BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

GREGORY A. HIMMELSBACH, Claimant, vs. QUAKER OATS COMPANY, Employer, and INDEMNITY INSURANCE CO. OF NORTH AMERICA, Insurance Carrier, Defendants.	FILE NOS. 5066732, 5066867 ARBITRATION DECISION HEAD NOTE NOS.: 1100, 1108, 1402.30, 1402.40, 1402.50, 1803, 1803.1, 2401, 2402, 3003, 4000

STATEMENT OF THE CASE

Gregory "Greg" Himmelsbach filed petitions in arbitration against Quaker Oats Company (hereinafter referred to as "Quaker"), the employer, and Indemnity Insurance Company of North America, the insurance carrier. The case came before the undersigned for an arbitration hearing on June 9, 2020. This case was scheduled to be an in-person hearing occurring in Des Moines. However, due to the outbreak of a pandemic in Iowa, the Iowa Workers' Compensation Commissioner ordered all hearings to occur via video means, using CourtCall. Accordingly, this case proceeded to a live video hearing via Court Call with claimant appearing remotely from his attorney's office, defense counsel appearing remotely, and the court reporter also appearing remotely. The hearing proceeded without significant difficulties.

The parties filed hearing reports for each file prior to the commencement of the hearing. On the hearing reports, the parties entered into numerous stipulations. Those stipulations were accepted and no factual or legal issues relative to the parties' stipulations will be made or discussed. The parties are now bound by their stipulations.

The evidentiary record includes Joint Exhibits 1 through 5, Claimant's Exhibits 1 through 5, and 7 through 9, and Defendants' Exhibits A, B, and D through H.

Claimant testified on his own behalf. No other witnesses testified at trial. The evidentiary record closed at the conclusion of the evidentiary hearing on June 9, 2020.

The parties submitted post-hearing briefs on July 20, 2020, and the cases were considered fully submitted on that date.

ISSUES

File No. 5066732 (date of injury June 25, 2018; right arm/shoulder)

1. Whether claimant's claim is barred for lack of timely notice under Iowa Code section 85.23.
2. Whether claimant sustained an injury that arose out of and in the course of employment on June 25, 2018.
3. Whether the alleged injury is a cause of temporary disability.
4. Whether the alleged injury is a cause of permanent disability, and if so,
5. Whether the permanent disability is to a scheduled member under Iowa Code section 85.34(2)(n) or a disability to the body as a whole and therefore an industrial disability.
6. The correct rate of compensation.
7. Payment of certain medical expenses.
8. Independent Medical Examination (IME) under Iowa Code section 85.39.
9. Penalty under Iowa Code section 86.13.
10. Taxation of costs.

File No. 5066867 (date of injury September 12, 2018; right lower extremity)

1. Whether claimant's claim is barred for lack of timely notice under Iowa Code section 85.23.
2. Whether claimant's claim is barred as untimely claimed under Iowa Code section 85.26.
3. Whether claimant sustained an injury that arose out of and in the course of employment on September 12, 2018.
4. Whether the alleged injury is a cause of temporary disability.
5. The correct rate of compensation.
6. Payment of certain medical expenses.
7. Independent Medical Examination (IME) under Iowa Code section 85.39.
8. Penalty under Iowa Code section 86.13.
9. Taxation of costs.

STIPULATION

Prior to hearing, the parties stipulated that defendants are entitled to a credit in both files under Iowa Code section 85.38(2) for payment of sick pay/disability income.

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 his demeanor at the time of hearing gave the undersigned no reason to doubt his veracity. Claimant is found credible.

Claimant was 58-years old at the time of hearing. He graduated from high school in 1981, and began working for Quaker about one year later. (Hearing Transcript, p. 15) Claimant's exhibit 5 contains job descriptions for the various jobs claimant has performed at Quaker. For the past 25 years, claimant has worked primarily as Clybourn Operator Relief. (Tr., p. 15)

Claimant's job duties include frequently carrying 50-pound bags of ingredients up stairs onto a platform, where he then pours the contents of the bag into a large hopper below. (Tr., pp. 16-17) He also frequently uses a large shovel to scoop spilled grain into a wheeled cart. Claimant testified that when full, the carts can weigh up to 1,000 pounds. Claimant then pushes and/or pulls the full cart to an area where the contents are unloaded to be used as chicken feed. Often there is spilled grain and meal on the ground, which makes pushing the carts difficult. (Tr., pp. 16-19)

At times, claimant is also responsible for "making totes." Claimant described the totes as large boxes, made of very thick cardboard. (Tr., pp. 19-20) In order to make the totes, claimant must fold the cardboard, which requires a good deal of force and effort given the thickness. (Tr., pp. 19-20) Another job duty required claimant to "pull tanks." The tanks can weigh up to 2,500 pounds, and are difficult to move when there is spilled grain or meal on the ground. (Tr., pp. 20-21)

Regardless of which job duties claimant is performing at any given time, he spends most of his shift on his feet. He works on several different floors of the plant, and must walk between the various areas and climb stairs regularly. Additionally, claimant's job duties often require the use of ladders, kneeling and squatting, and twisting and pivoting. (Tr., pp. 21-24) While there is an elevator, claimant testified that it is often out of service or the wait time is too long. (Tr., p. 22)

Claimant testified that at the time of the June 25, 2018 injury, his regular rate of pay was $31.44 per hour. He earned $36.24 per hour for vacation time. Quaker pays a higher rate for vacation time based on the number of overtime hours worked in the previous year. (Tr., pp. 54-55; Claimant's Ex. 3 p. 49) Claimant also regularly receives a performance bonus every year. (Tr., pp. 52-53; Cl. Ex. 3, p. 3) He testified that the performance bonus was previously divided into four payments, and then two payments, over the course of the year. (Tr., p. 53) Currently it is paid yearly in January. (Tr., p. 53) Quaker employees also receive a vacation bonus every year after they reach twenty-five years of service. (Tr., pp. 53-54; Cl. Ex. 3, pp. 39, 42, 45) Finally, Quaker employees receive a signing bonus for every collective bargaining agreement they reach with Quaker, which is paid in two lump-sum payments. (Tr., p. 54; Cl. Ex. 3, pp. 40, 43, 46)

Right Arm/Shoulder Injury (June 25, 2018)

On June 25, 2018, claimant was making totes during the first four hours of his shift, which required repetitively folding very large, thick pieces of cardboard. (Tr., pp. 19-20) About three hours into his shift, he noticed pain in his right shoulder going down into his right arm. (Tr., p. 24) Claimant testified that was the first time in his life he had pain in his shoulder. (Tr., pp. 25, 59) Later in his shift, he reported the injury to the health center at the plant. (Tr., p. 25)

The nurse in the health center initially thought claimant was having a heart attack. (Tr., p. 25) Claimant had previously suffered a heart attack, so the nurse drove him to the emergency room at Mercy Medical Center in Cedar Rapids. (Tr., p. 25; Joint Exhibit 2) The nurse reported to the medical staff at the hospital that claimant was having chest pain. (Tr., pp. 60, 73) Claimant testified that he was not having chest pain, but right arm and shoulder pain. (Tr., pp. 58-59)

The doctor at Mercy told Claimant to take it easy for a day or two. (Tr., p. 26) Claimant took a couple of weeks of vacation to rest his arm to see if it would get better. (Tr., p. 27) When he returned to the plant, he completed paperwork for the injury, as his time off did not resolve his symptoms. (Tr., p. 26)

After claimant returned to work, he frequently reported to the health center seeking treatment. (Tr., p. 27) Quaker provided ice and massage. (Tr., p. 27) Claimant testified that the ice only helped temporarily, and the massage caused a great deal of pain. (Tr., p. 27) Claimant testified that the treatment offered was not helping, but Quaker would not send him to a doctor. (Tr., pp. 27, 28) He stated that he was told the health center did not believe there was anything wrong with his shoulder, because he did not appear to be in enough pain. (Tr., pp. 27-28) Claimant continued to work through his pain for the next couple months.

Medical Treatment of the Right Arm/Shoulder

On September 11, 2018, Claimant was seen by his personal physician, John R. Brownell, M.D., for both his shoulder and knee injuries. (Tr., p. 31) Dr. Brownell ordered X-rays and an MRI of both the shoulder and knee. (Tr., p. 32; JE 2) The MRI of claimant's shoulder revealed a massive full-thickness tear of the supraspinatus tendon. (JE 1, p. 5) The MRI of claimant's knee revealed a complex tear of the posterior horn medial meniscus. (JE 1, p. 1) Dr. Brownell referred Claimant to David Hart, M.D., at Physician's Clinic of Iowa (PCI). (Tr., p. 35)

On November 5, 2018, claimant was seen by Dr. Hart at PCI, with both shoulder and knee pain. (JE 4, pp. 1- 5) Dr. Hart recommended addressing claimant's shoulder condition first. (Tr., p. 36) Dr. Hart diagnosed claimant with a complete tear of the right rotator cuff and recommended surgery. (JE 4, p. 3) He gave claimant restrictions of no overhead lifting with his right arm. (JE 4, p. 5) Quaker was not able to accommodate his restrictions, so claimant went on leave. (Tr., p. 36; JE 4, pp. 6-8)

Claimant testified that by late November 2018, he had not heard from Quaker regarding whether his claims would be accepted. (Tr., p. 36) He stated that he made calls to Quaker's workers' compensation manager, Kevin Engles, inquiring about the status of his claim. (Tr., p. 37) Claimant stated that he left voicemail messages but did not receive any return calls. (Tr., p. 37) As a result, claimant filed a complaint with the Iowa Insurance Commissioner. (Tr., pp. 36-37) Claimant received a letter from the Commissioner's office on December 18, 2018. (Cl. Ex. 2, pp. 15-16) The letter states that the Commissioner's office had contacted Sedgwick regarding the complaint, and was told that the claim was being investigated. (Cl. Ex. 2, p. 15) Claimant testified that he did not receive any notice from Quaker regarding any investigation of his claims. (Tr., p. 38)

Claimant underwent shoulder surgery on March 7, 2019, performed by Dr. Hart. (JE 4, p. 13) After the surgery, claimant participated in physical therapy for approximately five months. (Tr., p. 39; JE 5) Claimant saw Dr. Hart for a final follow-up visit on August 30, 2019. (Tr., p. 41; JE 4, pp. 22-27) When Dr. Hart asked claimant if he wanted restrictions, claimant testified that he said no, as he did not believe Quaker would allow him to return to work with restrictions. (Tr., p. 41) As such, Dr. Hart did not give claimant formal restrictions, but told him to take it easy. (Tr., p. 41; JE 4, p. 24)

Claimant returned to work at Quaker on September 9, 2019. (Tr., p. 42) He testified that he received help with heavier duties for the first couple of weeks. (Tr., p. 43) In November of 2019, Quaker provided a lift so that employees would no longer have to carry the bags of ingredients up the stairs to pour into the hopper. (Tr., p. 44) Claimant testified that between his return to work in September, and the plant shut-down for Christmas, he took several vacation days in order to rest his right arm. (Tr., p. 43) Additionally, he did not work as many overtime hours as he did prior to the injury. (Tr., pp. 44-45, 73-74)

Claimant returned to work in January, after the plant shut-down. He testified that at that time he wanted to attempt to work his normal hours, including overtime. (Tr., p. 45) However, the additional hours caused increased pain in his shoulder, as well as his left knee. (Tr., p. 45) As a result, claimant returned to Dr. Hart, as discussed further below. (Tr., p. 45)

Currently, claimant testified that he continues to have pain in his right shoulder, which worsens with activity. (Tr., p. 51; Cl. Ex. 4, p. 3) He cannot reach overhead as before, or hold items overhead, as it causes his arm to tingle and hurt. (Tr., p. 51) He cannot use a drill for any period of time. (Tr., p. 51) He testified that he uses his left hand more since the injury, and often changes hands while driving. (Tr., p. 51) He also has trouble reaching behind his back to get dressed. (Tr., p. 52).

Claimant testified that he recently paid his son to remodel his garage, which is something he would have done himself prior to the injuries. (Tr., p. 52) He testified that he was not able to tear out the paneling, or put in new sheetrock and siding. (Tr., p. 52)

He also was not able to lift many of the materials, and his wife and son had to do most of the sanding and staining. (Tr., p. 52)

Left Knee Injury (September 11, 2018)

In 2014, claimant had a fall at work and landed on both knees. (Tr., p. 30) Claimant testified that his left knee took the brunt of the fall. (Tr., p. 30) Following that fall, claimant had three separate surgeries on his left knee, which caused him to miss work for a significant period of time. (Tr., pp. 30-31) Claimant testified that he does not remember his right knee being much of a problem at that time. (Tr., p. 30; Def. Ex. H, p. 10) Following the surgeries, claimant returned to work in March 2017. (Tr., p. 31) Claimant testified that he had some "aches and pains" in his right knee after he returned to work, but those symptoms did not prevent him from performing his job duties. (Tr., pp. 30, 31; Def. Ex. H, p. 10)

On September 11, 2018, claimant was ascending stairs carrying a 50-pound bag of ingredients, when he felt his knee "lock up." (Tr., p. 29) He testified that he thought he was going to drop the bag and collapse. (Tr., p. 29) Later that day he saw his personal physician, Dr. Brownell. (Tr., p. 31) Claimant told Dr. Brownell about both his shoulder and knee injuries, and the doctor advised he should report the injuries to Quaker. (Tr., p. 31)

Claimant went to the Quaker health center the next day to report the knee injury. (Tr., p. 33) The only person in the health center at that time was a physical therapist, who was working with another patient. (Tr., p. 33) Claimant testified that he needed to return to his work station, so he decided to return to the health center later. (Tr., p. 33) Claimant did return to the health center on September 18, 2018, to report his knee injury. (Tr., p. 33) He testified that the same therapist was there when he returned, and remembered him coming in on September 12, so she put that date as the date of injury. (Tr., p. 33)

Medical Treatment of the Knee Injury

As noted above, when claimant initially saw Dr. Hart on November 5, 2018, he recommended addressing claimant's shoulder condition first. (Tr., p. 36; JE 4, pp. 1-5) Claimant returned to Dr. Hart on January 20, 2020. (Tr., p. 45; JE 4, pp. 28-30) Claimant testified that Dr. Hart expressed concern about the level of physical work he was performing at Quaker. (Tr., p. 46) Dr. Hart recommended a total knee replacement, and took claimant off work pending surgery. (Tr., pp. 46-47; JE 4, pp. 29-30)

The knee replacement surgery was initially delayed because of claimant's high blood sugar. (Tr., pp. 47-48) After claimant was able to get his blood sugar down, the surgery was postponed due to the coronavirus pandemic. (Tr., pp. 47-48) At the time of hearing, the surgery was scheduled for July 9, 2020. (Tr., p. 47) Claimant testified that at the time of his appointment with Dr. Hart in January 2020, he had not received any

notification from Quaker as to why they were not accepting liability for his work injuries. (Tr., p. 48; Cl. Ex. 1)

CONCLUSIONS OF LAW

File No. 5066732 (date of injury June 25, 2018; right arm/shoulder)

Notice under Iowa Code section 85.23

Defendants assert that claimant failed to provide notice to the employer pursuant to Iowa Code section 85.23. Claimant asserts he provided timely notice of his right arm/shoulder claim.

Iowa Code 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 that 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. Department of Transp., 296 N.W.2d 809 (Iowa 1980).

Failure to give notice is an affirmative defense, which the employer must prove by a preponderance of the evidence. DeLong v. Highway Commission, 229 Iowa 700, 295 N.W. 91 (1940). Claimant gave notice of his right shoulder injury on the date of injury, as evidenced by the injury report and claimant's testimony. (Tr., p. 25; Cl. Ex. 2, p. 12). Further, defendants had actual notice of the injury, as claimant reported experiencing shoulder and arm pain while folding totes. Defendants have failed to prove late notice with respect to the right arm/shoulder claim.

Causation of injury

The claimant has the burden of proving by a preponderance of the evidence that the alleged injury actually occurred and that it both arose out of and in the course of the employment. Quaker Oats Co. v. Ciha, 552 N.W.2d 143 (Iowa 1996); Miedema v. Dial Corp., 551 N.W.2d 309 (Iowa 1996). The words "arising out of" referred to the cause or source of the injury. The words "in the course of" refer to the time, place, and circumstances of the injury. 2800 Corp. v. Fernandez, 528 N.W.2d 124 (Iowa 1995). An injury arises out of the employment when a causal relationship exists between the injury and the employment. Miedema, 551 N.W.2d 309. The injury must be a rational consequence of a hazard connected with the employment and not merely incidental to the employment. Koehler Electric v. Wills, 608 N.W.2d 1 (Iowa 2000); Miedema, 551 N.W.2d 309. An injury occurs "in the course of" employment when it happens within a period of employment at a place where the employee reasonably may be when

performing employment duties and while the employee is fulfilling those duties or doing an activity incidental to them. Ciha, 552 N.W.2d 143.

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

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

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

Claimant credibly testified that he did not have any symptoms in his shoulder prior to the date of injury. Both the treating surgeon, Dr. Hart, as well as Farid Manshadi, M.D., who performed an independent medical evaluation (IME), opined that claimant's work activities on June 25, 2018 were a substantial contributing factor to his right shoulder injury.

Dr. Manshadi's IME took place on January 30, 2020. (Cl. Ex. 4) Claimant testified that Dr. Manshadi's examination lasted close to an hour. He stated that Dr. Manshadi performed several measurements of his shoulder, and asked him to walk up and down a hallway to observe his gait. (Tr., p. 50; Cl. Ex. 4, p. 4)

Dr. Manshadi found that claimant's work activities making totes on June 25, 2018 were a substantial contributing factor in bringing about his rotator cuff tear. (Cl. Ex. 4, p. 4) He found that claimant sustained 12 percent permanent impairment to the right upper extremity due to the work injury. (Cl. Ex. 4, p. 5) Dr. Manshadi recommended work restrictions of avoiding activity that requires repetitive reaching; avoiding activities at or above shoulder height; and no lifting more than 20 pounds with the right upper extremity. (Cl. Ex. 4, p. 5)

Dr. Hart spoke to claimant's attorney on April 15, 2020, and later signed a letter summarizing the conversation, indicating his agreement. (JE 4, pp. 31-33) With respect to the shoulder, Dr. Hart indicated that given claimant's history of sudden onset of pain in his shoulder while building large cardboard totes at work on June 25, 2018, it is more likely than not that the work activity was a substantial contributing factor causing his right shoulder injury and need for surgery. Dr. Hart further stated that due to claimant's current symptoms of pain and weakness in his shoulder while performing work activities, along with his difficulty reaching, lifting, and overhead activities, he would defer to Dr. Manshadi's recommended restrictions of no lifting more than 20 pounds with his right upper extremity, and avoiding repetitious reaching and overhead activities. Finally, Dr. Hart opined that claimant's shoulder injury extends into the torso, as he had a torn long-head of the biceps tendon, and a torn superior labrum, both of which attach to the glenoid, which is part of the scapula. (JE 4, pp. 31-33)

On May 20, 2020, Dr. Hart provided an additional note indicating that claimant reached maximum medical improvement for the shoulder on August 30, 2019, and provided an impairment rating of 4 percent of the right upper extremity, which is equal to 2 percent of the whole body. (Def. Ex. B, p. 4)

Theron Jameson, D.O., performed an IME for Quaker. His report is dated January 25, 2020. Claimant testified that Dr. Jameson spent approximately 15 to 20 minutes with him during his examination. (Tr., p. 49) Dr. Jameson's opinion differs from Dr. Hart and Dr. Manshadi. Dr. Jameson noted that the MRI dated September 21, 2018 showed a massive rotator cuff tear, with 2.5 centimeter retraction. (Def. Ex. A) Dr. Jameson stated that due to the size of the tear, it could not have happened without a fall or specific injury. (Def. Ex. A, p. 5) As such, he opined that the findings on the MRI were not work-related, but related to a chronic degenerative process. (Def. Ex. A, p. 5) Dr. Jameson did not recommend any permanent restrictions or further treatment for the shoulder, and did not provide an impairment rating. (Def. Ex. A, p. 7)

There is no evidence in the medical records provided that indicate claimant had any prior chronic degenerative process in his right shoulder. The X-Ray taken of

claimant's shoulder on the date of injury shows "no significant degenerative changes." (JE 1, p. 2). It is unclear whether Dr. Jameson was provided with this information prior to his examination and report.

Claimant credibly testified that he started noticing symptoms three hours into his shift on the day of the injury. (Tr., p. 24) He further testified that Dr. Jameson only spent about 15 to 20 minutes with him during his examination, while Dr. Manshadi spent close to an hour. (Tr., pp. 49-50) Finally, Dr. Hart, the treating surgeon, opined that it is more likely than not that the work activity of building totes on June 25, 2018, was a substantial contributing factor in causing claimant's shoulder injury and need for surgery. (JE 4, pp. 31-33) I find that the opinions of Dr. Hart and Dr. Manshadi are entitled to greater weight than that of Dr. Jameson. As such, I find that claimant's right shoulder injury arose out of and in the course of his employment.

Temporary disability

Section 85.34(1) provides that healing period benefits are payable to an injured worker who has suffered permanent partial disability until (1) the worker has returned to work; (2) the worker is medically capable of returning to substantially similar employment; or (3) the worker has achieved maximum medical recovery. The healing period can be considered the period during which there is a reasonable expectation of improvement of the disabling condition. See Armstrong Tire & Rubber Co. v. Kubli, 312 N.W.2d 60 (Iowa App. 1981). Healing period benefits can be interrupted or intermittent. Teel v. McCord, 394 N.W.2d 405 (Iowa 1986).

The parties stipulated that claimant is entitled to healing period benefits for the period of November 5, 2018 to September 9, 2019 (44 weeks) if defendants are liable for the injury. As I have determined defendants are liable for the injury, claimant is entitled to 44 weeks of healing period benefits.

Permanent disability

The 2017 legislative changes to Iowa Code Chapter 85 added the shoulder to the list of scheduled members in Iowa Code section 85.34(2). As such, all references to section 85.34 herein are to the post-July 1, 2017, version of the section unless otherwise stated.

The Iowa Legislature modified section 85.34 in 2017 by adding the shoulder to the list of scheduled members. The new subsection states, in its entirety: "For the loss of a shoulder, weekly compensation is paid based on four hundred weeks." Iowa Code § 85.34(2)(n).

The Iowa Supreme Court has repeatedly stated this agency lacks the legislature's expressly vested authority to interpret workers' compensation statutes. See, e.g., Ramirez-Trujillo v. Quality Egg, L.L.C., 878 N.W.2d 759, 770 (Iowa 2016), reh'g denied (May 27, 2016). Practically speaking, however, this agency acts as

the front-line authority in interpreting statutory workers' compensation provisions, particularly when statutory amendments are enacted. Thus, while the appellate courts have the final say, statutory interpretation by this agency is a necessary inevitability.

When conducting statutory interpretation, the goal is to determine the intent of the legislature. When the plain language of the statute is clear as to its meaning, courts apply the plain language and do not search for legislative intent beyond the express terms of the statute. Denison Municipal Utilities v. Iowa Workers' Compensation Com'r, 857 N.W.2d 230 (Iowa 2014). A statute is only ambiguous if reasonable minds could differ or be uncertain as to the meaning of the statute. Iowa Ins. Institute v. Core Group of Iowa Ass'n for Justice, 867 N.W.2d 58 (Iowa 2015). Statutes should be read as a whole, rather than looking at specific words or phrases in isolation. Id.

When the legislature amended section 85.34(2) to add shoulder to the list of scheduled members, no definition was included, nor did the legislature delineate specifically which anatomic parts of the body it intended to fall under the umbrella of the section. Unfortunately, the legislature's use of the generic term "shoulder" has resulted in uncertainly as to the meaning of the statute.

The Iowa Workers' Compensation Commissioner has addressed the issue in two recent appeal decisions: Mary Deng v. Farmland Foods, Inc., File No. 5061883 (App. Dec. Sept. 29, 2020) and Rosa Chavez v. MS Technology, LLC, File No. 5066270 (App. Dec. Sept. 30, 2020). In Deng, the main issue was whether a rotator cuff injury – specifically the infraspinatus - should be compensated as a shoulder under section 85.34(2)(n), or as a whole body injury under section 85.34(2)(v). The Commissioner ultimately determined that "shoulder" under section 85.34(2)(n) is not limited to the glenohumeral joint. The Commissioner also rejected the argument that whatever is proximal to the joint should be treated as an unscheduled injury under section 85.34(2)(v). Rather, the Commissioner held that given the entwinement of the glenohumeral joint and the muscles that make up the rotator cuff and the importance of the rotator cuff to the function of the joint, the muscles of the rotator cuff are included within the definition of "shoulder" under section 85.34(2)(n). Thus, the claimant's injury in Deng was compensated as a shoulder under section 85.34(2)(n).

In Chavez, the claimant had injuries involving her rotator cuff, as well as a labral tear and subacromial decompression. Similar to Deng, the Commissioner found that the labrum is closely interconnected both in location and function to the glenohumeral joint. See Second Injury Fund of Iowa v. Nelson, 544 N.W.2d 258, 270 (Iowa 1995), as amended on denial of reh'g (Feb. 14, 1996) (quoting Lauhoff Grain Co., 395 N.W.2d at 839). In fact, like the rotator cuff, the labrum is not only extremely close in proximity to the glenohumeral joint (if not wholly contained within the joint space), but it is crucial to the proper functioning of the joint. As such the claimant's labral tear was compensated as a shoulder under section 85.34(2)(n). With respect to the subacromial decompression, the Commissioner determined that based on the medical definition of

"acromion," it both forms part of the shoulder socket and protects the glenoid cavity. Therefore, the acromion is closely entwined with the glenohumeral joint both in location and function. As such, any disability resulting from a subacromial decompression should be compensated as a shoulder under section 85.34(2)(n).

In this case, claimant sustained a rotator cuff tear, which included a tear of the long-head of the biceps tendon and superior labrum. Based on the Commissioner's decisions in Deng and Chavez, the injury should be compensated as a shoulder under section 85.34(2)(n).

Dr. Hart, the treating surgeon, provided an impairment rating of 4 percent of the right upper extremity. (Def. Ex. B, p. 4) However, the last time Dr. Hart examined claimant's shoulder was on August 30, 2019. Dr. Manshadi's examination took place more recently, on January 30, 2020. (Cl. Ex. 4) Claimant testified that Dr. Manshadi took several measurements and spent close to an hour examining him. Dr. Manshadi found claimant sustained 12 percent impairment to the shoulder. I find his rating to be entitled to more weight. Pursuant to section 85.34(2)(n), the shoulder is compensated based on 400 weeks of benefits. As such, claimant is entitled to 12 percent permanent partial disability of the shoulder, or 48 weeks.

Rate of compensation

Claimant believes the proper weekly benefit rate to be $983.10, based on an average weekly wage of $1,621.00. (Cl. Ex. 3, p. 1) Defendants believe the proper rate is $870.44, based on an average weekly wage of $1,418.70. (Hearing Report; Def. Ex. E, p. 1)[1] Claimant argues that defendants' rate calculation is incorrect based on defendants' failure to include regular bonuses, inclusion of vacation pay at a lower rate, and inclusion of unrepresentative weeks. Defendants argue that the weeks included in the calculation are representative, that the bonuses claimant included are irregular bonuses, and that claimant's higher rate of pay for vacation time is based on a negotiated rate, and should be excluded as premium pay.

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.

If the employee is paid on a daily or hourly basis or by output, weekly earnings are computed by dividing by 13 the earnings, including shift differential pay but not including overtime or premium pay, over the 13-week period immediately preceding the

[1] Defendants' Exhibit E, p. 1 indicates a rate of $888.69, based on claimant's status as M4. However, the hearing report and claimant's exhibits refer to claimant's status as M2. As such, the rate presented on the hearing report is accepted as the rate defendants propose.

injury. Any week that does not fairly reflect the employee's customary earnings is excluded, however. Section 86.36(6)

Even though claimant may have worked more or less than 40 hours during some of the weeks before the injury due to unanticipated occurrences, a customary work week schedule should be used to calculate the rate of compensation. Thilges v. Snap-On Tools Corp., 528 N.W.2d 614, 619 (Iowa 1995). This customary work schedule rule takes precedence over any averaging of earnings over the 13 weeks prior to the injury set forth in Iowa Code section 85.36(6). Weishaar v. Snap-On Tools Corp., 582 N.W.2d 177 (Iowa 1998); Mercy Medical Center v. Healy, 801 N.W.2d 865 (Iowa App. 2011).

"Ascertainment of an employee's customary earnings does not turn on a determination of what earnings are guaranteed or fixed; rather, it asks simply what earnings are usual or typical for that employee." Jacobson Transp. Co. v. Harris, 778 N.W.2d at 199 (Iowa 2010).

This agency discussed inclusion/exclusion of vacation pay in a recent case. Torres v. A. Y. McDonald. Mfg., File No 5053064 (Arb. October 5, 2017) That decision held:

> Iowa Code section 85.36(6) describes that calculation method for an hourly employee. It states that:
>
> If the employee was absent from employment for reasons personal to the employee during part of the thirteen calendar weeks preceding the injury, the employee's weekly earnings shall be the amount the employee would have earned had the employee worked when work was available to other employees of the employer in a similar occupation. A week which does not fairly reflect the employee's customary earnings shall be replaced by the closest previous week with earnings that fairly represent the employee's customary earnings.

Bonuses are included in the gross earnings of an employee for the purposes of calculating the workers' compensation rate if the bonus is regular. An annual bonus is considered regular if it is regularly paid over a number of years. Ratliff v. Quaker Oats Co., File No. 5046704, p. 11 (App. Dec. 1/5/17). A bonus is regular even if it is discretionary or varies in amount. Id. ("It matters not whether an annual or quarterly bonus payment is discretionary or varies in amount ....") "The division of workers' compensation has determined that when a bonus is clearly an annual expectation and there is in fact a plan governing the bonus, the best policy consistent with the Supreme Court's guidance is to include the annual bonus and include a pro rata weekly amount to claimant's gross earning calculation." Mayfield v. Pella Corp., File No. 5019317 (Remand Dec. 6/30/09).

In Burton v. Hilltop Care Center, 813 N.W.2d 250 (Iowa 2012), the commissioner held that an annual bonus should be included in the rate calculation even though the

bonus amounts varied year to year. The commissioner divided the bonus by 52 and included the pro rata portion in the weekly gross earnings. Id. at 264. The Supreme Court upheld the commissioner's inclusion of the bonus. Id. at 266.

With respect to the inclusion of bonuses, I agree with claimant that the bonuses should be considered regular and included in the rate calculation. Claimant received two annual bonuses, and another bonus every time the union ratified a new contract. All Quaker employees receive a "pay for performance" bonus every January. (Tr., pp. 52-53; Cl. Ex. 3, p. 3, 49) Zach Kuntz, Quaker's human resources manager, testified for Quaker in another workers' compensation case. Portions of his testimony are included in Exhibit 3. Mr. Kuntz testified that the pay for performance bonus was paid annually, according to a plan. (Cl. Ex. 3, p. 49) He testified that the bonus is "based off of plant performance across key metrics: Safety, cost, delivery." (Cl. Ex. 3, p. 49)

Claimant further testified that he has received a vacation bonus every year since he reached 25 years of service with Quaker. (Tr., pp. 53-54; Cl. Ex. 3, pp. 39, 42, 45) The bonus was previously $500 per year, but since 2016, the vacation bonus has been 45 percent of the employee's wages for a 40-hour week. (Cl. Ex. 3, p. 45) Finally, claimant testified that he has received a bonus every time the union has ratified a contract with Quaker. (Tr., p. 54; Cl. Ex. 3, pp. 40, 43, 46)

All three of these bonuses are regular and should be included in the rate calculation. In the calculations claimant provided, the yearly bonuses were divided by 52 and added to the weekly gross earnings, and the bonus for ratification of the union contract was divided by the length of the contract - 208 weeks. (Cl. Ex. 3, pp. 1-2)

With respect to vacation pay, the agency has held that a higher vacation pay rate should be included as part of a rate calculation if the rate is contained in a contract between an employee's union and his employer. Stallman v. Quaker Oats Co., File No. 5065202, p. 16 (Arb. Dec. Jan. 25, 2019) (affirmed in Appeal Decision dated June 16, 2020); Oxley v. Lennox, File No. 5067306 (Arb. Dec. March 18, 2020).

Claimant testified that Quaker employees are paid at a higher rate for vacation hours. The vacation rate is based on the amount of overtime the employee worked the year before, and is negotiated between the union and Quaker. (Tr., pp. 54-55; Cl. Ex. 3, pp. 39, 42, 45) The evidence provided supports claimant's testimony.

Finally, in reviewing the rate calculations, I find that the weeks included in claimant's rate calculation fairly represent his customary earnings and more appropriately follow Iowa Code section 85.36(6). Therefore, I conclude that claimant's rate calculation of $983.10 is correct under these circumstances when applying Iowa Code section 85.36(6), and I adopt the same.

Medical expenses

The parties stipulated that the treatment claimant received for his shoulder was reasonable and necessary and connected to the medical condition upon which this

claim of injury is based. The parties also stipulated that the fees or prices charged by claimant's medical providers were fair and reasonable. I found claimant's shoulder injury to be compensable. As such, defendants are liable for the medical expenses outlined in claimant's Exhibit 7.

Penalty

Claimant contends he is entitled to penalty benefits pursuant to Iowa Code section 86.13. First, he claims that defendants lack a reasonable basis to deny liability. Second, he claims that defendants failed to communicate the basis for the denial of the claim. Defendants disagree, and claim that Dr. Jameson's report provides the reasonable basis for their denial. Further, defendants contend that claimant was notified of the ongoing investigation on December 18, 2018.

Iowa Code section 86.13(4) provides:

> 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 in 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.

In Christensen v. Snap-on Tools Corp., 554 N.W.2d 254 (Iowa 1996), and Robbennolt v. Snap-on Tools Corp., 555 N.W.2d 229 (Iowa 1996), the supreme court said:

> Based on the plain language of section 86.13, we hold an employee is entitled to penalty benefits if there has been a delay in payment unless the employer proves a reasonable cause or excuse. A reasonable cause or excuse exists if either (1) the delay was necessary for the insurer to investigate the claim or (2) the employer had a reasonable basis to contest the employee's entitlement to benefits. A "reasonable basis" for denial of the claim exists if the claim is "fairly debatable."

Christensen, 554 N.W.2d at 260.

The supreme court has stated:

(1) If the employer has a reason for the delay and conveys that reason to the employee contemporaneously with the beginning of the delay, no penalty will be imposed if the reason is of such character that a reasonable fact-finder could conclude that it is a "reasonable or probable cause or excuse" under Iowa Code section 86.13. In that case, we will defer to the decision of the commissioner. See Christensen, 554 N.W.2d at 260 (substantial evidence found to support commissioner's finding of legitimate reason for delay pending receipt of medical report); Robbennolt, 555 N.W.2d at 236.

(2) If no reason is given for the delay or if the "reason" is not one that a reasonable fact-finder could accept, we will hold that no such cause or excuse exists and remand to the commissioner for the sole purpose of assessing penalties under section 86.13. See Christensen, 554 N.W.2d at 261.

(3) Reasonable causes or excuses include (a) a delay for the employer to investigate the claim, Christensen, 554 N.W.2d at 260; Kiesecker v. Webster City Meats, Inc., 528 N.W.2d at 109, 111 (Iowa 1995); or (b) the employer had a reasonable basis to contest the claim—the "fairly debatable" basis for delay. See Christensen, 554 N.W.2d at 260 (holding two-month delay to obtain employer's own medical report reasonable under the circumstances).

(4) For the purpose of applying section 86.13, the benefits that are underpaid as well as late-paid benefits are subject to penalties, unless the employer establishes reasonable and probable cause or excuse. Robbennolt, 555 N.W.2d at 237 (underpayment resulting from application of wrong wage base; in absence of excuse, commissioner required to apply penalty).

> If we were to construe [section 86.13] to permit the avoidance of penalty if any amount of compensation benefits are paid, the purpose of the penalty statute would be frustrated. For these reasons, we conclude section 86.13 is applicable when payment of compensation is not timely . . . or when the full amount of compensation is not paid.

Id.

(5) For purposes of determining whether there has been a delay, payments are "made" when (a) the check addressed to a claimant is mailed (Robbennolt, 555 N.W.2d at 236; Kiesecker, 528 N.W.2d at 112), or (b) the check is delivered personally to the claimant by the employer or its workers' compensation insurer. Robbennolt, 555 N.W.2d at 235.

> (6) In determining the amount of penalty, the commissioner is to consider factors such as the length of the delay, the number of delays, the information available to the employer regarding the employee's injury and wages, and the employer's past record of penalties. Robbennolt, 555 N.W.2d at 238.
>
> (7) An employer's bare assertion that a claim is "fairly debatable" does not make it so. A fair reading of Christensen and Robbennolt, makes it clear that the employer must assert facts upon which the commissioner could reasonably find that the claim was "fairly debatable." See Christensen, 554 N.W.2d at 260.

Meyers v. Holiday Express Corp., 557 N.W.2d 502 (Iowa 1996).

Weekly compensation payments are due at the end of the compensation week. Robbennolt, 555 N.W.2d 229, 235. Penalty is not imposed for delayed interest payments. Davidson v. Bruce, 593 N.W.2d 833, 840 (Iowa App. 1999). Schadendorf v. Snap-On Tools Corp., 757 N.W.2d 330, 338 (Iowa 2008).

When an employee's claim for benefits is fairly debatable based on a good faith dispute over the employee's factual or legal entitlement to benefits, an award of penalty benefits is not appropriate under the statute. Whether the issue was fairly debatable turns on whether there was a disputed factual dispute that, if resolved in favor of the employer, would have supported the employer's denial of compensability. Gilbert v. USF Holland, Inc., 637 N.W.2d 194 (Iowa 2001).

Pursuant to Iowa Code section 86.13(4)(c), the employer bears the burden to establish that the reasonable cause or excuse for the delay in benefits was preceded by a reasonable investigation, that the results of that investigation are the actual basis for denial, and that the employer contemporaneously conveyed the basis to the claimant at the time of the delay or denial.

In this case, defendants' denial of the shoulder injury was based on Dr. Jameson's report. While his report may provide a reasonable basis for the denial, defendants did not obtain his report until January 25, 2020, approximately 19 months after the injury was reported. Claimant testified that he made several telephone calls to Quaker's workers' compensation coordinator, Kevin Engles, and left voice mail messages asking about the status of his claim. (Tr., p. 37) Claimant's calls and messages were unanswered. (Tr., p. 37) In November or December of 2018, claimant filed a complaint with the Iowa Insurance Commissioner. (Tr., pp. 37-38) The Commissioner's office contacted Sedgwick, and was advised that the claim was under investigation. (Cl. Ex. 2, p. 15) The Insurance Commissioner's office sent claimant a letter advising of this on December 18, 2018. (Cl. Ex. 2, pp. 15-16) However, claimant testified that no one from Quaker ever informed him regarding the status of the investigation. (Tr., p. 38) Defendants have not provided any evidence to the contrary.

Defendants provided answers to claimant's Request for Admissions on April 16, 2019, and responded to the remainder of discovery on September 16, 2019. (Cl. Ex. 1; Cl. Ex. 2, pp. 1-2) In those responses, defendants did not provide a basis for the denial, nor provide any information regarding an ongoing investigation of the claim. (Cl. Ex. 1; Cl. Ex. 2, pp. 1-2)

I find that defendants did not offer evidence of a reasonable investigation or provide a reasonable excuse for the delay in payment of benefits until receipt of Dr. Jameson's report, 19 months after the injury was reported. Iowa Code section 86.13(4)(c)(1)-(2). I find that defendants did not contemporaneously convey their bases for delay of benefits. Iowa Code section 86.13(4)(c)(3). Defendants bore the burden to establish a reasonable basis, or excuse, and to prove the contemporaneous conveyance of those bases to the claimant. Defendants failed to carry their burden of proof on the penalty issues, and a penalty award is appropriate. Iowa Code section 86.13. Defendants also have a history of being assessed with penalties, as demonstrated in the attachment to claimant's brief.

The purpose of Iowa Code section 86.13 is both punishment for unreasonable conduct, but also deterrence for future cases. Robbennolt, 555 N.W.2d at 237. In this regard, the Commission is given discretion to determine the amount of the penalty imposed, with a maximum penalty of 50 percent of the amount of the delayed, or denied, benefits. Christensen v. Snap-On Tools Corp., 554 N.W.2d 254, 261 (Iowa 1996). In exercising its discretion, the agency must consider factors such as the length of the delays, the number of delays, the information available to the employer regarding the employee's injury and wages, and the employer's past record of penalties. Meyers v. Holiday Express Corp., 557 N.W.2d 502, 505 (Iowa 1996). Given the length of the delay, the lack of evidence regarding any investigation, and defendants' history regarding penalty benefits, a penalty in the range of 50 percent is appropriate. The penalty applies to benefits prior to defendants' receipt of Dr. Jameson's report in January 2020, after which defendants had a reasonable basis for their denial.

Claimant was awarded 44 weeks of healing period benefits, and 48 weeks of permanent partial disability benefits, at the rate of $983.10. All of the healing period benefits, and approximately 18 weeks of the permanent benefits, were payable prior to Dr. Jameson's report. Therefore, a penalty in the amount of $30,000.00 is imposed based on defendants' failure to communicate the basis of their denial to claimant, the length of the delay, and defendants' history of being assessed with penalties.

The remaining issues of payment of the independent medical evaluation and costs are addressed below, as those issues are applicable to both files.

File No. 5066867 (date of injury September 12, 2018; right lower extremity)

Notice and Statute of Limitations

There is little dispute that claimant gave notice to Quaker of his knee injury on September 18, 2018. (Cl. Ex. 2, p. 14) Defendants argue, however, that the knee injury manifested more than 90 days prior to that notice.

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 a 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, the factors may include missing work when the condition prevents performing the job, or receiving significant medical care for the condition. For time limitation purposes, the discovery rule then becomes pertinent so the statute of limitations does not begin to run until the employee, as a reasonable person, knows or should know, that the cumulative injury condition is serious enough to have a permanent, adverse impact on his or her employment. Herrera v. IBP, Inc., 633 N.W.2d 284 (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).

Claimant testified that he did have some symptoms in his knee prior to September of 2018. In his deposition, he stated that his right knee symptoms started at some point after he returned to work in 2017. (Def. Ex. H, p. 37) He also told Dr. Brownell that he had continuing right knee pain since the incident in 2014, but had only treated for the left knee. (JE 3, p. 1) Dr. Brownell found normal range of motion in the right knee with no tenderness at that time, but some crepitus.

That being said, claimant's right knee symptoms did not prevent him from performing his job until September of 2018. Claimant credibly testified that he continued to work, despite some symptoms, and the medical evidence supports his testimony. (Tr., pp. 30, 31, 75, 76; Def. Ex. H, p. 10). Even Dr. Jameson noted that the traumatic incident in 2014 would not have caused his right knee condition. (Def. Ex. A, p. 6) As such, I find that claimant's right knee injury manifested on or around September 12, 2018. Claimant reported the right knee injury to defendant employer on September 18, 2018. Therefore, claimant's right knee claim is not barred by the notice requirement of section 85.23.

With respect to the statute of limitations, Iowa Code section 85.26(1) requires an employee to bring an original proceeding for benefits within two years from the date of the occurrence of the injury if the employer has paid the employee no weekly indemnity benefits for the claimed injury. If the employer has paid the employee weekly benefits on account of the claimed injury, however, the employee must bring an original

proceeding within three years from the date of last payment of weekly compensation benefits. Claimant's petition was filed timely on December 10, 2018.

Causation of injury

Defendants denied claimant's right knee injury based on Dr. Jameson's opinion. Dr. Jameson opined that claimant's knee condition was the result of arthritis, and was not related to a work injury. (Def. Ex. A, p. 6)

Both Dr. Hart and Dr. Manshadi provided contrary opinions. Dr. Hart opined that the cause of claimant's knee condition was multifactorial, and includes osteoarthritis. (JE 4, p. 31) However, he also found that claimant's work activities at Quaker were a substantial contributing factor causing his knee condition and need for a total knee replacement. (JE 4, p. 31) Likewise, Dr. Manshadi found that claimant's work activities on or before September 12, 2018, were a substantial contributing factor in materially aggravating his right knee condition. (Cl. Ex. 4, p. 5) Dr. Manshadi further recommended restrictions of avoiding prolonged standing or walking, climbing stairs occasionally, no ladders, no crawling, avoid uneven surfaces. (Cl. Ex. 4, p. 6)

While a claimant is not entitled to compensation for the results of a preexisting injury or disease, its mere existence at the time of a subsequent injury is not a defense. Rose v. John Deere Ottumwa Works, 247 Iowa 900, 76 N.W.2d 756 (1956). If the claimant had a preexisting condition or disability that is materially aggravated, accelerated, worsened or lighted up so that it results in disability, claimant is entitled to recover. Nicks v. Davenport Produce Co., 254 Iowa 130, 115 N.W.2d 812 (1962); Yeager v. Firestone Tire & Rubber Co., 253 Iowa 369, 112 N.W.2d 299 (1961).

I find that claimant's work activities leading up to and on September 12, 2018 materially aggravated his degenerative osteoarthritis in his right knee, which was a substantial factor in causing his right knee injury and need for surgery. Therefore, defendants are liable for the injury to claimant's right knee.

Temporary disability

Claimant is seeking a running award from January 20, 2020 until such time as he meets the requirements of Iowa Code section 85.34(1). The parties stipulated that if defendants are liable for the alleged injury, claimant is entitled to weekly benefits for this period of time. As such, claimant is entitled to temporary total disability benefits from January 20, 2020, until (1) he has returned to work; (2) he is medically capable of returning to substantially similar employment; or (3) he has achieved maximum medical recovery. See Armstrong Tire & Rubber Co. v. Kubli, 312 N.W.2d 60 (Iowa App. 1981).

Rate of compensation

Claimant believes the proper weekly benefit rate to be $970.70, based on an average weekly wage of $1,555.00. (Cl. Ex. 3, p. 2) Defendants believe the proper rate is $900.58, based on an average weekly wage of $1,433.86. (Hearing Report; Def. Ex.

E, p. 2)[2] Based on my findings above, I conclude that claimant's rate calculation is correct under these circumstances when applying Iowa Code section 85.36(6) and I adopt the same.

Medical expenses and alternate care

The parties stipulated that the treatment claimant received for his right knee was reasonable and necessary and connected to the medical condition upon which this claim of injury is based. The parties also stipulated that the fees or prices charged by claimant's medical providers were fair and reasonable. I found claimant's right knee injury compensable. As such, Defendants are liable for the medical expenses outlined in claimant's Ex. 7.

Claimant has established care for his right knee injury with Dr. Hart. Dr. Hart also treated claimant for his shoulder injury, and was the authorized treating provider for claimant's prior left leg injury (Tr., pp. 61-62) Claimant has established a long-standing doctor-patient relationship with Dr. Hart.

Dr. Hart has recommended a total knee replacement, and at the time of hearing the surgery was scheduled. Claimant has requested that Dr. Hart continue to be authorized as his treating physician for the right knee injury. It does not appear defendants object to this request. Therefore, Dr. Hart will remain the authorized treating physician for claimant's right knee. Defendants shall continue to authorize treatment with Dr. Hart until such time as he releases claimant from his care.

Penalty under Iowa Code section 86.13 for unreasonable denial of benefits

The same arguments discussed above are applicable to this claim as well. I find that defendants did not offer evidence of a reasonable investigation or provide a reasonable excuse for the delay in payment of benefits until receipt of Dr. Jameson's report, approximately 16 months after the knee injury was reported. Iowa Code section 86.13(4)(c)(1)-(2). I find that defendants did not contemporaneously convey their bases for delay of benefits. Iowa Code section 86.13(4)(c)(3). Defendants bore the burden to establish a reasonable basis, or excuse, and to prove the contemporaneous conveyance of those bases to the claimant. Defendants failed to carry their burden of proof on the penalty issues, and a penalty award is appropriate. Iowa Code section 86.13. Defendants also have a history of being assessed with penalties, as demonstrated in the attachment to claimant's brief.

Given the length of the delay, the lack of evidence regarding any investigation, and defendants' history regarding penalty benefits, a penalty in the range of 50 percent is appropriate. As I found above, when defendants' received Dr. Jameson's report and provided it to claimant, they had a reasonable basis for the denial of the claim.

---

[2] Again, defendants' Exhibit E, p. 2 shows a rate of $915.76 based on claimant's status of M4. As above, the rate proposed on the hearing report is accepted as defendants proposed rate.

Claimant was not yet at maximum medical improvement at the time of hearing, and has been awarded ongoing temporary total disability benefits from January 20, 2020 until such time as he meets the requirements of Iowa Code section 85.34(1). For this claim, the weekly benefit rate is $970.70. Therefore, I award penalty benefits in the amount of $450.00, based on approximately one week of temporary total disability benefits.

IME and Taxation of Costs

Iowa Code section 85.39 permits an employee to be reimbursed for subsequent examination by a physician of the employee's choice where an employer-retained physician has previously evaluated permanent disability and the employee believes that the initial evaluation is too low. The section also permits reimbursement for reasonably necessary transportation expenses incurred and for any wage loss occasioned by the employee attending the subsequent examination.

Defendants are responsible only for reasonable fees associated with claimant's independent medical examination. Claimant has the burden of proving the reasonableness of the expenses incurred for the examination. See Schintgen v. Economy Fire & Casualty Co., File No. 855298 (App. April 26, 1991). Claimant need not ultimately prove the injury arose out of and in the course of employment to qualify for reimbursement under section 85.39. See Dodd v. Fleetguard, Inc., 759 N.W.2d 133, 140 (Iowa App. 2008).

The agency has held that a doctor's finding that an injury is not causally related to claimant's employment is the equivalent of a zero permanent impairment rating. Lucas v. Nelson Co., File No. 5041228 (Arb. Dec., Aug. 2012); Shafer v. TPI Iowa, File No. 5041226 (Arb. Dec., Aug. 2012). A zero impairment rating is sufficient to trigger entitlement to a section 85.39 independent medical examination. Holton-Martin v. Savery Hotel, File No. 1040787 (App. March 1994).

Dr. Manshadi's evaluation took place on January 30, 2020; five days after Dr. Jameson's January 25, 2020 report. (Cl. Ex. 4; Def. Ex. A). Dr. Jameson declined to rate Claimant's injuries. (Def. Ex. A, p. 7). Regardless, pursuant to agency precedent, claimant is entitled to reimbursement for Dr. Manshadi's evaluation pursuant to Iowa Code section 85.39.

With respect to costs, 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). The entire reasonable costs of doctors' and practitioners' reports may be taxed as costs pursuant to 876 IAC 4.33. Caven v. John Deere Dubuque Works, File Nos. 5023051, 5023052 (App. July 21, 2009).

Claimant's Exhibit 9 contains his asserted costs. He seeks assessment of the filing fee, which is a reasonable request and an allowable cost pursuant to 876 IAC 4.33(7). Defendants will be ordered to reimburse claimant $100.00 representing the filing fee.

Claimant seeks $1,000.00 for reimbursement of the telephone conference with Dr. Hart. The Iowa Supreme Court has determined that only the cost of the report itself can be assessed. Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839, 846-47 (Iowa 2015) (hereinafter "DART"). There is no breakdown provided as to what portion of the $1,000.00 fee, if any, was for the conference, and what portion was for his report. As such, I decline to assess this expense as a cost.

Claimant also seeks $26.00 for obtaining copies of medical records. This is not an allowable cost under the rules.

Defendants will be ordered to reimburse claimant $1,800.00 for Dr. Manshadi's evaluation and report, and are assessed with $100.00 in costs.

ORDER

THEREFORE, IT IS ORDERED:

File No. 5066732 (date of injury June 25, 2018; right arm/shoulder)

Defendants shall pay claimant forty-four (44) weeks of healing period benefits for the period of November 5, 2018 to September 9, 2019, at the rate of nine hundred eighty-three dollars and 10/100 ($983.10) per week.

Defendants shall pay claimant forty-eight (48) weeks of permanent partial disability benefits, commencing September 10, 2019, at the rate of nine hundred eighty-three dollars and 10/100 ($983.10) per week.

Defendants shall pay accrued weekly benefits in a lump sum together with interest payable at an annual rate equal to the one-year treasury constant maturity published by the federal reserve in the most recent H15 report settled as of the date of injury, plus two percent, as required by Iowa Code section 85.30.

Defendants shall pay claimant penalty benefits in the amount of thirty thousand dollars and 00/100 ($30,000.00).

Defendants are entitled to a credit pursuant to Iowa Code section 85.38(2) for payment of sick pay/disability income.

Defendants are responsible for all reasonable and necessary medical care related to the right shoulder injury, as outlined in claimant's exhibit 7.

File No. 5066867 (date of injury September 12, 2018; right lower extremity)

Defendants shall pay claimant temporary total disability benefits at the weekly rate of nine hundred seventy dollars and 70/100 ($970.70), commencing January 20, 2020, until such time as claimant meets the requirements of Iowa Code section 85.34(1).

Defendants shall pay accrued weekly benefits in a lump sum together with interest payable at an annual rate equal to the one-year treasury constant maturity published by the federal reserve in the most recent H15 report settled as of the date of injury, plus two percent, as required by Iowa Code section 85.30.

Defendants shall pay claimant penalty benefits in the amount of four hundred fifty dollars and 00/100 ($450.00).

Defendants are entitled to a credit pursuant to Iowa Code section 85.38(2) for payment of sick pay/disability income.

Defendants are responsible for all reasonable and necessary medical care related to the right knee injury, pursuant to Iowa Code section 85.27.

Defendants shall reimburse claimant's independent medical evaluation fee in the amount of one thousand eight hundred dollars and 00/100 ($1,800.00).

Defendants shall reimburse claimant's costs in the amount of one hundred dollars and 00/100 ($100.00), pursuant to rule 876 IAC 4.33.

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

Signed and filed this 23rd day of June, 2021.

JESSICA L. CLEEREMAN
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served as follows:

Andrew Giller (Via WCES)

Timothy Wegman (Via WCES)