

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

VALERIE JUST,	:	
	:	
Claimant,	:	
	:	
vs.	:	
	:	File No. 5067290
WELLS FARGO BANK NA,	:	
	:	ARBITRATION
Employer,	:	
	:	DECISION
and	:	
	:	
OLD REPUBLIC INSURANCE	:	
COMPANY,	:	
	:	Headnotes: 1402.40, 1403.10, 1802,
Insurance Carrier,	:	1803, 2206, 2501, 2701, 2907
Defendants.	:	

Claimant Valerie Just filed a petition in arbitration on January 25, 2019, alleging she sustained injuries to her right shoulder, right upper extremity, left lower extremity and body as a whole while working for the defendant, Wells Fargo Bank NA (“Wells Fargo”), on February 8, 2017. Wells Fargo and its insurer, the defendant, Old Republic Insurance Company (“Old Republic”) filed an answer on January 29, 2019.

An arbitration hearing was held on February 6, 2020, at the Division of Workers’ Compensation in Des Moines, Iowa. Attorney Nicholas Platt represented Just. Just appeared and testified. Attorney Tiernan Siems represented Wells Fargo and Old Republic. Joint Exhibits (“JE”) 1 through 6, and Exhibits 1 through 5 and A through E were admitted into the record. The record was held open through March 6, 2020, for the receipt of post-hearing briefs. The briefs were received and the record was closed.

At the start of the hearing the parties submitted a hearing report listing stipulations and issues to be decided. Wells Fargo and Old Republic waived all affirmative defenses.

STIPULATIONS

1. An employer-employee relationship existed between Wells Fargo and Just at the time of the alleged injury.
2. Just sustained an injury on February 8, 2017, which arose out of and in the course of her employment with Wells Fargo.

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

4. Although entitlement to temporary benefits cannot be stipulated, Just was off work from February 8, 2017 through February 17, 2017.

5. If Wells Fargo and Old Republic are liable for the alleged injury, Just is entitled to temporary benefits from February 8, 2017 through February 17, 2017.

6. If the alleged injury is found to be the cause of permanent disability, the disability is an industrial disability.

7. If the alleged injury is found to be the cause of permanent disability, the commencement date for permanent partial disability benefits, if any are awarded, is November 28, 2017.

8. At the time of the alleged injury Just's gross earnings were \$2,430.04 per week, she was married and entitled to two exemptions, and the parties believe the weekly rate is \$1,385.86.

9. Prior to the hearing Just was paid 11.5714 weeks of compensation at the rate of \$1,070.97 per week plus she received a permanent partial disability payment check on January 31, 2018, in the amount of \$23,561.34.

10. The costs set forth in Exhibit 5 have been paid.

ISSUES

1. What is the nature of the injury?
2. Is the alleged injury a cause of permanent disability?
3. Is Just entitled to temporary benefits from February 8, 2017 through February 17, 2017?
4. Is Just entitled to alternate care under Iowa Code section 85.27?
5. Are Wells Fargo and Old Republic entitled to a credit under Iowa Code section 85.38(2) for payment of sick pay/disability income in the amount of \$11,825.00?
6. Is Just entitled to penalty benefits based on an underpaid rate?
7. Should costs be assessed against either party?

FINDINGS OF FACT

Just lives with her husband in Des Moines, Iowa. (Exhibit 2, page 1, Transcript, p. 8) Just is right-hand dominant. (JE 1, p. 1; Tr., p. 13) At the time of the hearing she was sixty-three. (Tr., p. 8)

Just graduated from high school and attended South Dakota State University, earning a bachelor of science degree in agronomy in 1978. (Tr., p. 8) Just has not attended additional schooling after graduating from college. Just has received periodic training from Wells Fargo, her employer. (Tr., p. 9)

After college, from 1986 through 1991, Just worked as a remedial teacher in Minnesota. (Tr., p. 10) Just had to carry resource and teaching materials throughout the school and she also provided recess and lunchroom relief, monitoring the children. (Tr., p. 10) After leaving teaching, Just worked as a real estate and mortgage closer for Petersen Abstract where she drove around the country to represent real estate agents in the closing of properties for four years. (Tr., p. 9) Just had to lift and carry documents to perform her job duties. (Tr., p. 9)

In 1996 Wells Fargo hired Just as a mortgage closer. (Tr., p. 11) Just prepared closing packets. (Tr., p. 11) Just has continued to work for Wells Fargo since 1996. (Tr., p. 11) For the past twenty-one years Just has worked as an operational risk consultant. (Tr., pp. 11-12, 56) At the time of her work injury in February 2017, Just was working in the executive complaint mortgage office. (Tr., p. 11) Just manages complaints and information requests received by Wells Fargo Home Mortgage and she ensures that the processes used by the operational teams for Wells Fargo Home Mortgage are policy and regulatory compliant. (Tr., p. 12) Just's position is sedentary with minimal lifting and carrying. (Tr., p. 12)

On February 8, 2017, Just went to work early at Wells Fargo for training. (Tr., p. 13) It had been snowing outside and snow had accumulated in the parking lot when she arrived. (Tr., p. 13) Just crossed the parking lot and headed toward the sidewalk to the building. (Tr., p. 13) Just was pulling a computer bag and carrying her purse and coffee. (Tr., p. 14) Just reported she could feel the snow pulling or dragging on her computer bag. (Tr., p. 14) After hitting a decline in the sidewalk near the building Just reported "my feet gave out from under me or I --honestly, it happened so fast I couldn't really describe exactly what happened; but when I finally realized what had happened, I was sprawled on the ground." (Tr., p. 14)

After falling Just noticed "significant pain" in her arm and shoulder. (Tr., p. 14) People were walking into the building and gathered around Just and tried to help her. (Tr., p. 15) Some individuals tried to lift up Just using her right shoulder, and the pain was intolerable. (Tr., pp. 15-16) Just was able to get up and she walked into the building with assistance. (Tr., p. 16) Just called her husband to come and take her to the emergency room. (Tr., p. 17) Just's husband was delayed in traffic and a security guard called an ambulance that took her to Methodist West. (Tr., p. 17)

At the hospital Just was complaining of right shoulder pain and left ankle pain. (JE 1) Just received x-rays, and the treating physician listed a clinical impression of traumatic closed displaced fracture of the proximal end of the right humerus, moderate left ankle sprain, and a closed avulsion fracture of the left talus. (JE 1, p. 9) Hospital staff dispensed a shoulder sling and an ankle orthotic to Just, prescribed pain

medication, and referred Just to Jon Gehrke, M.D., an orthopedic surgeon with Des Moines Orthopedic Surgeons. (JE 1; JE 2, p. 1; Tr., p. 17)

Dr. Gehrke examined Just the day of her injury, reviewed her x-rays, and assessed her with a right closed displaced two-part fracture of the proximal humerus, and right closed dorsal talar neck avulsion fracture. (JE 2, p. 2) Dr. Gehrke recommended a computerized tomography scan for the humeral neck fracture, noted the dorsal talar neck injury should heal on its own, and prescribed a CAM boot for the talar neck injury with full weightbearing. (JE 2, p. 2)

On February 10, 2017, Just returned to Dr. Gehrke. (JE 2, p. 4) After reviewing the computerized tomography scan, Dr. Gehrke opined Just may benefit from surgical intervention. (JE 2, p. 4) Dr. Gehrke restricted Just from working. (JE 2, p. 6)

The adjuster for Old Republic contacted Just and told her Old Republic would be directing her care and she should not return to Dr. Gehrke. (Tr., p. 19) Just requested to see Kyle Galles, M.D., an orthopedic surgeon with Iowa Ortho. (Tr., p. 20) The adjuster agreed to make a referral. (Tr., p. 20)

On February 16, 2017, Just attended an appointment with Dr. Kyle Galles, complaining of right shoulder pain that was aching, throbbing, aggravated by movement, and relieved by rest. (JE 4, p. 1) Dr. Kyle Galles examined Just, reviewed her imaging, diagnosed her with a right proximal humerus fracture, and ordered additional imaging prior to surgery. (JE 4, pp. 2, 5) Dr. Kyle Galles imposed restrictions of no use of the right upper extremity and no driving and placed Just into a shoulder immobilizer. (JE 4, pp. 3, 5-6) After reviewing the additional imaging, Dr. Kyle Galles recommended conservative treatment. (JE 4, pp. 8, 10) Dr. Kyle Galles continued to monitor Just and determined her fracture was healing in an acceptable position and continued her restrictions. (JE 4, pp. 17, 19, 24, 26)

Just complained of knee pain and Dr. Kyle Galles referred her to Timothy Vinyard, M.D., an orthopedic surgeon with Iowa Ortho. (JE 4, p. 11) Just reported she began experiencing right knee pain after the work injury she described as sharp and severe over the anterior aspect of her knee with mild aching over the lateral aspect of her knee that is worse with activity, especially stairs, and better with rest. (JE 4, p. 11) Dr. Vinyard recommended magnetic resonance imaging and imposed restrictions of no lifting over ten pounds, and to avoid repetitive climbing, lifting, pulling, pushing, kneeling, squatting, stooping, or twisting. (JE 4, pp. 13, 15)

Just denied having problems with her right shoulder and right knee before the work injury. (Tr., pp. 12-13) Just had sprained her ankle decades before her work injury, but testified it had cleared up long before her work injury. (Tr., p. 13)

Just received the imaging for her right knee and the reviewing radiologist listed an impression of grade 3 to 4 patellar chondromalacia and a small joint effusion. (JE 3, p. 1) During a follow-up appointment, Dr. Vinyard assessed Just with acute right knee pain and chondromalacia of the right patella, discussed treatment options with her,

ordered a corticosteroid injection and physical therapy, and imposed restrictions of no lifting over twenty pounds, and to avoid repetitive lifting, pulling, pushing, climbing, kneeling, squatting, stooping, and twisting. (JE 4, pp. 29-31)

Just also complained of left foot and ankle pain and Dr. Kyle Galles referred her to Joseph Galles, M.D., an orthopedic surgeon with Iowa Ortho. (JE 4, p. 20) Dr. Joseph Galles examined Just's left foot and ankle, assessed Just with a left ankle sprain of an unspecified ligament, and ordered her to work on strengthening and range of motion using a Thera-Band, and noted she could transition to sedentary work-related activities. (JE 4, pp. 20, 22-23)

Just testified she was off work for approximately three months. (Tr., p. 38) During that time she received weekly workers' compensation benefits and an auto deposit check from Wells Fargo. (Tr., pp. 38-40) Just said she received the same salary she normally received during the three month period when she was off work and receiving workers' compensation benefits. (Tr., pp. 41-42)

Just continued to complain of pain and a sensation that her shoulder was out of alignment at times when she moved her shoulder. (JE 4, p. 32) Dr. Kyle Galles examined Just, reviewed additional imaging, found her fracture appeared to be healing in an acceptable position, ordered physical therapy, informed Just he believed the sensation she had in her shoulder would improve with physical therapy, ordered her to wear an immobilizer and continued her work restrictions of no use of the right arm. (JE 4, pp. 33-34, 36)

On April 10, 2017, Just attended a follow-up appointment with Dr. Joseph Galles regarding her left foot pain. (JE 4, p. 37) Dr. Joseph Galles examined Just, found her left ankle demonstrated full range of motion with no instability, determined she could return to unrestricted activities specific to her left ankle, opined Just had reached maximum medical improvement, and released her from care for her left ankle. (JE 4, pp. 37, 39)

Just returned to Dr. Vinyard's office on April 25, 2017, reporting her symptoms improved after she received the corticosteroid injection. (JE 4, p. 40) Eric Hedrick, P.A. examined Just and discussed his findings with Dr. Vinyard. (JE 4, p. 40) Dr. Vinyard discontinued Just's physical therapy, recommended home exercises, discussed the progression of osteoarthritis, placed her at maximum medical improvement, and released her to return to work without restrictions. (JE 4, pp. 42, 43) Just reported she believed the physical therapy was helpful, but the cortisone shot she received was more helpful and relayed the benefits from the injection lasted for four to six months. (Tr., pp. 34-35, 79)

Dr. Kyle Galles continued to treat Just's right shoulder condition. (JE 4, p. 44) During an appointment on May 3, 2017, Dr. Kyle Galles documented Just's fracture appeared to be "healing uneventfully," ordered additional physical therapy, discontinued the immobilizer, released Just to return to driving, and imposed a restriction of no work over shoulder height. (JE 4, pp. 45, 47-48) On May 31, 2017, Dr. Kyle Galles

documented Just's shoulder pain was improving, he ordered physical therapy, and imposed restrictions of no lifting over ten pounds and to minimize work over shoulder height. (JE 4, pp. 49, 50, 52) Just reported her pain was improving with additional physical therapy and Dr. Kyle Galles continued her restrictions. (JE 4, pp. 54, 56-57)

Just injured her left ankle while walking and she returned to Dr. Joseph Galles on July 21, 2017, reporting her pain was aggravated by walking and relieved by rest and an ACE wrap. (JE 4, p. 58) Dr. Joseph Galles assessed Just with a left ankle ligament sprain, left ankle instability, and pain in an unspecified limb, recommended Just wear a lace-up brace as needed and with any moderate activity, including walking, advised Just to continue strengthening and range of motion exercises, ordered magnetic resonance imaging, and released Just to return to work without restrictions. (JE 4, pp. 58, 60)

Just returned to Dr. Kyle Galles on August 9, 2017, regarding her right shoulder pain. (JE 4, p. 61) Just reported the pain was mild and aching, and occurred constantly. (JE 4, p. 61) Dr. Kyle Galles opined Just could continue her exercises independently and released her to return to work without restrictions. (JE 4, pp. 62, 63) Just testified the physical therapy she received for her shoulder "helped immensely." (Tr., p. 22)

Dr. Kyle Galles discontinued Just's physical therapy. (Tr., p. 22) Just requested additional physical therapy and he informed her that in his experience additional physical therapy would not be valuable. (Tr., p. 22) Just testified when Dr. Kyle Galles discontinued her physical therapy she was still experiencing symptoms in her right shoulder. (Tr., p. 23) Just reported she was very angry with Dr. Kyle Galles because she did not believe he had her best interest in mind and she believed he was acting as an advocate for the insurance company. (Tr., pp. 23, 63-64) Just reported she did not seek additional treatment because the adjuster "had made it very clear at the very beginning that I was to go to Iowa Ortho." (Tr., p. 23)

Just worked from home while she was attending physical therapy. (Tr., p. 42) Just reported when she returned to work she was using her same keyboard and mouse and she found she was having to use small movements with her mouse during the day and at the end of the day her upper arm would be very sore. (Tr., p. 42) Just requested an ergonomic evaluation, which was approved. (Tr., p. 42) Wells Fargo followed the recommendations from the evaluation and provided Just with a modified work station with a different mouse and platform for her keyboard and provided her with handicapped parking near the handicapped entrance so she did not have to lift her computer through the entry doors. (Tr., p. 43)

After receiving the left ankle magnetic resonance imaging, Just returned to Dr. Joseph Galles on August 29, 2017, complaining of sharp and occasional pain radiating into her left lower leg. (JE 4, p. 64) Dr. Joseph Galles reviewed the imaging, opined the imaging did not demonstrate any new pathology, ordered physical therapy, and directed Just to continue normal activity. (JE 4, pp. 64, 66-67) During a follow-up appointment on October 17, 2017, Dr. Joseph Galles documented he believed physical therapy could be contributing to overuse type syndrome in Just's left ankle, discontinued her physical

therapy, ordered Just to resume normal day-to-day activities, and imposed no restrictions. (JE 4, pp. 68, 70) On November 28, 2017, Dr. Joseph Galles examined Just, assessed her with left ankle tendinitis, and released her without restrictions. (JE 4, pp. 71, 73)

On December 18, 2017, Dr. Vinyard completed a check-the-box letter for Wells Fargo and Old Republic. (JE 4, p. 74) Dr. Vinyard documented Just reached maximum medical improvement on April 25, 2017, checked he agreed Just had been able to return to full duty without restrictions, agreed he released Just from care, and agreed Just had not sustained a permanent impairment “using the AMA Guides to the Evaluation of Permanent Impairment.” (JE 4, p. 74) The letter did not reference which version of the AMA Guides Dr. Vinyard used in rendering his opinion. (JE 4, p. 74)

Dr. Joseph Galles completed a check-the-box letter for Wells Fargo and Old Republic on December 27, 2017. (JE 4, p. 75) Dr. Joseph Galles documented Just reached maximum medical improvement on November 28, 2017. (JE 4, p. 75) Dr. Joseph Galles checked he agreed Just had been able to return to full duty without restrictions, agreed he released Just from care, and agreed Just had not sustained a permanent impairment “using the AMA Guides to the Evaluation of Permanent Impairment.” (JE 4, p. 75) As with the letter sent to Dr. Vinyard, the letter sent to Dr. Joseph Galles does not reference which version of the AMA Guides Dr. Joseph Galles used in rendering his opinion. (JE 4, p. 75)

On January 22, 2018, Dr. Kyle Galles issued an impairment rating using the using the Guides to the Evaluation of Permanent Impairment (AMA Press, 5th Ed. 2001) (“AMA Guides”), noting he last examined Just on August 9, 2017 regarding her right proximal humerus fracture and determined she did not need any work restrictions or further care. (JE 4, p. 76) Dr. Kyle Galles opined:

[w]ith regard to residual impairment, referencing the AMA Guides to Evaluation of Permanent Impairment, 5th Edition, page 476, Figure 16-40, she would have a 3% upper extremity impairment for flexion to 140 degrees. Page 477, Figure 16-43, a 4% upper extremity impairment for abduction of 100 degrees. Page 479, Figure 16-46, a 0% upper extremity impairment for 80 degrees of external rotation and 2% upper extremity impairment for internal rotation of 50 degrees. Total upper extremity impairment, therefore, would equate to 9%.

(JE 4, p. 76)

On June 17, 2018, Just’s attorney sent a letter to the attorney for Wells Fargo and Old Republic, requesting additional care for her right arm and shoulder with James Nepola, M.D. at the University of Iowa Hospitals and Clinics and not with Dr. Kyle Galles. (Ex. 3, p. 1) Just testified she did not trust Dr. Kyle Galles because she did not believe he had her best interest in mind and so she requested a second opinion. (Tr., p. 25) Just reported Dr. Joseph Galles is a phenomenal physician and she believed he

clearly cared about her condition and is someone she would choose to go back to. (Tr., p. 38) Wells Fargo and Old Republic did not authorize the care Just requested.

John Kuhnlein, D.O., an occupational medicine physician, conducted an independent medical examination for Just on August 29, 2018, and issued his report on September 13, 2018. (Ex. 1) Dr. Kuhnlein examined Just and reviewed her medical records. (Ex. 1) Dr. Kuhnlein diagnosed Just with a comminuted proximal greater tuberosity fracture with mild displacement and nondisplaced lesser tuberosity fracture, nondisplaced fracture of the surgical neck of the humerus, chronic mid-humeral pain, right knee contusion, right knee chondromalacia, chronic right knee pain, a left ankle sprain with small avulsion fragments consistent with anterior capsule and anterior talofibular ligament type avulsion injury, and left ankle instability that had resolved. (Ex. 1, pp. 11-12)

With respect to causation for the right knee, Dr. Kuhnlein noted while Just's patellofemoral chondromalacia more likely than not predated the February 8, 2017 work injury, it was asymptomatic until the work injury and given her history "it is more likely than not that the chondromalacia was 'lit up'" by the work injury, and also finding her chronic right knee pain is related to the work injury. (Ex. 11, p. 12) Dr. Kuhnlein also found the right shoulder fractures and left ankle avulsion and sprain directly related to the work injury, noting any ankle instability appeared resolved. (Ex. 11, p. 12)

Dr. Kuhnlein found Just reached maximum medical improvement for her right shoulder condition on August 9, 2017, for her right knee condition on April 20, 2017, and for her left foot and ankle condition on November 28, 2017. (Ex. 11, p. 13) Using the AMA Guides, Dr. Kuhnlein opined,

[t]urning to Figures 16-40, 16-43 and 16-46, and when comparing the right to the unaffected left shoulder, there is a total of 6% right upper extremity impairment for deficits in range of motion. Turning to Table 16-35, page 510, there is 2% right upper extremity impairment for the motor deficits. Turning to the Combined Values Chart on page 604, when these values are combined (6% x 2%) this is 8% right upper extremity impairment. Turning to Table 16-3, page 439, this would convert to a 5% whole person impairment.

With respect to the right knee, no crepitation was noted, and she has no patellofemoral tenderness, the tenderness is in other areas of the right knee. As a result, the footnote under Table 17-31, Page 544 would not apply in this particular case. Ligamentous laxity was noted in both the affected and unaffected knee, so that would not apply. The physical means of impairment rating does not apply, but Ms. Just still has pain, and I believe Chapter 18 does apply here. I would assign 2% right lower extremity impairment for the residual discomfort from the chondromalacia. I also believe that Chapter 18 implies [*sic*] for the left ankle condition and would assign 1% right lower extremity impairment. Turning to the Combined Values Chart on page 604, when these values are combined

(2% x1%) this is 3% right lower extremity impairment. Turning to Table 17-3, page 527, this would convert to a 1% whole person impairment.

Turning to the Combined Values Chart on Page 604, when these values are combined (5%x1%) this is a 6% whole person impairment.

(Ex. 1, p. 13) Dr. Kuhnlein noted because of her current work Just is able to accommodate most of her work tasks, and if she changed jobs, she would require permanent work restrictions that would also apply to avocational activities. (Ex. 1, p. 14) Dr. Kuhnlein recommended material handling restrictions of lifting no more than ten pounds occasionally from floor to waist, no more than twenty pounds occasionally from waist to shoulder, and no more than ten pounds occasionally over the shoulder, noting Just should try to keep weight in front of her as much as possible and avoid lifting laterally as much as possible. (Ex. 1, p. 14) With respect to nonmaterial handling restrictions, Dr. Kuhnlein noted Just can stoop, squat, kneel, crawl, climb stairs, and work at or above shoulder height occasionally, bend at the waist frequently, and grip and grasp frequently with the right arm. (Ex. 1, p. 14) Dr. Kuhnlein recommended Just work on ground levels and avoid work on ladders or at heights due to safety concerns about maintaining a three-point safety stance with the right arm, right knee, and left ankle, and noted permanent restrictions may be unnecessary if a different type of mouse helps her ability to grip and grasp the mouse. (Ex. 1, p. 14) Dr. Kuhnlein found no vision, hearing, communication, environmental, personal protective equipment, shift work, or travel restrictions, noting if she works on uneven surfaces good footgear is appropriate. (Ex. 1, p. 14)

With respect to future care, Dr. Kuhnlein noted Just continued to complain of mid-humeral pain some distance from the fracture sites, and opined "there is no other reasonable explanation for her to have this pain other than this injury." (Ex. 11, p. 12) Given the breakdown in the physician-patient relationship between Dr. Kyle Galles and Just, Dr. Kuhnlein recommended a referral to Dr. Nepola at the University of Iowa Hospitals and Clinics for a second opinion. (Ex. 11, p. 12) Dr. Kuhnlein agreed an ergonomic assessment of her workstation would be appropriate and any necessary changes to her workstation should be made. (Ex. 11, pp. 12-13) Dr. Kuhnlein noted he would treat the right knee and left ankle complaints symptomatically, with support sleeves or braces and over-the-counter medication. (Ex. 11, p. 13)

On August 16, 2019, Wells Fargo and Old Republic provided an e-mail response to Just's request for medical care. (Ex. 3, p. 3) Wells Fargo and Old Republic agreed Just could return to Dr. Kyle Galles, but declined to authorize an appointment with another physician. (Ex. 3, p. 3)

Just returned to Dr. Kyle Galles on September 5, 2019, for a recheck of her right shoulder, complaining of some continuing pain over the lateral aspect of her right upper area near the deltoid insertion, and reporting reaching and overhead activities flare up things a bit more. (JE 4, p. 77) Dr. Kyle Galles assessed Just with chronic right shoulder pain, other chronic pain, and pain in an unspecified limb, recommended

additional magnetic resonance imaging and daily stretching exercises at home, and imposed no restrictions. (JE 4, pp. 78, 80)

Just received additional right shoulder magnetic resonance imaging on September 18, 2019. (JE 3, p. 3) The reviewing radiologist listed an impression as follows:

1. No rotator cuff tear. No significant rotator cuff tendinosis.
2. There is deformity in the humeral head. The anterior labrum is also markedly thickened with somewhat diminutive posterior labrum. There is slight posterior subluxation/positioning of the humeral head relative to the glenoid. These findings could be congenital or perhaps related to chronic changes of prior trauma.
3. Mild acromioclavicular joint degenerative changes.

(JE 3, p. 3)

On October 10, 2019, Just attended a follow-up appointment with Dr. Kyle Galles regarding her right shoulder pain. (JE 4, p. 81) Dr. Kyle Galles reviewed the magnetic resonance imaging, finding the fractures were well-healed and united appropriately, “[t]here are some perhaps early degenerative changes noted to the glenohumeral joint. Otherwise fairly unremarkable. Again, rotator cuff appears to be intact.” (JE 4, p. 82) Dr. Kyle Galles assessed Just with right shoulder region arthritis, recommended she take over-the-counter anti-inflammatories or Tylenol, and released her to return to work without restrictions. (JE 4, pp. 82-83)

Following her appointment with Dr. Kyle Galles, Just again requested a second opinion with respect to her arm/shoulder injury. (Ex. 3, p. 6) Just’s attorney relayed Wells Fargo and Old Republic had insisted she return to Dr. Kyle Galles and he had no further treatment recommendations, despite the problems she was still having with her shoulder. (Ex. 3, p. 6) Wells Fargo and Old Republic denied Just’s request, noting, with respect to Just’s “ongoing ‘problems,’” Just had been placed at maximum medical improvement “[h]ence, it is not surprising that Ms. Just might still have some subjective complaints.” (Ex. 3, p. 7)

After Wells Fargo and Old Republic refused Just’s request for additional medical care, she scheduled an appointment with William Jacobson, M.D., an orthopedic surgeon with Capital Orthopaedics. (Tr., pp. 25-26) Just saw Dr. Jacobson a week before the hearing. (Tr., p. 26) Dr. Jacobson’s records were not produced or admitted before the record was closed. Just testified Dr. Jacobson had ordered a computerized tomography scan of her right shoulder before the hearing. (Tr., p. 32) Just testified she would like to continue treatment with Dr. Jacobson if it were authorized and that she plans to continue treating with him whether or not the treatment is authorized. (Tr., p. 33) Just takes Advil and Tylenol three times per week. (Tr., p. 49)

Just testified when she tries to put clothes on over her head, her right shoulder goes out of alignment and she has to manipulate her shoulder to push it back in. (Tr., p. 32) Just reported this has been happening since her work injury. (Tr., p. 32) When Just has to lift things she uses her left arm to support the bulk of the weight and she uses her dominant right arm to guide things. (Tr., p. 45) Just reported when she blows her hair dry her arm hurts and will become stuck in a locked position. (Tr., p. 51) Hanging clean clothes causes her arm to become very sore and painful. (Tr., p. 51) When Just stands for a period of time dangling her arm, her arm will become painful and she has to support it with her other arm across her body, which impacts her ability to garden. (Tr., p. 51)

Just reported before her work injury she enjoyed riding bicycles. (Tr., p. 50) Since her work injury when she leans her weight on her arm for five to ten minutes her arm bothers her. (Tr., p. 50)

Just started beekeeping in 2015. (Tr., p. 50) When caring for the bees Just had to lift the boxes weighing up to forty to sixty pounds over her head. (Tr., pp. 50-51) After the work injury Just's husband had to entirely take over the beekeeping. (Tr., p. 51)

Just relayed she continues to have problems with her knee. (Tr., p. 35) Just noted when she goes up stairs she experiences a sharp pain in her knee. (Tr., p. 35) At hearing Just reported she was not seeking additional care for her knee. (Tr., p. 35)

Just testified she is not having symptoms with her left ankle, but she is hypervigilant where she walks and she is careful not to walk on uneven ground because she twisted and resprained her left ankle in the summer of 2017 when she hit an uneven area in her yard. (Tr., p. 38)

Just reported she did not believe she could perform the full functions of her position with Petersen Abstract because the job required her to carry bundles of materials and involved a lot of walking. (Tr., p. 48) Just also believed she would have difficulty returning to teaching because children often do unexpected physical things she would be concerned about and she had to carry resource materials and learning aids throughout the building. (Tr., pp. 48-49)

CONCLUSIONS OF LAW

I. Applicable Law

This case involves several issues, including nature and extent of disability, temporary benefits, alternate medical care, credits, penalty benefits, and the recovery of costs and interest under Iowa Code sections 85.27, 85.33, 85.34, 85.38, 86.13, 86.40, and 535.3. In 2017, the Iowa Legislature enacted changes to Iowa Code chapters 85, 86, and 535 effecting workers' compensation cases. 2017 Iowa Acts chapter 23 (amending Iowa Code sections 85.16, 85.18, 85.23, 85.26, 85.33, 85.34, 85.39, 85.45, 85.70, 85.71, 86.26, 86.39, 86.42, and 535.3). Under 2017 Iowa Acts chapter 23 section 24, the changes to Iowa Code sections 85.18, 85.23, 85.26, 85.33,

85.34, 85.39, 85.71, 86.26, 86.39, and 86.42 apply to injuries occurring on or after the effective date of the Act. Just's injury occurred before July 1, 2017, therefore, the new provisions of the statute do not apply to this case.

The calculation of interest is governed by Sanchez v. Tyson, File No. 5052008 (Ruling on Defendant's Motion to Enlarge, Reconsider, or Amend Appeal Decision Re: Interest Rate Issue), which holds interest for all weekly benefits payable and not paid when due which accrued before July 1, 2017, is payable at the rate of ten percent; all interest on past due weekly compensation benefits accruing on or after July 1, 2017, is 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.

II. Credibility

At hearing questions were raised concerning Just's ongoing symptoms in her right shoulder and right knee and her need for additional care after Drs. Kyle Galles, Joseph Galles, and Vinyard released her from care. I have assessed the credibility of witnesses in thousands of cases for more than a decade as an administrative law judge. Just is one of the most credible witnesses I have ever observed.

During the hearing I assessed Just's credibility by considering whether her testimony was reasonable and consistent with other evidence I believe, whether she had made inconsistent statements, her "appearance, conduct, memory and knowledge of the facts," and her interest in the case. State v. Frake, 450 N.W.2d 817, 819 (Iowa 1990). Just has an obvious interest in the outcome of this case. I had the opportunity to observe Just testify under oath. During her testimony Just engaged in direct eye contact, her rate of speech was appropriate, and she did not engage in any furtive movements. Just's memory was clear and consistent. I find Just's testimony reasonable and consistent with the other evidence I believe. Based on my personal observations at hearing, I found Just to be a credible witness. I find Just's testimony that she continues to experience symptoms and pain in her right shoulder and right knee credible.

III. Nature of the Injury – Permanent Impairment

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

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

Farmers Elevator Co. v. Manning, 286 N.W.2d 174, 177 (Iowa 1979). The parties agree Just sustained a work injury. Just avers she has sustained permanent impairments to her right upper extremity, right lower extremity, and left lower extremity caused by the work injury. Wells Fargo and Old Republic contend Just has not sustained a permanent impairment.

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

It is well-established in workers' compensation that "if a claimant had a preexisting condition or disability, aggravated, accelerated, worsened, or 'lighted up' by an injury which arose out of and in the course of employment resulting in a disability found to exist," the claimant is entitled to compensation. Iowa Dep't of Transp. v. Van Cannon, 459 N.W.2d 900, 904 (Iowa 1990). The Iowa Supreme Court has held,

a disease which under any rational work is likely to progress so as to finally disable an employee does not become a "personal injury" under our Workmen's Compensation Act merely because it reaches a point of disablement while work for an employer is being pursued. It is only when there is a direct causal connection between exertion of the employment and the injury that a compensation award can be made. The question is whether the diseased condition was the cause, or whether the employment was a proximate contributing cause.

Musselman v. Cent. Tel. Co., 261 Iowa 352, 359-60, 154 N.W.2d 128, 132 (1967).

A. Right Upper Extremity

Dr. Kyle Galles, a treating orthopedic surgeon, and Dr. Kuhnlein, an occupational medicine physician who conducted an independent medical examination of Just, have provided opinions on causation and permanency. Both physicians opined Just sustained a permanent impairment to her right shoulder caused by the work injury. Just has established she has sustained a permanent impairment to her right shoulder caused by the work injury.

B. Right Lower Extremity

Dr. Vinyard, a treating orthopedic surgeon, and Dr. Kuhnlein have provided opinions on whether Just has sustained a permanent impairment to her right knee caused by the work injury. I find Dr. Kuhnlein's opinion to be the most persuasive.

On April 25, 2017, Dr. Vinyard placed Just at maximum medical improvement and released her from care without any restrictions. (JE 4, pp. 42-43) On December 18, 2017, Dr. Vinyard completed a check-the-box letter sent to him by Wells Fargo and Old Republic. (JE 4, p. 74) The letter does not have any handwritten comments, with the exception of the date Just reached maximum medical improvement. (JE 4, p. 74) The letter does not provide what version of the AMA Guides Dr. Vinyard used in reaching his conclusions. (JE 4, p. 74) The Workers' Compensation Commissioner has expressly adopted the Fifth Edition of the AMA Guides to be used in workers' compensation cases. Iowa Code § 85.34(2); 876 IAC 2.4.

Dr. Kuhnlein examined Just in August 2018, more than a year after Dr. Vinyard last examined her, and he prepared a comprehensive report of his findings and opinions. (Ex. 1) Dr. Kuhnlein noted while Just's patellofemoral chondromalacia more likely than not predated the February 8, 2017, work injury, her condition was asymptomatic until the work injury and given her history "it is more likely than not that the chondromalacia was 'lit up'" by the work injury, and also opined her chronic right knee pain was related to the work injury. (Ex. 11, p. 12) In reaching his conclusions, Dr. Kuhnlein used the AMA Guides 5th Edition, which has been adopted by the Workers' Compensation Commissioner.

There is no evidence in this case Just complained of right knee pain or that she received treatment for right knee pain before the work injury. Just's medical records document she complained of right knee pain shortly after the work injury. For these reasons, I find Just has established her right knee condition was lighted up by the work injury and that the work injury also caused her chronic right knee pain, which has resulted in a permanent impairment.

C. Left Lower Extremity

Dr. Joseph Galles, a treating orthopedic surgeon, and Dr. Kuhnlein have provided opinions on whether Just has sustained a permanent impairment to her left ankle caused by the work injury. I do not find Just has sustained a permanent impairment to her left ankle. At hearing Just testified she is not having symptoms with

her left ankle, but she is hypervigilant where she walks and she is careful not to walk on uneven ground because she twisted and resprained her left ankle in the summer of 2017 when she hit an uneven area in her yard. (Tr., p. 38) This testimony is consistent with Dr. Joseph Galles's opinion. Both expert opinions contain flaws.

Dr. Joseph Galles treated Just over time. On November 28, 2017, Dr. Joseph Galles released Just from care without restrictions. (JE 4, pp. 42-43) On December 27, 2017, Dr. Joseph Galles completed a check-the-box letter sent to him by Wells Fargo and Old Republic. (JE 4, p. 74) The letter does not have any handwritten comments, with the exception of the date Just reached maximum medical improvement, which he documented occurred on November 28, 2017. (JE 4, p. 74) As with Dr. Vinyard's letter, the letter completed by Dr. Joseph Galles does not provide what version of the AMA Guides Dr. Joseph Galles used in reaching his conclusions. (JE 4, p. 74) As also noted above, the Workers' Compensation Commissioner has expressly adopted the Fifth Edition of the AMA Guides to be used in workers' compensation cases. Iowa Code § 85.34(2); 876 IAC 2.4.

Dr. Kuhnlein examined Just for purposes of an independent medical examination in August 2018, and diagnosed her with a left ankle sprain with small avulsion fragments consistent with anterior capsule and anterior talofibular ligament type avulsion injury, and left ankle instability that had resolved. (Ex. 1) Dr. Kuhnlein prepared a comprehensive report of his findings and opinions. Dr. Kuhnlein used the AMA Guides 5th Edition in rendering his opinion. His opinion has typographic errors. Dr. Kuhnlein discussed the left ankle condition, stating he believed Chapter 18 addressing pain under the AMA Guides Fifth Edition applies to the left ankle condition, and he assigned an additional one percent right lower extremity impairment, and using the Combined Values Chart on page 604, assigned a "3% right lower extremity impairment." (Ex. 1, p. 13) No attempt was made to correct Dr. Kuhnlein's opinion prior to hearing or to explain it. Just was not complaining of ankle pain symptoms at hearing. Based on her own testimony, I do not find Just has proven she sustained a permanent impairment to her left lower extremity caused by the work injury.

IV. Extent of Disability

"Industrial disability is determined by an evaluation of the employee's earning capacity." Cedar Rapids Cmty. Sch. Dist. v. Pease, 807 N.W.2d 839, 852 (Iowa 2011). In considering the employee's earning capacity, the deputy commissioner evaluates several factors, including "consideration of not only the claimant's functional disability, but also [his] age, education, qualifications, experience, and ability to engage in similar employment." Swiss Colony, Inc. v. Deutmeyer, 789 N.W.2d 129, 137-38 (Iowa 2010). The inquiry focuses on the injured employee's "ability to be gainfully employed." Id. at 138.

The determination of the extent of disability is a mixed issue of law and fact. Neal v. Annett Holdings, Inc., 814 N.W.2d 512, 525 (Iowa 2012). Compensation for permanent partial disability shall begin at the termination of the healing period. Iowa

Code § 85.34(2). Compensation shall be paid in relation to 500 weeks as the disability bears to the body as a whole. Id. § 85.34(2)(u).

As noted above, I found the opinion of Dr. Joseph Galles to be the most persuasive with respect to Just's left ankle condition. Just has not established she sustained a permanent impairment to her left ankle. I adopted Dr. Kuhnlein's opinion with respect to her right knee condition. Dr. Kuhnlein assigned a two percent permanent impairment to Just's right lower extremity.

Drs. Kyle Galles and Kuhnlein provided impairment opinions on Just's right shoulder. Dr. Kyle Galles assigned Just a nine percent total upper extremity impairment, and Dr. Kuhnlein assigned Just an eight percent total upper extremity impairment. (JE 4, p. 76; Ex. 1, p. 13) Both physicians used the same figures in the AMA Guides Fifth Edition in reaching their conclusions. Dr. Kuhnlein's opinion is based on observations he obtained eight months after those of Dr. Kyle Galles, and note some improvements in range of motion over time. The opinions are similar, and adopt Dr. Kuhnlein's rating given it occurred later in time.

At the time of the hearing Just was sixty-three. (Tr., p. 8) Just is a college graduate. (Tr., p. 8) She is articulate and able to use a computer. Just possesses superior management and executive skills. Just has worked for Wells Fargo for the past twenty-one years. She does not require any accommodations to perform her duties at Wells Fargo, which fall within Dr. Kuhnlein's restrictions. Just has received pay increases from Wells Fargo since her work injury.

Just expressed concern about her employment given recent reductions in staff at Wells Fargo. (Tr., pp. 45-47) As of the date of the hearing she continued to work for Wells Fargo. Any concern about the status of her ongoing employment is speculative because Just continues to work for Wells Fargo. If her circumstances change in the future, Just could pursue a review-reopening action. Since her work injury Just has received increases in her pay. (Tr., p. 58)

While Just is able to successfully perform her duties at Wells Fargo and she has received raises since the work injury, Just has sustained permanent injuries to her right shoulder and right knee that interfere with activities she performed in the past, and which impact her employability.

During the hearing Just testified about the difficulties she has dressing and blow drying her hair. These difficulties are consistent with Dr. Kuhnlein's findings. Just used to enjoy riding bicycles with her family members. Since the work injury she experiences pain when riding ten minutes, which has curtailed her riding activity. Just also enjoyed beekeeping and she can no longer lift the heavy boxes of bees and must rely on her husband. Her shoulder condition also impacts her ability to garden.

Just is able to perform the past relevant work she has performed at Wells Fargo for the past twenty-one years. I do believe she would have difficulty returning to her work as a mortgage closer and remedial instructor given the lifting she previously did.

Considering all of the factors of industrial disability, I find Just has sustained a thirty percent industrial disability. Just is entitled to 150 weeks of permanent partial disability benefits at the stipulated rate of \$1,385.86, commencing on the stipulated commencement date of November 28, 2017.

V. Temporary Benefits and Underpaid Temporary Benefits

Just seeks to recover temporary disability benefits from the day of her injury, February 8, 2017 through February 12, 2017. Wells Fargo and Old Republic did not address temporary benefits in their post-hearing brief. The parties stipulated if Wells Fargo and Old Republic were liable for the alleged injury, Just is entitled to temporary benefits from February 8, 2017 through February 17, 2017, at the stipulated rate of \$1,385.86 per week.

Iowa Code section 85.33 governs temporary disability benefits, and Iowa Code section 85.34 governs healing period and permanent disability benefits. Dunlap v. Action Warehouse, 824 N.W.2d 545, 556 (Iowa Ct. App. 2012).

An employee has a temporary partial disability when because of the employee's medical condition, "it is medically indicated that the employee is not capable of returning to employment substantially similar to the employment in which the employee was engaged at the time of the injury, but is able to perform other work consistent with the employee's disability." Iowa Code § 85.33(2). Temporary partial disability benefits are payable, in lieu of temporary total disability and healing period benefits, due to the reduction in earning ability as a result of the employee's temporary partial disability, and "shall not be considered benefits payable to an employee, upon termination of temporary partial or temporary total disability, the healing period, or permanent partial disability, because the employee is not able to secure work paying weekly earnings equal to the employee's weekly earnings at the time of the injury." Id.

As a general rule, "temporary total disability compensation benefits and healing-period compensation benefits refer to the same condition." Clark v. Vicorp Rest., Inc., 696 N.W.2d 596, 604 (Iowa 2005). The purpose of temporary total disability benefits and healing period benefits is to "partially reimburse the employee for the loss of earnings" during a period of recovery from the condition. Id. The appropriate type of benefit depends on whether or not the employee has a permanent disability. Dunlap, 824 N.W.2d at 556. Just has established she sustained permanent disabilities caused by the work injury, therefore, if she is entitled to temporary benefits she is entitled to healing period benefits.

The record evidence, including Exhibit A, supports Just was not paid healing period benefits from February 8, 2017 through February 11, 2017. There was no evidence presented at hearing Just was paid for time she missed from work for this period. The record shows Just was paid \$764.67 in temporary total disability benefits for the period of February 12, 2017 through February 16, 2017. Just is entitled to healing period benefits from February 8, 2017 through February 11, 2017, at the stipulated rate of \$1,385.86 per week, plus interest consistent with Sanchez.

According to Exhibit A, Wells Fargo and Old Republic paid Just 11.5714 weeks of temporary total disability benefits for the period of February 12, 2017, through May 3, 2017, at the rate of \$1,070.97 per week. The parties stipulated Just's rate is \$1,385.86. Just was underpaid healing period benefits during this period based on an incorrect rate. Just is entitled to healing period benefits from February 12, 2017, through May 3, 2017, at the stipulated rate of \$1,385.86, plus interest, consistent with Sanchez. Wells Fargo and Old Republic are entitled to a credit for the temporary benefits previously paid to Just.

VI. Credit for Short-Term Disability Benefits

Wells Fargo and Old Republic contend they are entitled to a credit for short-term disability payments made to Just. Just disputes Wells Fargo and Old Republic are entitled to a credit for temporary disability payments made to her.

Wells Fargo has a short-term disability plan ("the Plan") for its employees. The Plan provides short-term disability benefits to an employee who has a medically certified health condition who is unable to perform some or all of the employee's job duties for more than seven consecutive calendar days. (Ex. D, p. 3) Wells Fargo pays for the entire cost of the coverage. (Ex. D, p. 3) An employee can qualify for long-term disability benefits if on an approved leave of absence covered by the Plan, including workers' compensation leave. (Ex. D, p. 5)

The Plan provides short-term disability benefits replace either 65% or 100% of the employee's covered pay for up to twenty-six weeks and "coordinate with other sources of income [the employee] receive[s] so that [the employee's short term disability] benefit combined with other sources of income is never more than 100% of [the employee's] predisability covered pay." (Ex. D, p. 3) Under the Plan, Just was entitled to up to twenty-five weeks of short-term disability benefits at 100% of her pay because she had worked for Wells Fargo for ten years or more at the time of her work injury. (Ex. D, p. 8)

The plan provides the employee "**will never receive more than 100% of [the employee's] predisability covered pay. [The employee's short-term disability] benefit automatically will be reduced by the amount of income [the employee] receive[s] (or [is] eligible to receive) from other sources, including but not limited to:**" workers' compensation, including wage replacement or a settlement awarded to the employee. (Ex. D, p. 9) (emphasis in original)

According to a summary earnings log produced at hearing by Wells Fargo, Just received a short-term disability benefit of \$4,242.62 per two-week period on March 1, 2017, March 15, 2017, March 29, 2017, April 14, 2017, and April 28, 2017, offset by her "on-the-job injury pay" of \$2,141.94 per two-week period, and \$2,545.57 on May 11, 2017, offset by \$1,223.97 in workers' compensation, for a total of \$23,758.67, less the offset total of \$11,933.67 for a net short-term disability benefit of \$11,825.00. (Ex. D, p. 9) All short-term disability payments were paid to Just before she reached maximum medical improvement.

Iowa Code section 85.38(2) provides:

2. *Benefits paid under group plans.*

a. In the event the employee with a disability shall receive any benefits, including medical, surgical, or hospital benefits, under any group plan covering nonoccupational disabilities contributed to wholly or partially by the employer, which benefits should not have been paid or payable if any rights of recovery existed under this chapter, chapter 85A, or chapter 85B, then the amounts so paid to the employee from the group plan shall be credited to or against any compensation payments, including medical, surgical, or hospital, made or to be made under this chapter, chapter 85A, or chapter 85B. The amounts so credited shall be deducted from the payments made under these chapters. Any nonoccupational plan shall be reimbursed in the amount deducted. This section shall not apply to payments made under any group plan which would have been payable even though there was an injury under this chapter or an occupational disease under chapter 85A or an occupational hearing loss under chapter 85B.

The Iowa Supreme Court has held that the purpose of Iowa Code section 85.38(2) is to preclude an employee with a disability from receiving a double recovery of workers' compensation benefits and group disability plan benefits provided by the employer. State v. Erbe, 519 N.W.2d 812, 815 (Iowa 1994).

An employer seeking the credit bears the burden of proving entitlement to the credit. Miller v. Maintainer Corp. of Iowa, Inc., File No. 5020192 (App. Dec. 2, 2009). To meet this burden, Wells Fargo and Old Republic must prove: (1) the benefits were received under a group plan; (2) contribution to the plan was made by the employer; (3) the benefits should not have been paid if workers' compensation benefits were received; and (4) the amount to be credited or deducted from payments made or owed under Iowa Code chapter 85. Id.

Just received short-term disability benefits under a group plan. (Ex. D, p. 3) The Plan documents support Wells Fargo made the contributions to the Plan. (Ex. D, p. 3) According to the Plan's express language, the Plan allowed Just to receive 100% of her predisability pay because she had been employed for ten years or more. The Plan does not exclude short-term disability benefit coverage for work-related injuries, rather, the Plan requires an offset or credit for workers' compensation benefits received, so the employee does not receive more than 100% of the employee's predisability earnings. The Plan simply allows for an offset of the workers' compensation benefits paid when issuing short-term disability benefits. Wells Fargo and Old Republic have not established Just should not have been paid short-term disability benefits if she received workers' compensation benefits under the Plan. To the contrary, the Plan permitted Just to receive both workers' compensation and short-term disability benefits up to 100% of her predisability pay. Wells Fargo and Old Republic are not entitled to a credit

for the short-term disability benefits paid to Just while she was receiving healing period benefits.

VII. Alternate Medical Care

Just requested alternate medical care for her right shoulder at hearing, requesting future treatment with Dr. Jacobson. Wells Fargo and Old Republic contend the treatment they have provided with Dr. Kyle Galles is reasonable.

An employer is required to furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance, hospital services and supplies, and transportation expenses for all conditions compensable under the workers' compensation law. Iowa Code § 85.27(1). The employer has the right to choose the provider of care, except when the employer has denied liability for the injury. Id. "The treatment must be offered promptly and be reasonably suited to treat the injury without undue inconvenience to the employee." Id. § 85.27(4). If the employee is dissatisfied with the care, the employee should communicate the basis for the dissatisfaction to the employer. Id. If the employer and employee cannot agree on alternate care, the commissioner "may, upon application and reasonable proofs of the necessity therefor, allow and order other care." Id. The statute requires the employer to furnish reasonable medical care. Id. § 85.27(4); Long v. Roberts Dairy Co., 528 N.W.2d 122, 124 (Iowa 1995) (noting "[t]he employer's obligation under the statute turns on the question of reasonable necessity, not desirability"). The Iowa Supreme Court has held the employer has the right to choose the provider of care, except when the employer has denied liability for the injury, or has abandoned care. Iowa Code § 85.27(4); Bell Bros. Heating & Air Conditioning v. Gwinn, 779 N.W.2d 193, 204 (Iowa 2010).

On June 17, 2018, Just's attorney sent a letter to the attorney for Wells Fargo and Old Republic requesting additional care for her right arm and shoulder from Dr. Nepola at the University of Iowa Hospitals and Clinics, and not with Dr. Kyle Galles. (Ex. 3, p. 1) Wells Fargo and Old Republic did not approve the request.

Dr. Kuhnlein conducted an independent medical examination in August 2018, and recommended a referral to Dr. Nepola for a second opinion. (Ex. 11, p. 12) Wells Fargo and Old Republic did not authorize a referral to Dr. Nepola.

On August 16, 2019, the attorney for Wells Fargo and Old Republic sent an e-mail to Just's attorney agreeing to authorize a return visit to Dr. Kyle Galles, but refusing to authorize treatment with another physician. (Ex. 3, p. 3) Just agreed to return to Dr. Kyle Galles. Dr. Kyle Galles examined Just on September 5, 2019, and ordered additional magnetic resonance imaging. (JE 4, p. 77; JE 3, p. 3) On October 10, 2019, Just returned to Dr. Kyle Galles complaining of shoulder pain. (JE 4, p. 81) Dr. Kyle Galles did not offer Just any additional treatment options. (JE 4, p. 82)

At hearing Just credibility testified regarding the ongoing problems she is experiencing with her right upper extremity and the breakdown of her relationship with Dr. Kyle Galles. Just requested a second opinion. Wells Fargo and Old Republic

refused her request and agreed Just could return to Dr. Kyle Galles. Just returned to Dr. Kyle Galles. Dr. Kyle Galles has not offered Just any additional treatment; I do not find the care offered reasonable given Just's ongoing right upper extremity symptoms.

Just has requested alternate medical care with Dr. Jacobson. I find Just is entitled to a second opinion regarding her right shoulder condition. Wells Fargo and Old Republic have not wholly abandoned care and should retain the right to control the care. Just is entitled to a second opinion concerning the ongoing problems she is experiencing with her right upper extremity. Within twenty days of the date of this order Wells Fargo and Old Republic shall schedule an appointment with an orthopedic surgeon specializing in the shoulder, other than Dr. Kyle Galles, and follow any and all treatment recommendations made by the orthopedic surgeon.

VIII. Penalty

In her post-hearing brief, Just seeks an award of penalty benefits for an underpaid rate, for 11.574 weeks of temporary total disability benefits and for twenty-two weeks of permanent partial disability benefits. Wells Fargo and Old Republic aver there was a dispute as to whether Just had permanent work restrictions and whether she is entitled to permanency benefits. Wells Fargo and Old Republic did not address the underpaid rate issue.

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

The statute requires the employer or insurance company to conduct a "reasonable investigation and evaluation" into whether benefits are owed to the employee, the results of the investigation and evaluation must be the "actual basis" relied on by the employer or insurance company to deny, delay, or terminate benefits, and the employer or insurance company must contemporaneously convey the basis for the denial, delay, or termination of benefits to the employee at the time of the denial, delay, or termination of benefits. Iowa Code § 86.13(4). An employer may establish a "reasonable cause or excuse" if "the delay was necessary for the insurer to investigate the claim," or if "the employer had a reasonable basis to contest the employee's entitlement to benefits." Christensen, 554 N.W.2d at 260. "A 'reasonable basis' for denial of the claim exists if the claim is 'fairly debatable.'" Burton v. Hilltop Care Ctr., 813 N.W.2d 250, 267 (Iowa 2012). "Whether a claim is 'fairly debatable' can generally be determined by the court as a matter of law." Id. The issue is whether the employer had a reasonable basis to believe no benefits were owed to the claimant. Id. "If there

was no reasonable basis for the employer to have denied the employee's benefits, then the court must 'determine if the defendant knew, or should have known, that the basis for denying the employee's claim was unreasonable.'" Id.

Benefits must be paid beginning on the eleventh day after the injury, and "each week thereafter during the period for which compensation is payable, and if not paid when due," interest will be imposed. Iowa Code § 85.30. In Robbennolt, the Iowa Supreme Court noted, "[i]f the required weekly compensation is timely paid at the end of the compensation week, no interest will be imposed As an example, if Monday is the first day of the compensation week, full payment of the weekly compensation is due the following Monday." Robbennolt, 555 N.W.2d at 235. A payment is "made" when the check addressed to the claimant is mailed, or personally delivered to the claimant. Meyers v. Holiday Express Corp., 557 N.W.2d 502, 505 (Iowa 1996) (abrogated by Keystone Nursing Care Ctr. v. Craddock, 705 N.W.2d 299 (Iowa 2005) (concluding the employer's failure to explain to the claimant why it would not pay permanent benefits upon the termination of healing period benefits did not support the commissioner's award of penalty benefits)).

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

The record reflects Wells Fargo and Old Republic underpaid Just \$314.89 per week for all temporary and permanent benefits. No reason has been provided for the failure to pay the correct rate. At the time of hearing Wells Fargo and Old Republic stipulated to the correct rate, yet failed to pay Just for past benefits owed. I find imposition of a penalty is appropriate to deter Wells Fargo and Old Republic and other employers and insurance carriers from engaging in similar conduct in the future. I award Just \$2,500.00 in penalty benefits.

IX. Costs

Just seeks to recover the \$100.00 filing fee. (Ex. 5, p. 1) Iowa Code section 86.40, provides, "[a]ll costs incurred in the hearing before the commissioner shall be taxed in the discretion of the commissioner." Rule 876 IAC 4.33(6), provides

[c]osts 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.

The administrative rule expressly allows for the recovery of the filing fee. Using my discretion, I find Wells Fargo and Old Republic should be assessed the \$100.00 filing fee.

ORDER

IT IS THEREFORE ORDERED, THAT:

Defendants shall pay the claimant one hundred fifty (150) weeks of permanent partial disability benefits at the stipulated weekly rate of one thousand three hundred eighty-five and 86/100 dollars (\$1,385.86), commencing on the stipulated commencement date of November 28, 2017.

Defendants shall pay the claimant healing period benefits from February 8, 2017 through May 3, 2017, at the stipulated weekly rate of one thousand three hundred eighty-five and 86/100 dollars (\$1,385.86).

Defendants shall pay accrued weekly benefits in a lump sum together with interest at the rate of ten percent for all weekly benefits payable and not paid when due which accrued before July 1, 2017, and all interest on past due weekly compensation benefits accruing on or after July 1, 2017, shall be 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. Sanchez v. Tyson, File No. 5052008 (Apr. 23, 2018 Ruling on Defendant's Motion to Enlarge, Reconsider, or Amend Appeal Decision Re: Interest Rate Issue).

Defendants shall receive a credit for all temporary and permanent workers' compensation benefits paid to date.


Defendants shall pay the claimant two thousand five hundred and 00/100 dollars (\$2,500.00) in penalty benefits.

Within twenty days of the date of this order Wells Fargo and Old Republic shall schedule an appointment with an orthopedic surgeon specializing in the shoulder, other than Dr. Kyle Galles, and follow all treatment recommendations made by the orthopedic surgeon.

Defendants shall reimburse the claimant one hundred and 00/100 dollars (\$100.00) for the filing fee.

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

Signed and filed this 7th day of April, 2020.



HEATHER L. PALMER
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Nick Platt (via WCES)

Tiernan Siems (via WCES)

Right to Appeal: This decision shall become final unless you or another interested party appeals within 20 days from the date above, pursuant to rule 876-4.27 (17A, 86) of the Iowa Administrative Code. The notice of appeal must be filed via Workers' Compensation Electronic System (WCES) unless the filing party has been granted permission by the Division of Workers' Compensation to file documents in paper form. If such permission has been granted, the notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 150 Des Moines Street, Des Moines, Iowa 50309-1836. The notice of appeal must be received by the Division of Workers' Compensation within 20 days from the date of the decision. The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or legal holiday.