BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

CHARLES STEAHR,	:	
Claimant,	:	File Nos. 20700328.01 1662741.01
vs.	:	
EAST PENN MANUFACTURING CO.,	:	ARBITRATION DECISION
Employer,	:	
and	:	
SENTINEL INSURANCE COMPANY,	:	
Insurance Carrier, Defendants.	:	Head Note Nos.: 1801, 1803, 1803.1, 2500, 2501, 2502, 4000

STATEMENT OF THE CASE

Claimant, Charles Steahr, has filed petitions for arbitration seeking workers' compensation benefits against East Penn Manufacturing Co., employer, and Sentinel Insurance Company, insurer, both as defendants.

In accordance with agency scheduling procedures and pursuant to the Order of the Commissioner in the Matter of Coronavirus/COVID-19 Impact on Hearings, the hearing was held on June 10, 2021, via CourtCall. The record was held open until June 24, 2021, to allow claimant to obtain a rebuttal opinion of Dr. Bansal. The case was considered fully submitted on July 9, 2021, upon the simultaneous filing of briefs.

The record consists of Joint Exhibits 1-5; Claimant's Exhibits 1-9; Defendants' Exhibits A—F and H, and the testimony of claimant.

ISSUES

File No. 1662741.01, Date of Injury February 15, 2019:

1. Whether claimant is entitled to temporary benefits for February 16, 2019, through May 3, 2020.
2. Whether claimant is entitled to permanent benefits,
3. Whether the disability is scheduled member or industrial;
4. The extent of claimant's permanent disability;

5. Whether claimant is entitled to reimbursement of medical expenses;
6. Whether claimant is entitled to reimbursement of an independent medical examination pursuant to Iowa Code § 85.39; and
7. Whether claimant is entitled to penalty benefits for unreasonable denial of temporary benefits and the underpayment of benefits;
8. Assessment of costs.

File No. 20700328.01, Date of Injury, April 5, 2018:

1. Whether claimant is entitled to temporary benefits for February 16, 2019, through May 3, 2020.
2. Whether claimant is entitled to permanent benefits,
3. Whether the disability is scheduled member or industrial;
4. The extent of claimant's permanent disability;
5. Whether claimant is entitled to reimbursement of medical expenses;
6. Whether claimant is entitled to reimbursement of an independent medical examination pursuant to Iowa Code § 85.39; and
7. Whether claimant is entitled to penalty benefits for unreasonable denial of temporary benefits and the underpayment of benefits;
8. Assessment of costs.

STIPULATIONS

The parties filed a hearing report at the commencement of the arbitration hearing. On the hearing report, the parties entered into various stipulations. All of those stipulations were accepted and are hereby incorporated into this arbitration decision and no factual or legal issues relative to the parties' stipulations will be raised or discussed in this decision. The parties are now bound by their stipulations.

File No. 1662741.01, Date of injury February 15, 2019:

The parties stipulate the claimant sustained an injury on February 15, 2019, which arose out of and in the course of his employment. The parties agree that if permanent benefits are found to be owing, the commencement date of those benefits is May 4, 2020.

The parties agree claimant's gross earnings at the time of the alleged injury were $764.13 per week. The claimant was married and entitled to two exemptions. Based on the foregoing, the weekly benefit rate is $507.29.

Defendants waive all affirmative defenses. Prior to the hearing, claimant was paid 74.5714 weeks of compensation at the rate of $483.05 per week through May 31, 2021. Defendants paid 9.2857 weeks at $477.65 per week. Defendants continue to pay weekly benefits at $483.05

File No. 20700328.01, Date of injury, April 5, 2018:

The parties stipulate the claimant was an employee at the time of the alleged injury, but dispute that the claimant sustained an injury arising out of and in the course of her employment on April 5, 2018.

The parties agree that if permanent benefits are found to be owing, the commencement date of those benefits is May 4, 2020.

The parties agree claimant's gross earnings at the time of the alleged injury were $700.90 per week. The claimant was married and entitled to two exemptions. Based on the foregoing, the weekly benefit rate is $463.90.

Defendants waive all affirmative defenses. There are no credits being sought.

FINDINGS OF FACT

At the time of the hearing, claimant was a 64-year-old person. He began working for defendant employer on February 1, 2015, and was terminated for cause on April 4, 2019, for events unrelated to his work injury. On April 12, 2019, claimant was deemed disabled by the Social Security Administration (SSA). He is currently employed on a part-time basis delivering magazines to business owners in southern Iowa and northern Missouri once every two weeks.

Claimant's educational history includes a BA in accounting obtained in 1978 and an MBA in 1989. (CE 2:27) His past work history includes positions as a cost accountant, finance manager, accounts receivable manager and tax accountant. (CE 2:28-29) He also worked as a full and part-time sales associate at Menards. (CE 2:29)

When asked why he has not obtained employment utilizing these degrees, claimant maintained that he was overqualified for the available positions and could not find employment because of this.

Claimant is currently taking care of close relatives who are in hospice and his disabled wife and is not in the position to move from his current location in Centerville, Iowa.

His past medical history includes a total knee replacement and inguinal hernia repair. However, he was cleared to return to regular work duties without restrictions on July 18, 2017. (JE 1, pp. 4-7). Furthermore, on March 5, 2018, following a left total hip replacement, claimant was again able to return to his job without any work restrictions. (JE 1, pp. 8-10).

This matter comes before the undersigned as a result of two alleged injuries. The first incident took place on April 5, 2018, wherein claimant tripped when his foot struck the side of a vending machine at work. He fell onto his right shoulder and arm.

Claimant was seen on April 6, 2018, at South Central Iowa Medical Clinic with pain in both of his upper arms, and pain in his biceps when lifting his arms. (JE 1, p. 11). At that time, he was assessed with bilateral shoulder pain and there was "[c]oncern that he may have disrupted the rotator cuff bilaterally due to inability to lift the arms[.]" (JE 1, pp. 12-13). He was provided restrictions of no work requiring use of arms above his shoulder level and minimal use of both arms. (JE 1, p. 14). Claimant was already scheduled to be off work for an unrelated hydrocele repair surgery shortly after his fall at work. (JE 1, pp. 11, 15).

By April 27, 2018, claimant was returned to full duty work with no restrictions. (JE 1, pp. 15-17). It was noted that physical therapy for the left shoulder was recommended but not approved. (JE 1:15)

On July 18, 2018, claimant reported to his therapist tripping over a cat in his home and falling onto his right shoulder. (JE 5:1)

On November 28, 2018, claimant was seen by Patrick Sullivan, M.D., for pain and discomfort in his right shoulder that had persisted for several months. (JE 2, p. 9) Claimant recalled no specific injury and that while the pain made it difficult for him to perform his job, he had missed no work. (JE 2, p. 9). Dr. Sullivan diagnosed claimant with an impingement syndrome with possible rotator cuff tear, and recommended an MRI. (JE 2, p. 10). An MRI taken on December 5, 2018 showed the following: 1) Full-thickness fullwidth supraspinatus tendon tear. Very mild muscle belly atrophy. 2) At least partial articular sided tear of infraspinatus. 3) High-grade partial articular sided tear of subscapularis. 4) Mild-to-moderate tendinosis with likely longitudinal intrasubstance partial tear involving the extracapsular biceps tendon. 5) Irregular posterior inferior labral tear. Additional irregular areas of labral fraying. 6) Moderate to advanced AC joint arthrosis with type II acromion. (JE 2, p. 16).

On December 17, 2018, following the MRI, Dr. Sullivan diagnosed claimant with a full thickness rotator cuff tear with impingement syndrome in his right shoulder. (JE 2:14) Dr. Sullivan recommended surgical repair but because claimant needed to assist his wife during a post-operative knee rehabilitation the two agreed claimant would proceed with repair after claimant's wife's surgery and recovery. (JE 2:14) Dr. Sullivan administered an injection and returned claimant to work without restrictions. (JE 2, pp. 14-17)

On or about February 15, 2019, claimant tripped on floor mats at work and fell onto his right side. He presented to South Central Iowa Medical Clinic the following day with pain and stiffness in the shoulders bilaterally without the ability to lift his right arm. (JE 1, p. 18). The examination revealed tenderness to palpation on the anterior aspect of the shoulder and pain with abduction of the arm. (JE 1:19) PA-C Nicole Ruble wrote a work excuse for claimant, keeping him off work until February 18, 2019. (JE 1:20)

A second MRI taken on February 23, 2019, showed: 1) Massive full-thickness rotator cuff tear of the supraspinatus and infraspinatus tendons. There is mild early

volume loss involving the supraspinatus 2) Marked biceps tendinosis with longitudinal partial thickness tearing. 3) Mild acromioclavicular joint degenerative changes. There is also degenerative spurring involving the inferior glenoid/humeral head. (JE 3, p. 1).

On February 27, 2019, PA-C Ruble referred claimant to orthopaedics and continued claimant on restrictions. (JE 1, pp. 22-24).

On March 21, 2019, claimant was seen by Wesley Smidt, M.D., who recommended surgical repair and imposed work restrictions of no overhead work with his right arm. (JE 2, p. 19, 21). The surgery took place on April 3, 2019, and included 1) Right shoulder arthroscopy. 2) Arthroscopic subacromial decompression. 3) Arthroscopic distal clavicle excision. 4) Open rotator cuff repair using Corkscrew anchors. (JE 2:22-23) Claimant was kept off work until May 6, 2019, upon which he was returned to work with restrictions of no use of the right arm. (JE 2:26, 29) On May 6, 2019, claimant was sent to physical therapy.

On June 3, 2019, claimant returned to Dr. Smidt with reports that the pain was tolerable and progress was being made in physical therapy. (JE 2:30) On July 1, 2019, the work restrictions were modified to allow claimant to lift up to three pounds on the right. (JE 2:34) During the August 5, 2019, visit, claimant reported that he was not having pain in his right shoulder region but was having difficulty with his range of motion. (JE 3:36) Dr. Smidt advised claimant that he may never regain full range of motion and should he want to improve his range of motion, he would need to undergo a reverse total shoulder arthroplasty. (JE 2, p. 39).

On September 12, 2019, claimant's work restrictions were modified again to disallow no overhead work with the right arm. (JE 2:41) Claimant was sent to Dr. Schulte for an evaluation for the reverse total shoulder arthroplasty. (JE 2:41)

On October 24, 2019, claimant consulted with Dr. Schulte over claimant's ongoing range of motion issues in his right shoulder. (JE 2:42) In the history section, Kary Schulte, M.D., documented that claimant fell in April 2018 while walking in the break room. He had a second fall at work in February 2019. (JE2:42) Based on the history, diagnostic records, and examination, Dr. Schulte agreed that claimant was a candidate for reverse total shoulder arthroplasty. (JE 2:42-44)

Claimant's work restrictions were modified to allow lifting up to 5 pounds with the right arm and no use of the right arm above chest height. (2:46)

On January 8, 2020, Dr. Schulte performed a reverse right total shoulder replacement on claimant. (JE 2, pp. 47-49). Claimant was released to return to work on January 27, 2020, with restrictions of no lifting greater than five pounds and no overhead lifting with the right arm. (JE 2:53) These work restrictions were modified again on March 9, 2020, to allow lifting with the right arm up to 15 pounds. (JE 2:56)

Dr. Schulte placed claimant at maximum medical improvement (MMI) on May 4, 2020 with no permanent restrictions and assessed permanent impairment rating of 28 percent to the right upper extremity due to the shoulder arthroplasty and range of motion deficits. (JE 2, p. 59) Claimant was discharged from therapy on May 4, 2020, as well. (JE 5: 99) Claimant's post discharge prognosis was "fair." (JE 5:99) He continued to be limited in shoulder abduction and flexion and limited in strength with external rotation. (JE 5:99) His pain level significantly decreased to a 2-3 on a 10 scale. (JE 5:99)

Claimant was noted to be a compliant patient who worked hard during physical therapy. (See et seq Ex. 5)

Sunil Bansal, M.D., conducted an independent medical examination (IME) on March 1, 2021, diagnosing claimant with right shoulder full thickness rotator cuff tear and partial tear of the biceps tendon as a result of his acute fall at work on April 5, 2018. (CE 1, pp. 15-17). Dr. Bansal assigned no specific permanent impairment to the April 5, 2018 date of injury. (CE 1, p. 17).

With reference to claimant's second fall at work on February 15, 2019, Dr. Bansal diagnosed claimant with right shoulder massive rotator cuff tear, status post right shoulder arthroscopy with subacromial decompression, distal clavicle excision, and rotator cuff repair using corkscrew anchors; and right shoulder rotator cuff tear arthropathy, status post reverse right total shoulder replacement. (CE 1, p. 18) He opined that due to the extensive tearing claimant required a reverse total shoulder arthroplasty. (CE 1:19)

On examination, claimant exhibited tenderness to palpation diffusely in the right shoulder, anteriorly in the left shoulder, tenderness to palpation over the right upper arm, full elbow range of motion with a 20 percent elbow flexion deficit on the right. (CE 1:14) Claimant had deficits in the shoulder range of motion as well. (CE 1:14)

Dr. Bansal agreed with the May 4, 2020, MMI date set forth by Dr. Schulte. (CE 1:20)

For this injury, Dr. Bansal assessed a 30 percent right upper extremity impairment for the right shoulder and a 4 percent right upper extremity impairment for the right biceps. (CE 1:21) Dr. Bansal also recommended work restrictions of no lifting greater than 15 pounds with the right arm from floor to table and no lifting over the shoulder with the right arm. (CE 1:21) Claimant was advised to limit frequent reaching with the right arm as well. (CE 1:21)

Joshua Kimelman, D.O., conducted an IME on March 22, 2021. (DE F:1). Dr. Kimelman diagnosed claimant with right reverse shoulder implant and noted claimant was not unlikely to improve over his current status. (Def. Ex. F, p. 3) On examination, the claimant had restricted rotation of the neck, 90 degrees of abduction with the right

arm with weakness, 100 degrees in for forward flexion in the right arm, 40 degrees of external rotation, and pain with impingement testing of the shoulder. (DE F:2)

Dr. Kimelman concluded the claimants right shoulder condition was not likely to improve over the current status. (DE F:3) Claimant's complaints of weakness and restriction of motion were consistent with the physical findings. (DE F:3) He further opined that the rotator cuff tear of February 15, 2019 showed extension beyond the previous MRI of April 5, 2018. And therefore his previous rotator cuff tear was made worse by the February 15, 2019 fall. (DE F:3)

Dr. Kimelman also opined that he "believe[s] that [claimant's] condition after the February 15, 2019 fall and loss of strength in abduction and forward flexion is a result of the fall." (Def. Ex. F, p. 4). Finally, Dr. Kimelman agreed with the 28 percent right upper extremity impairment assigned by Dr. Schulte, but unlike Dr. Schulte, he recommended a permanent 15-pound lifting restriction above shoulder height with Mr. Steahr's right arm. (Def. Ex. F, p. 5).

On May 28, 2020, Dr. Schulte gave the following opinion in regards to Mr. Steahr's permanent impairment related to the February 15, 2019 injury:

> As requested, an impairment rating was performed using the "AMA Guides to the Evaluation of Permanent Impairment, 5th Edition, 2000." Range of motion measurement showed 150 degrees of flexion, which provides a 2% impairment to the involved upper extremity, 160 degrees of abduction, which provides a 1% impairment to the involved right upper extremity; he had 60 degrees of internal rotation, which provides a 2% impairment to involved upper extremity; and he had 60 degrees of external rotation, which provides no measurable impairment. His total impairment for loss of range of motion is 4% for the involved upper extremity. Having undergone total shoulder arthroplasty, according to Table 16-27, page 506 of the "Guides," this assigns a 24% impairment to the involved upper extremity. His total impairment, therefore, is 28% to the involved upper extremity.

(JE 2, p. 59)

After reviewing Dr. Bansal's IME report, Dr. Kimelman provided the following additional opinion:

> Additionally, in Dr. Bansal's report, he noted that the patient, according to Table 16-1 and 16-3, had an impairment related to his elbow, 4% of the upper extremity, which is 2% of the whole person. Apparently he extrapolated because the patient had some degenerative changes in his biceps tendon that he must have weakness of his elbow, thus increased permanency. At the time of my evaluation, the patient had no complaint of elbow problems, including weakness or objective signs of loss of function

> in his elbow. Additionally, I would point out that Table 16-11 refers to weakness secondary to peripheral nerve disorders that would be unrelated to his posttraumatic rotator cuff tear.

(Def. Ex. F, p. 6)

Dr. Bansal provided a rebuttal to Dr. Kimelman's report on June 23, 2021, stating that the impairment was based on his examination and finding of a 20 percent loss of right elbow flexion strength deficit that is ratable per Table 16-35 of the AMA Guides, Fifth Edition. (CE 10:78-79)

Ronald R. Schmidt, a rehabilitation consultant, opined that post injury general labor positions are not available to claimant because most of those jobs require bilateral lifting. He still had accounting supervisor and salesclerking jobs available to him and numerous other occupations in related fields. (Ex G:8) Mr. Schmidt opined claimant's loss of earning capacity was 5 percent because he was precluded from returning to the occupation in which he was employed at the time of the injury. (Ex. G:9)

On July 9, 2019, defendants informed claimant that it appeared claimant was capable of working and that the defendant employer had light duty work available but since claimant was terminated for cause, the benefit payments would cease on August 9, 2019, thirty days from the date of the letter. (CE 5:37) Claimant's counsel informed defendants' counsel that the cessation of payments based on this would be grounds for a penalty claim. (CE 6:39) Defendants' counsel acknowledged that the agency case law does not support the defendants' position but that the defendants had a right to test this with the appellate courts. (CE 6:40)

In 2017, claimant's gross earnings were $31,450.00. (CE 7:57) In 2018, his gross earnings were $30,926.00. (CE 7:59) In 2019, his gross earnings were $8,318.00. (CE 7:60)

Claimant's Social Security Disability (SSD) application was approved effective October 2019. (CE 8:63)

CONCLUSIONS OF LAW

The party who would suffer loss if an issue were not established has the burden of proving that issue by a preponderance of the evidence. Iowa R. App. P. 6.904(3).

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. 19

On April 5, 2018, claimant tripped and fell at work, striking his right shoulder. He was scheduled to be off work due to recovery from an unrelated surgery. By April 27, 2018, claimant returned to work without restrictions. However, his pain in the right shoulder continued and eventually he was diagnosed with a rotator cuff tear. It was recommended that he have revision surgery but due to family circumstances, he delayed and received injection therapy.

This condition did not fully heal as he sustained a second injury to his right shoulder on February 15, 2019. As a result of this second injury, claimant underwent reverse total shoulder arthroplasty surgery. The greater weight of the evidence supports a finding that claimant sustained a work injury to the right shoulder on April 5, 2018 that was exacerbated and lit up by a fall on February 15, 2019. Dr. Kimelman, defendants' retained expert, explained that the MRI tests following the February 15, 2019, fall showed an extension of the rotator cuff tear of April 5, 2018.

Thus is it found that claimant sustained a work injury to his right shoulder on April 5, 2018, that was lit up and aggravated by a subsequent work injury of February 15, 2019.

Defendants argue that even if both injuries were work related, no temporary benefits are owed beyond what has been paid because claimant was terminated for cause on April 4, 2019. Defendants maintain they had accommodated work available for the claimant but that the termination for cause was tantamount to a refusal to except light duty work. Defendants acknowledge that this is not a legal position adopted by the agency.

Defendant's assertion that claimant is not entitled to weekly temporary total disability, temporary partial disability, or healing period benefits due to a refusal to accept suitable work pursuant to Iowa Code section 85.33(3) is an affirmative defense. The employer must show by the preponderance of the evidence that the work was offered; that the work was suitable, that is, having a physical or mental demand level that does not exceed claimant's capacities; and, that the refusal was an intentional act. Brodigan v. Nutri-ject Systems, Inc., File No. 5001106 (App. April 13, 2004). Woods v. Siemens-Furnas Controls, File Nos. 1303082, 1273249 (Arb. July 22, 2002). Disciplinary action such as a suspension or termination based upon misconduct or a violation of an employer's work rules is not a refusal to perform suitable work. See Edwards v. Weitz Corp., File 5032285 (Arb. June 22, 2011), affirmed on Appeal August 22, 2012 (ordering temporary benefits be paid to an employee who was terminated for failing a drug test); Phu v. Tension Envelope, File No. 5035804 (Arb. July 31, 2012) (ordering temporary benefits be paid because termination from work due to an outburst of anger is not a failure to accept work under Iowa Code section 85.33(3)); Karen Walker v. Terian Inc. d/b/a Casey's, File 5039253 (Arb. January 19, 2011), affirmed on appeal December 8, 2011 (ordering temporary benefits be paid because "[d]isciplinary action such as a suspension or termination based upon misconduct or a violation of an employer's work rules is not a refusal to perform suitable work").

Because termination is not considered a refusal to perform suitable work, claimant is entitled to temporary benefits for February 16, 2019, through May 3, 2020. On May 4, 2020, Dr. Schulte placed claimant at MMI with no permanent restrictions.

The next question is whether claimant sustained a scheduled member or industrial disability.

Claimant ultimately underwent reverse right total shoulder replacement. Claimant argues that this should be considered an injury to the whole body rather than limited to the shoulder. 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) (2019). The specific issue is whether claimant's disability is a scheduled disability to his "shoulder" under Iowa Code section 85.34(2)(n) or an unscheduled disability under Section 85.34(2)(v).

The commissioner has issued two opinions regarding the question of when a shoulder injury transforms into a whole body injury. In Deng v. Farmland Foods, File No. 5061883 (Appeal September 29, 2020), the Commissioner determined that "shoulder" under section 85.34(2)(n) is not limited to the glenohumeral joint.

> Given the entwinement of the glenohumeral joint and the muscles that make up the rotator cuff, including the infraspinatus, and the importance of the rotator cuff to the function of the joint, I find the muscles that make up the rotator cuff are included within the definition of "shoulder" under section 85.34(2)(n). Thus, I find claimant's injury to her infraspinatus should be compensated as a shoulder under section 85.34(2)(n).

Deng, at 10-11.

In Chavez v. MS Technology, LLC, File No. 5066270 (App. September 30, 2020), the Commissioner affirmed his legal holding in Deng and applied his interpretation to the various impairments and disabilities sustained by the claimant in that case.

> Again, as explained in Dr. Peterson's operative note, claimant's subacromial decompression was performed to remove scar tissue and fraying between the supraspinatus and the underside of the acromion. As discussed above, the acromiom forms part of the socket and helps protect the glenoid cavity, and as such, I found it is closely interconnected with the glenohumeral joint in both location and function. And as discussed in Deng, I found the supraspinatus - a muscle that forms the rotator cuff - to be similarly entwined with the glenohumeral joint. Thus, claimant's subacromial decompression impacted two anatomical parts that are essential to the functioning of the glenohumeral joint; in fact, the procedure was actually performed to improve the function of the joint. As such, I find any disability resulting from her subacromial decompression should be compensated as a shoulder under section 85.34(2)(n).

Chavez, at 6.

The reverse right total shoulder replacement involved incisions to the posterolateral aspect of the acromion, arthroscopic subacromial decompression, arthroscopic distal clavicle excision and open rotator cuff repair using corkscrew anchors. (JE 2:22-23) Based on the operating report and the decisions of the Commissioner in Deng and Chavez, the claimant suffered an injury to his "shoulder" under Iowa Code section 85.34(2)(n). As such, his disability is a scheduled member.

Dr. Schulte assigned a 28 percent impairment while Dr. Bansal assessed 30 percent for the right shoulder and 4 percent for the right upper extremity for the right biceps. The additional percentage Dr. Bansal assessed was due to his measurements of right elbow range of motion deficits. Dr. Kimelman assigned a 28 percent right upper extremity impairment as he did not find any elbow range of motion deficits.

While the claimant may have elbow range of motion deficits, the injured body part at issue is claimant's shoulder. He received treatment for his shoulder and not for his elbow. Thus, the greater weight of the evidence supports the impairment rating given by Dr. Kimelman and Dr. Schulte of 28 percent to the shoulder.

Claimant is further entitled to reimbursement of medical expenses associated with his right shoulder injury of both April 5, 2018, and February 15, 2019, including mileage. Claimant seeks reimbursement for the mileage associated with his IME with Dr. Kimelman.

The examination and report of Dr. Bansal is reimbursable as Dr. Schulte provided an impairment rating of 28 percent on May 4, 2020, triggering the claimant's entitlement to his own examination at the cost of the defendants. Claimant is also entitled to the mileage for the examination with Dr. Bansal, which is reimbursable under Iowa Code § 85.39.

The report of Dr. Bansal is assessed as a cost as are the other costs itemized in exhibit 9.

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.

The final issue is whether claimant is entitled to penalty benefits for unreasonable denial of temporary benefits and the underpayment of benefits;

The well-established agency and appellate case law holds that even if an employee is terminated for what the employer deems misconduct, such disciplinary action does not excuse the employer from paying temporary benefits.

Iowa Code 86.13(4) provides the basis for awarding penalties against an employer. Iowa Code 86.13(4) states:

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

If weekly compensation benefits are not fully paid when due, Iowa Code section 86.13 requires that additional benefits be awarded unless the employer shows reasonable cause or excuse for the delay or denial. Robbennolt v. Snap-On Tools Corp., 555 N.W.2d 229 (Iowa 1996). Delay attributable to the time required to perform a reasonable investigation is not unreasonable. Kiesecker v. Webster City Custom Meats, Inc., 528 N.W.2d 109 (Iowa 1995).

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

1993). An issue of fact is fairly debatable if substantial evidence exists which would support a finding favorable to the employer. Gilbert v. USF Holland, Inc., 637 N.W.2d 194 (Iowa 2001). An employer's bare assertion that a claim is fairly debatable is insufficient to avoid imposition of a penalty. The employer must assert facts upon which the commissioner could reasonably find that the claim was "fairly debatable." Meyers v. Holiday Express Corp., 557 N.W.2d 502 (Iowa 1996).

Defendants argue that they have a right to appeal this decision. They do have this right but it is not reasonable to withhold benefits from the claimant while defendants seek to have the agency precedent overturned without supportive case law. Defendants have not provided a viable argument in favor of their position other than they are entitled to test the agency precedent at the appellate level. That is the very definition of a bare assertion. Claimant is entitled to a 50 percent penalty on the entire amount of these benefits unreasonably denied.

Prior to hearing, in regards to the injury of February 15, 2019, defendants paid Mr. Steahr weekly permanent partial disability benefits from May 4, 2020, through May 31, 2021, totaling $27,119.43. (Def. Ex. B, pp. 5-6). This is 56.143 weeks at $483.05 per week. The stipulated benefit rate $507.29. Defendants provided no explanation as to why claimant was underpaid for the 56.143 weeks. Claimant is entitled to a 50 percent penalty on the amount of underpayment of temporary benefits.

ORDER

THEREFORE, it is ordered:

That defendants are to pay unto claimant one hundred twelve (112) weeks of permanent partial disability benefits at the rate of four hundred sixty-three and 90/100 dollars ($463.90) per week from May 4, 2020.

That defendants shall pay unto claimant temporary benefits for February 16, 2019, through May 3, 2020.

That defendants shall reimburse claimant for medical expenses associated with the right shoulder injury of April 28, 2018, and February 15, 2019, including mileage.

That defendants shall reimburse claimant for the IME fee of Dr. Bansal.

That defendants shall reimburse claimant for mileage associated with his examination with Dr. Kimelman.

That defendants are to pay until claimant 50 percent penalty on the amount of underpayment of temporary benefits.

That defendants shall pay accrued weekly benefits in a lump sum.

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

That defendants are to be given credit for benefits previously paid.

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

That defendant shall pay the costs of this matter pursuant to rule 876 IAC 4.33, including the transcript costs.

Signed and filed this 18th day of October, 2021.

JENNIFER S. GERRISH-LAMPE
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

James Neal (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.