter's opinion claimant required further shoulder treatment. (Ex. M, p. 97) In determining claimant's loss of earning capacity, Mr. Schmidt noted that pre-injury, claimant demonstrated an ability to function in the medium physical demand category. Post-injury, Mr. Schmidt opined claimant was limited to light level work due to Dr. Chapman's 20-pound restriction and Dr. Kreiter's restrictions on movement of the neck, riding in bumpy vehicles, or jumping movements. Mr. Schmidt opined the 20-pound restriction precluded claimant from returning to work as a packager. He found claimant was capable of continued employment as a sewing machine operator, but noted few such employment opportunities in the Dubuque area. (Ex. M, p. 98)

Utilizing the restrictions to claimant's neck, Mr. Schmidt concluded claimant's post-injury employment options included cook, counter attendant, and concession employee. He noted these positions carried median wages of $8.53 to $11.87 per hour. (Ex. M, p. 97) Mr. Schmidt compared claimant's preinjury average weekly wage of $342.00 with the average weekly wage carried by the sample set of post-injury positions of $386.80. After doing so, he found claimant sustained no loss of earning capacity with respect to the wage available to claimant. (Ex. M, p. 98) Given consideration of all relevant factors, Mr. Schmidt concluded claimant sustained a 15 to 20 percent loss of "earning power" as a result of the work injury of September 25, 2013. (Ex. M, p. 98)

Dr. Chapman was provided Dr. Kreiter's IME report for review. After doing so, by a letter dated January 14, 2016, Dr. Chapman opined Dr. Kreiter did a "nice job" of summarizing claimant's condition and care. Dr. Chapman expressed agreement with Dr. Kreiter's findings. (Ex. H, p. 74)

At the arranging of defendants, on March 7, 2016, claimant presented for IME with Joseph Chen, M.D. In his report, Dr. Chen combined claimant's subjective history with references to medical records reviewed. (Ex. 2, pp. 1-3) In his history discussion, Dr. Chen indicated claimant was laid off on September 25, 2013 and reported her neck and shoulder were painful on that date. (Ex. 2, p. 1) Dr. Chen also performed a physical examination. (Ex. 2, p. 3)

Following records review, interview, and examination, Dr. Chen issued diagnoses of cervical myofascial pain syndrome; chronic right shoulder pain; mild degeneration of cervical intervertebral disc; and non-traumatic tear of the right supraspinatus tendon. Dr. Chen opined claimant suffered primarily from chronic mechanical and myofascial neck and right shoulder pain. (Ex. 2, p. 3) He did not recommended surgical treatment of the cervical spine, as he believed surgery was not likely to improve claimant's condition substantially and likely would result in worsened neck pain. (Ex. 2, p. 4) Similarly, Dr. Chen opined surgical treatment of the shoulder would likely lead to further pain and guarding due to increased myofascial pain. (Ex. 2, p. 4)

Dr. Chen offered no recommendations with respect to further treatment. (Ex. 2, p. 6) Dr. Chen placed claimant at MMI on the date of his evaluation, March 7, 2016. He reasoned it was on this date that claimant was advised further treatment was not likely to be helpful. (Ex. 2, p. 5)

Dr. Chen opined claimant sustained permanent impairment to her neck and opined claimant fell within DRE Cervical Category II, warranting a permanent impairment rating of 6 percent whole person. However, Dr. Chen then apportioned only 2 percent of this impairment to the work injury, based upon "subjective complaints of pain" and claimant's "allegation" of a work-related cumulative injury. Dr. Chen did not address the extent of any permanent impairment to claimant's shoulder. Dr. Chen opined the permanent restrictions recommended by Dr. Kreiter were "unnecessary" as there was no proof performing such activities was likely to harm claimant's cervical spine or shoulder. (Ex. 2, p. 5)

On March 30, 2016, claimant returned to Dr. Kreiter for a repeat evaluation. Dr. Kreiter also reviewed provided records, including Dr. Chen's IME report, and issued a rebuttal report that same date. Following review of Dr. Chen's IME, Dr. Kreiter expressed disagreement with Dr. Chen's opinions regarding claimant's shoulder condition. Dr. Kreiter opined on physical examination, claimant demonstrated findings of the right AC joint which most likely caused impingement of the rotator cuff, as well as painful abduction. He explained in his experience, a resection would improve claimant's function and would not cause further pain and guarding. Dr. Kreiter indicated once the shoulder had been treated, providers would be better able to focus upon claimant's other conditions. With respect to claimant's neck condition, Dr. Kreiter agreed with Dr. Chen that surgery was not recommended. Aside from these comments, Dr. Kreiter reaffirmed the opinions he offered in his prior IME report. (Ex. X, p. 204)

At the time of evidentiary hearing on January 22, 2016, claimant remained unemployed. Her most recent job application was submitted January 18, 2016. (Claimant's testimony)

Claimant's son, Meris Muminovic, testified at evidentiary hearing. Mr. Muhminovic testified he nearly always accompanied claimant to her medical appointments. He also testified he assisted in completion of Social Security Disability paperwork and applications for employment. He is hopeful with respect to claimant's prospects for returning to work. (Mr. Muhminovic's testimony)

Mr. Muhminovic's testimony was clear, knowledgeable, and consistent with the evidentiary record. Nothing in his demeanor led the undersigned to doubt his veracity. Mr. Muhminovic is found credible.

CONCLUSIONS OF LAW

The first issue for determination is whether the stipulated work injury is a cause of permanent disability.

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

The claimant has the burden of proving by a preponderance of the evidence that the injury is a proximate cause of the disability on which the claim is based. A cause is proximate if it is a substantial factor in bringing about the result; it need not be the only cause. A preponderance of the evidence exists when the causal connection is probable rather than merely possible. George A. Hormel & Co. v. Jordan, 569 N.W.2d 148 (Iowa 1997); Frye v. Smith-Doyle Contractors, 569 N.W.2d 154 (Iowa App. 1997); Sanchez v. Blue Bird Midwest, 554 N.W.2d 283 (Iowa App. 1996).

The question of causal connection is essentially within the domain of expert testimony. The expert medical evidence must be considered with all other evidence introduced bearing on the causal connection between the injury and the disability.

Supportive lay testimony may be used to buttress the expert testimony and, therefore, is also relevant and material to the causation question. The weight to be given to an expert opinion is determined by the finder of fact and may be affected by the accuracy of the facts the expert relied upon as well as other surrounding circumstances. The expert opinion may be accepted or rejected, in whole or in part. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); IBP, Inc. v. Harpole, 621 N.W.2d 410 (Iowa 2001); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995). Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417 (Iowa 1994). Unrebutted expert medical testimony cannot be summarily rejected. Poula v. Siouxland Wall & Ceiling, Inc., 516 N.W.2d 910 (Iowa App. 1994).

Claimant suffered a stipulated cumulative injury to her right shoulder, right arm and neck on September 25, 2013. As a result of this injury, treating physician, Dr. Chapman imposed a 20-pound lifting restriction. Claimant was later seen by Dr. Kreiter, who opined claimant sustained ratable permanent impairment and required restrictions. Dr. Chapman subsequently expressed agreement with Dr. Kreiter's findings. Claimant also underwent an evaluation with Dr. Chen, who too opined claimant had sustained ratable permanent impairment.

As the opining physicians have indicated claimant has sustained ratable permanent impairment and two physicians have opined claimant requires activity restrictions, it is determined claimant has proven by a preponderance of the evidence that she sustained permanent disability as a result of the work injury of September 25, 2013.

The next issue for determination is the extent of claimant's industrial disability, including whether claimant is entitled to permanent total disability benefits under the odd-lot doctrine.

Under the Iowa Workers' Compensation Act, permanent partial disability is compensated either for a loss or loss of use of a scheduled member under Iowa Code section 85.34(2)(a)-(t) or for loss of earning capacity under section 85.34(2)(u). The parties have stipulated claimant's disability shall be evaluated industrially.

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

Functional impairment is an element to be considered in determining industrial disability which is the reduction of earning capacity, but consideration must also be given to the injured employee's age, education, qualifications, experience, motivation, loss of earnings, severity and situs of the injury, work restrictions, inability to engage in employment for which the employee is fitted and the employer's offer of work or failure

to so offer. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963); Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961).

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

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

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

Claimant was 61 years of age at the time of evidentiary hearing. Her education is limited to completion of the 8th grade in her native Bosnia and she lacks fluency in English. While she is capable of communicating in English, her communication skills are such that allow her to "get by," as opposed to fully immerse. Claimant has shown knowledge of a sufficient amount of English to perform job duties in a factory setting; however, I find it highly unlikely claimant would be capable of performing an employment position which required fluency or above a conversational level of English language skills. When her English language skills are combined with her extremely limited education, claimant was limited in her access to a large portion of the labor market predating the work injury. Therefore, any negative impact upon claimant's ability to engage in manual labor in unskilled and semi-skilled professions detrimentally impacts claimant's earning capacity.

Claimant sustained a stipulated work-related injury to her neck, right shoulder, and right arm. Claimant has undergone a protracted course of conservative care, without relief. Multiple providers have raised the possibility of surgical treatment of her neck, right shoulder, and right arm. However, there is no consistency amongst the providers as to the appropriate order for such procedures to be performed and also disagreement between the opining providers as to the efficacy of the offered procedures. Based upon these facts, the undersigned is unable to find claimant has behaved unreasonably in failing to submit to the offered procedures.

Claimant's IME physician, Dr. Kreiter, opined claimant sustained permanent impairment of 6 percent whole person due to her neck condition and 10 percent whole person due to her right shoulder condition. Treating physician, Dr. Chapman, reviewed Dr. Kreiter's IME and expressed agreement with Dr. Kreiter's findings. Defendants' IME physician, Dr. Chen opined claimant suffered from a 6 percent whole person impairment to her neck, but apportioned only 2 percent of that impairment to claimant's work injury. Dr. Chen did not opine as to the extent, if any, of permanent impairment to claimant's right shoulder.

Following review of the entirety of the evidentiary record, the undersigned finds Dr. Kreiter's opinions on the extent of claimant's permanent functional impairment to be entitled to the greatest weight. The diagnoses issued by Dr. Kreiter are consistent with the weight of the medical records in evidence. Dr. Kreiter also performed a clear and detailed analysis, explaining his methodology for arriving at claimant's permanent impairment ratings. Dr. Kreiter's opinion is further buttressed by Dr. Chapman's subsequent review and expressed agreement with Dr. Kreiter's findings.

Dr. Chen's diagnoses of claimant's injuries are inconsistent with the remainder of the evidentiary record, notably his opinions regarding myofascial pain. Additionally, Dr. Chen initially rated claimant's neck in accordance with the AMA Guidelines to the Evaluation of Permanent Impairment and arrived at the same rating as Dr. Kreiter. However, Dr. Chen then sought to apportion claimant's permanent disability based purportedly upon her symptoms involving subjective complaints and an allegation of a work-related injury. I find this attempt by Dr. Chen to be improper, as he attempts to incorporate a level of doubt into the extent of claimant's permanent impairment based upon his skepticism regarding the occurrence of a work-related injury. The work injury has been stipulated to by the parties. Dr. Chen also failed to address the extent of permanent impairment sustained with respect to the shoulder condition.

Given the undersigned provides greater weight to the opinions of Dr. Kreiter, I adopt Dr. Kreiter's computation of the extent of permanent impairment to claimant's neck and right shoulder.

As a result of the stipulated injuries to her neck, right shoulder and right arm, Dr. Chapman imposed a 20-pound lifting restriction. Claimant was subsequently seen for an IME with Dr. Kreiter, who recommended restrictions with respect to the right shoulder and neck conditions; however, Dr. Kreiter indicated he would avoid categorizing

restrictions as permanent with respect to claimant's right shoulder pending appropriate care. With respect to the shoulder, Dr. Kreiter recommended restrictions of no overhead work or lifting greater than 5 pounds with the right arm, with the elbow at her side, and no repetitive pulling, pushing, or polishing. With respect to the cervical condition, Dr. Kreiter recommended restrictions of no work requiring frequent side-to-side motion of the neck or upward gaze for a prolonged period, avoidance of continuous forward flexion, and avoidance of riding in bumpy vehicles or jumping. Dr. Chapman subsequently expressed agreement with Dr. Kreiter's findings. Dr. Chen opined the restrictions recommended by Dr. Kreiter were unnecessary.

Following review of the entirety of the evidentiary record, I find the opinions of Dr. Kreiter and Dr. Chapman entitled to the greatest weight with respect to claimant's need for permanent restrictions. Dr. Chen's opinion that restrictions were unnecessary is unconvincing, given multiple providers have raised surgical treatment options for claimant. I am unable to reconcile claimant's potential need for surgery with Dr. Chen's opinion that she requires no restrictions; surely, if a condition is significant enough to warrant a surgical recommendation, activity restrictions are a reasonable and expected consequence of the condition. Furthermore, Dr. Chen's diagnoses involved chronic and myofascial pain, which are not entirely consistent with the opinions of treating and opining physicians whose diagnoses involved cervical radiculopathy and right shoulder impingement. Therefore, Dr. Chen's opinion as to the necessity of restrictions for the diagnosed conditions is not on point.

Given I provide greater weight to the opinions of Dr. Kreiter and Dr. Chapman, I adopt the recommended restrictions imposed by these physicians. Although Dr. Kreiter cautioned against considering claimant's right shoulder conditions permanent pending further treatment, I find no indication claimant is likely to pursue further treatment in the foreseeable future. Therefore, Dr. Kreiter's recommended restrictions with respect to the right shoulder are properly considered permanent for purposes of determining claimant's access to the labor market.

Claimant was laid off on September 11, 2014 by defendant-employer. Defendant-employer maintains the layoff was based on a lack of production work. There is insufficient evidence in the record to support a determination the layoff was based on claimant's work injury and resulting physical difficulties. Defendant-employer maintained claimant as an employee for approximately one year after the stipulated work injury and when production work slowed, defendant-employer reassigned claimant to the shipping department in an effort to retain claimant as an employee. Claimant's position has not been filled by a new employee.

Following the layoff, claimant has been unsuccessful in obtaining employment. Claimant has submitted multiple job applications for positions which seemingly may have the potential to accommodate her limited English skills. She has also sought positions which are lighter nature, in hopes of accommodating her physical limitations. Thus far, claimant has been unable to locate employment, although she continues to submit applications.

Claimant receives ongoing Social Security Disability benefits, but has continued to submit applications for employment in positions which may be within her abilities. Her use of online applications and attempts to utilize her son as a translator are consistent with industry practices and claimant's language skills. Claimant is likely skeptical of her ability to return to work due to her lack of success in the job search and continued physical limitations. However, claimant has shown motivation to seek employment.

Claimant's work history consists entirely of meatpacking and her work at defendant-employer. Post-injury, claimant continued to work in her preinjury position for approximately one year. Claimant testified she worked in pain, but further indicated she would have continued working had she not been laid off. Furthermore, for the two months prior to her termination, claimant reportedly worked in the shipping department of defendant-employer, work which was likely more physically demanding than her preinjury sewing position. Therefore, I find claimant is capable of working in some capacity.

Two experts offered opinions regarding claimant's vocational prospects. Mr. Schmidt opined claimant continued to qualify for wages in the same range she earned prior to the work injury, but opined claimant was now limited to light level work due to Dr. Chapman's 20-pound restriction. Accordingly, he opined claimant could not return to work in meatpacking and had sustained a 15 to 20 percent loss of earning capacity. Mr. Magner opined as a result of claimant's communication difficulties and physical limitations, there were no employment positions available to her.

I find the vocation opinion of Mr. Schmidt to be entitled to greater weight. Mr. Schmidt's analysis explains the impact of claimant's restrictions upon her ability to return to her preinjury positions, he attempted to locate a sampling of positions appropriate for claimant, and he considered the wages these sample positions may bring. Mr. Magner's report lacks similar analysis, as there is no effort to describe a labor market survey, identify positions for which claimant may qualify, or to explicitly consider the impact of claimant's restrictions. Mr. Magner's report was summary in nature and thus, provides the undersigned little probative assistance in considering the extent of claimant's loss of access to the labor market.

Although I provide Mr. Schmidt's vocational opinion entitled to more probative value than that of Mr. Magner, I also find Mr. Schmidt's opinion does not accurately consider the full extent of the impact of claimant's work restrictions upon her access to the labor market. In crafting his analysis, Mr. Schmidt elected to proceed without consideration of claimant's right shoulder restrictions. He did so based upon medical evidence which cautioned against considering the restrictions permanent. However, as outlined *supra*, Dr. Kreiter's restrictions relative to claimant's right shoulder are properly considered in determining claimant's loss of access to the labor market, as claimant is not inclined to undergo further treatment. Accordingly, Mr. Schmidt's vocational opinion is an incomplete assessment, as no consideration is made of the right shoulder restrictions.

Upon consideration of the above and all other relevant factors of industrial disability, it is determined claimant sustained a 75 percent industrial disability as a result of the stipulated work-related injury of September 25, 2013. Such an award entitles claimant to 375 weeks of permanent partial disability benefits (75 percent x 500 weeks = 375 weeks).

It is also determined claimant failed to carry her burden of proving an entitlement to permanent total disability benefits as a matter of law pursuant to the odd-lot doctrine. I find claimant has failed to make a prima facie case of total disability, as claimant returned to work in her preinjury position for one year following the work injury and Mr. Magner's vocational opinion provided little probative value. As claimant has failed to show a prima facie case of total disability, claimant is not entitled to permanent total disability benefits as an odd-lot worker.

The next issue for determination is the commencement date for permanent disability benefits.

Healing period compensation describes temporary workers' compensation weekly benefits that precede an allowance of permanent partial disability benefits. Ellingson v. Fleetguard, Inc., 599 N.W.2d 440 (Iowa 1999). Section 85.34(1) provides that healing period benefits are payable to an injured worker who has suffered permanent partial disability until the first to occur of three events. These are: (1) the worker has returned to work; (2) the worker medically is capable of returning to substantially similar employment; or (3) the worker has achieved maximum medical recovery. Maximum medical recovery is achieved when healing is complete and the extent of permanent disability can be determined. Armstrong Tire & Rubber Co. v. Kubli, Iowa App., 312 N.W.2d 60 (Iowa 1981). Neither maintenance medical care nor an employee's continuing to have pain or other symptoms necessarily prolongs the healing period.

The parties stipulated that weekly indemnity benefits were ongoing as of the date of evidentiary hearing. Claimant's entitlement to temporary disability benefits was not placed at issue in this proceeding; however, the parties did not stipulate to a date for commencement of permanent partial disability benefits. Pursuant to Iowa Code section 85.34(2), compensation for permanent partial disability shall begin at the termination of the healing period. Therefore, the undersigned must determine on what date claimant's healing period terminated, thus beginning claimant's entitlement to permanent partial disability benefits.

Following her lay off on September 11, 2014, defendants commenced payment of temporary total disability/healing period benefits. During the period that followed, claimant continued to receive ongoing medical evaluation and treatment; she remained under activity restrictions. Claimant has not returned to work in any capacity. It is therefore determined claimant's healing period ended upon achievement of maximum medical improvement.

None of claimant's treating physicians specifically opined as to a date claimant achieved MMI. At the time of his IME on November 10, 2015, Dr. Kreiter opined determination of MMI was difficult. Dr. Kreiter opined claimant's neck condition had stabilized over the prior three to four months, but claimant's shoulder had become more symptomatic. Dr. Chen assigned an MMI date of the date of his IME evaluation on March 7, 2016; the undersigned rejects this date as it occurred following an evidentiary hearing in which the parties requested determination of the extent of claimant's permanent disability.

Relying upon Dr. Kreiter's report, it is determined claimant achieved MMI as of August 10, 2015. Dr. Kreiter opined claimant's neck condition had stabilized over the period three to four months prior to IME evaluation. While he recommended further treatment of claimant's right shoulder, claimant is unlikely to proceed with this intervention. Absent intervention, claimant's shoulder condition is unlikely to materially improve. As claimant's shoulder condition is unlikely to improve, assignment of the MMI date corresponding with stabilization of her neck condition is reasonable.

The best evidence in the case supports a determination claimant achieved MMI on August 10, 2015, thus ending her healing period. Permanent partial disability benefits therefore commence on August 11, 2015, at the conclusion of the healing period.

The next issue for determination is the rate of compensation.

Section 85.36 states the basis of compensation is the weekly earnings of the employee at the time of the injury. The section defines weekly earnings as the gross salary, wages, or earnings to which an employee would have been entitled had the employee worked the customary hours for the full pay period in which injured as the employer regularly required for the work or employment. The various subsections of section 85.36 set forth methods of computing weekly earnings depending upon the type of earnings and employment.

Iowa Code section 85.61(3) defines as gross earnings, those recurring payments made by the employer to the employee for employment, before any authorized or lawfully required deduction or withholding. As claimant's workers' compensation benefits are not taxable, claimant's rate is designed to reflect the earnings of an employee after deduction of payroll taxes.

Iowa Code section 85.61(6) defines "payroll taxes" as follows, in relevant part:

> a. An amount equal to the amount which would be withheld pursuant to withholding tables in effect on July 1 preceding the injury under the Internal Revenue Code, and regulations pursuant thereto, as amended, as though the employee had elected to claim the maximum number of exemptions for actual dependency, blindness and old age to which the employee is entitled on the date of which the employee was injured.

b. An amount equal to the amount which would be withheld pursuant to withholding tables in effect on July 1 preceding the injury under chapter 422, and any rules pursuant thereto, as though the employee had elected to claim the maximum number of exemptions for actual dependency, blindness and old age to which the employee is entitled on the date on which the employee was injured.

The parties stipulated on the date of the work injury, claimant's gross earnings were $357.45 per week and claimant was married. A dispute exists regarding the number of exemptions claimant is entitled to claim. Claimant's weekly benefit amount had been computed and paid at $259.12 per week, based upon a total of 6 exemptions. Defendants argue claimant is not entitled to claim 6 exemptions and should, instead, be limited to 2 exemptions, one for herself and one for her husband.

Among the individuals claimed as exemptions by claimant are five family members residing in Bosnia: her father-in-law, daughter, son-in-law, grandson, and nephew. Claimant testified she and her husband send funds to these individuals; however, the evidentiary record lacks detail as to the frequency with which funds are sent, the amounts of those transfers, or facts to support the actual dependency of the individuals in question. Claimant's tax returns are not in evidence to verify her claimed exemptions.

While it is possible these individuals are properly claimed by claimant as exemptions, it is claimant who carries the burden of proof on this issue and the evidentiary record simply lacks sufficient detail to allow claimant to carry her burden. It is therefore determined claimant is entitled to claim two exemptions, one for herself and one for her husband. The parties stipulated at the time of the work injury, claimant's gross weekly earnings were $357.45 and claimant was married. Having determined claimant is entitled to claim two exemptions, the proper rate of compensation is $253.13.

The next issue for determination is whether claimant is entitled to penalty benefits under Iowa Code section 86.13 and if so, how much.

If weekly compensation benefits are not fully paid when due, section 86.13 requires that additional benefits be awarded unless the employer shows reasonable cause or excuse for the delay or denial. Robbennolt v. Snap-on Tools Corp., 555 N.W.2d 229 (Iowa 1996).

Delay attributable to the time required to perform a reasonable investigation is not unreasonable. Kiesecker v. Webster City Meats, Inc., 528 N.W.2d 109 (Iowa 1995).

It also is not unreasonable to deny a claim when a good faith issue of law or fact makes the employer's liability fairly debatable. An issue of law is fairly debatable if viable arguments exist in favor of each party. Covia v. Robinson, 507 N.W.2d 411

(Iowa 1993). An issue of fact is fairly debatable if substantial evidence exists which would support a finding favorable to the employer. Gilbert v. USF Holland, Inc., 637 N.W.2d 194 (Iowa 2001).

An employer's bare assertion that a claim is fairly debatable is insufficient to avoid imposition of a penalty. The employer must assert facts upon which the commissioner could reasonably find that the claim was "fairly debatable." Meyers v. Holiday Express Corp., 557 N.W.2d 502 (Iowa 1996).

If the employer fails to show reasonable cause or excuse for the delay or denial, the commissioner shall impose a penalty in an amount up to 50 percent of the amount unreasonably delayed or denied. Christensen v. Snap-on Tools Corp., 554 N.W.2d 254 (Iowa 1996). The factors to be considered in determining the amount of the penalty include the length of the delay, the number of delays, the information available to the employer and the employer's past record of penalties. Robbennolt, 555 N.W.2d at 238.

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

> 4. a. If a denial, a delay in payment, or a termination of benefits occurs without reasonable or probable cause or excuse known to the employer or insurance carrier at the time of the denial, delay in payment, or termination of benefits, the workers' compensation commissioner shall award benefits in addition to those benefits payable under this chapter, or chapter 85, 85A, or 85B, up to fifty percent of the amount of benefits that were denied, delayed, or terminated without reasonable or probable cause or excuse.
>
> b. The workers' compensation commissioner shall award benefits under this subsection if the commissioner finds both of the following facts:
>
> (1) The employee has demonstrated a denial, delay in payment, or termination of benefits.
>
> (2) The employer has failed to prove a reasonable or probable cause or excuse for the denial, delay in payment, or termination of benefits.
>
> c. In order to be considered a reasonable or probable cause or excuse under paragraph *"b"*, an excuse shall satisfy all of the following criteria:
>
> (1) The excuse was preceded by a reasonable investigation and evaluation by the employer or insurance carrier into whether benefits were owed to the employee.
>
> (2) The results of the reasonable investigation and evaluation were the actual basis upon which the employer or insurance carrier contemporaneously relied to deny, delay payment of, or terminate benefits.
>
> (3) The employer or insurance carrier contemporaneously conveyed the basis for the denial, delay in payment, or termination of

benefits to the employee at the time of the denial, delay, or termination of benefits.

Defendant-employer laid claimant off on September 11, 2014, at a time when she remained under active medical care and restrictions. The parties presented no dispute at evidentiary hearing regarding claimant's entitlement to healing period benefits subsequent to her layoff. The dispute arises with respect to whether or not claimant is entitled to penalty benefits pursuant to section 86.13 and if so, how much. Claimant became entitled to healing period benefits commencing September 12, 2014. It is undisputed the owed healing period benefits were not paid until March 2015. Claimant has therefore demonstrated a delay in payment of benefits as required by section 86.13(4)(b)(1).

Pursuant to section 86.13(4)(b)(2), the burden shifts to defendants to prove a reasonable or probable cause or excuse for the delay. In order to meet this burden, defendants must establish compliance with the three-prong test in section 86.13(4)(c). The undersigned finds defendants have failed to establish compliance with the three-prong test; specifically, I find defendants failed to perform a reasonable investigation, with the results of the investigation serving as the basis for the delay.

Claimant suffered a stipulated work-related injury on September 25, 2013. Thereafter, claimant received authorized medical treatment with multiple providers. While she treated, claimant continued to work for defendant-employer for a period of nearly one year. Upon layoff, claimant became entitled to healing period benefits, as she remained under authorized physician-imposed restrictions. There is no evidence claimant was fired for cause or some other dispute existed which would support a contention claimant may not be entitled to healing period benefits. The facts are straightforward: claimant suffered a stipulated work-related injury and defendant-employer failed to offer claimant work within her authorized physician-imposed restrictions. Benefits should have commenced promptly.

There is no evidence defendants performed a timely investigation of claimant's entitlement to temporary disability benefits contemporaneous to the delay. Defendants' counsel authored correspondence to claimant's counsel three months following claimant's layoff, requesting information and advising the claim was being investigated. While counsel requested information relevant to this proceeding, none of the information requested was sufficient to justify a failure to commence payment of benefits. As defendants authorized treatment, defendants were well aware of restrictions imposed by authorized physicians and of defendant-employer's failure to accommodate these restrictions. Nevertheless, a period of an additional three months followed before payment was made to claimant. As a result, claimant did not receive her first benefit payment until approximately 18 months post-injury and 6 months post layoff. Defendants' delay is unreasonable.

The evidentiary record fails to identify the specific date defendants issued payment to claimant for weekly benefits. The best evidence is the letter of defendants' counsel dated March 6, 2015 which indicated payment would be issued. The period of September 12, 2014 to March 26, 2015 corresponds to a delay of 25.143 weeks. At claimant's weekly rate of $253.13, the delayed benefits total $6,364.45; accordingly, the maximum penalty which can be awarded is $3,182.73 (50 percent x $6,354.45 = $3,182.73). Claimant's benefits were unreasonably delayed for a period of six months during which time claimant remained under the care and restrictions of a physician authorized by defendants. However, the undersigned was unable to find any other cases wherein defendant-employer was subjected to penalty benefits. A penalty of $2,500.00 is warranted.

The final issue for determination is a specific taxation of costs pursuant to Iowa Code section 86.40 and rule 876 IAC 4.33.

Iowa Code section 86.40 states:

> **Costs.** All costs incurred in the hearing before the commissioner shall be taxed in the discretion of the commissioner.

Iowa Administrative Code Rule 876—4.33(86) states:

> **Costs.** Costs taxed by the workers' compensation commissioner or a deputy commissioner shall be (1) attendance of a certified shorthand reporter or presence of mechanical means at hearings and evidential depositions, (2) transcription costs when appropriate, (3) costs of service of the original notice and subpoenas, (4) witness fees and expenses as provided by Iowa Code sections 622.69 and 622.72, (5) the costs of doctors' and practitioners' deposition testimony, provided that said costs do not exceed the amounts provided by Iowa Code sections 622.69 and 622.72, (6) the reasonable costs of obtaining no more than two doctors' or practitioners' reports, (7) filing fees when appropriate, (8) costs of persons reviewing health service disputes. Costs of service of notice and subpoenas shall be paid initially to the serving person or agency by the party utilizing the service. Expenses and fees of witnesses or of obtaining doctors' or practitioners' reports initially shall be paid to the witnesses, doctors or practitioners by the party on whose behalf the witness is called or by whom the report is requested. Witness fees shall be paid in accordance with Iowa Code section 622.74. Proof of payment of any cost shall be filed with the workers' compensation commissioner before it is taxed. The party initially paying the expense shall be reimbursed by the party taxed with the cost. If the expense is unpaid, it shall be paid by the party taxed with the cost. Costs are to be assessed at the discretion of the deputy commissioner or workers' compensation commissioner hearing the

case unless otherwise required by the rules of civil procedure governing discovery. This rule is intended to implement Iowa Code section 86.40.

Iowa Administrative Code rule 876—4.17 includes as a practitioner, "persons engaged in physical or vocational rehabilitation or evaluation for rehabilitation." A report or evaluation from a vocational rehabilitation expert constitutes a practitioner report under our administrative rules. Bohr v. Donaldson Company, File No. 5028959 (Arb. November 23, 2010); Muller v. Crouse Transportation, File No. 5026809 (Arb. December 8, 2010)

Claimant requests taxation of the cost of $100.00 filing fee (Ex. T, p. 138); this is an allowable cost and is taxed to defendants. Claimant also requests taxation of $236.30 for claimant's deposition transcript. Review of the itemized statement reveals the cost for a copy of the transcript was $186.30 and $20.00 for handling; an additional $30.00 was changed for a condensed version of the transcript. (Ex. T, pp. 143-144) Transcription costs may be taxed when appropriate; I find taxation is appropriate, given defendants chose to submit claimant's deposition transcript into evidence. However, I will not tax the cost of the convenience of a condensed copy of the transcript in addition to the basic copy fee. Accordingly, defendants are taxed with $206.30 of the cost of claimant's deposition transcript.

Finally, claimant has requested taxation of the costs of securing practitioners' reports. Three such fees are included in the evidentiary record: Dr. Kreiter's IME of November 10, 2015; Mr. Magner's vocational report; and Dr. Kreiter's IME of March 30, 2016. (Ex. T, pp. 139-142; Ex. Y, p. 207) Per rule 4.33, only two such reports may be taxed. Given I found the vocational report of Mr. Magner to provide little probative assistance, I decline to tax any portion of his fee against defendants. Dr. Kreiter's reports, on the other hand, were relied upon by the undersigned to a great degree. I therefore find Dr. Kreiter's report fees subject to taxation.

Claimant is not permitted to receive reimbursement for the full cost of either of Dr. Kreiter's IMEs as a practitioner's report under rule 4.33. Rather, the Iowa Supreme Court has ruled only the portion of the IME expense incurred in preparation of the written report can be taxed. Des Moines Area Regional Transit Authority v. Young, 867 N.E.2d 839 (Iowa 2015). Dr. Kreiter charged what appears to be a flat fee for each IME: $700.00 for the November 2015 IME and $800.00 for the March 2016 IME. I am unable to discern by Dr. Kreiter's documentation how much time was spent in performing physical examination versus in performing records review and drafting a written report. Given the breadth, scope and specificity of Dr. Kreiter's reports, the extent of claimant's medical care, and utilizing agency experience in reviewing such reports, a reasonable taxation of costs would be one-half of the total amount billed for the first IME ($350.00) and approximately one-third of the total amount billed for the second IME ($265.00). *See* LaGrange v. Nash Finch, File No. 5043316 (App. July 1, 2015).

Defendants are taxed with costs in the amount of $921.30.

ORDER

THEREFORE, IT IS ORDERED:

Defendants shall pay unto claimant three hundred seventy-five (375) weeks of permanent partial disability benefits commencing August 11, 2015 at the weekly rate of two hundred fifty-three and 13/100 dollars ($253.13).

Defendants shall pay accrued weekly benefits in a lump sum.

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

Defendants shall pay penalty benefits in the amount of two thousand five hundred and no/100 dollars ($2,500.00).

Defendants shall pay interest on the penalty benefits from the date of this decision. See Schadendorf v. Snap On Tools, 757 N.W.2d 330, 339 (Iowa 2008).

Defendants shall receive credit for benefits paid.

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

Costs are taxed to defendants in the amount of nine hundred twenty-one and 30/100 dollars ($921.30) pursuant to 876 IAC 4.33 as set forth in the decision.

Signed and filed this 14th day of November, 2016.

ERICA J. FITCH
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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Right to Appeal: This decision shall become final unless you or another interested party appeals within 20 days from the date above, pursuant to rule 876-4.27 (17A, 86) of the Iowa Administrative Code. The notice of appeal must be in writing and received by the commissioner's office within 20 days from the date of the decision. The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday. The notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 1000 E. Grand Avenue, Des Moines, Iowa 50319-0209.