

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

KREY CLARY,

Claimant,

vs.

EE NEWCOMER ENTERPRISES, INC.,

Employer,

and

ZURICH AMERICAN INS. CO.,

Insurance Carrier,

Defendants.

File No. 1657303.01

ARBITRATION

DECISION

Head Note Nos.: 1803.1, 4000.1

STATEMENT OF THE CASE

The claimant, Krey Clary, filed a petition for arbitration and seeks workers' compensation benefits from E.E. Newcomer Enterprises, Inc., employer, and Zurich American Insurance Company, insurance carrier. The claimant was represented by John Dougherty. The defendants were represented by Jean Dickson.

The matter came on for hearing on October 20, 2020, before deputy workers' compensation commissioner Joseph Walsh in Des Moines, Iowa via Court Call videoconferencing system. The record in the case consists of joint exhibits 1 through 6; claimant's exhibits 1 through 4; and defense exhibits A through G. The claimant testified at hearing. The parties did an excellent job of narrowing the issue and the evidence. Tracy Hamm was appointed and served as the court reporter for the proceedings. The matter was fully submitted on November 23, 2020, after helpful briefing by the parties.

ISSUES

The parties submitted the following issues for determination:

1. The nature and extent of claimant's permanent disability. There are numerous legal and factual disputes surrounding the nature and extent of his disability.
2. The claimant contends a penalty is owed for late or denied payments.

STIPULATIONS

Through the hearing report, the parties stipulated to the following:

1. The parties had an employer-employee relationship.
2. Claimant sustained an injury which arose out of and in the course of employment on October 5, 2018.
3. This injury was a cause of some temporary and permanent disability.
4. Temporary disability/healing period and medical benefits are no longer in dispute.
5. The weekly rate of compensation is \$588.70.
6. Defendants have paid and are entitled to a credit of 12.429 weeks of compensation (permanent partial disability).
7. Affirmative defenses have been waived.
8. Medical expenses are not in dispute.

FINDINGS OF FACT

Krey Clary was 53 years-old as of the date of hearing. He is a high school graduate who served in the United States Navy. He completed an eight-week auto body training course. He has a manual labor work history, working in manufacturing and then garage door installation. He began working for Adams Door Company in 2001, which is the predecessor of the employer in this case, EE Newcomer.

Mr. Clary testified live and under oath at hearing. His testimony was highly credible. He was an excellent witness as his testimony was simple, straightforward and he answered the questions he was asked directly. He was a good historian and his testimony matched with the other evidence in the record. There was nothing about his demeanor which caused me any concern regarding his truthfulness.

Mr. Clary testified regarding his job duties as a commercial garage door installer in some detail at hearing. (Transcript, pages 13-15) He loaded the heavy doors at the shop (up to 150 pounds) and transported them to the work site where he would build the frames and install the sections. It was heavy, overhead work. His written job description is in the record. (Defendants' Exhibit C, pages 9-10)

The parties have stipulated that Mr. Clary sustained a work injury on October 5, 2018. The injury was serious. On that date, he was working on a ladder when it started to fold. As he quickly attempted to descend the ladder his leg went through a rung and he fell backward ending up hanging upside down with his back to the ladder and his head a foot from the floor. He had a cut on his arm. He did not realize his shoulder was

injured until he attempted to pick up his ladder and he could not do it. The accident was witnessed. (Def. Ex. C, pp. 11-14)

Mr. Clary immediately sought treatment that day. MercyOne Indianola Family Medicine Clinic documented the following:

Patient is a 49 y/o male presents to clinic for right shoulder pain and left elbow laceration. Patient was working on a garage door, up on an 8 foot ladder and fell, states he was able to break his fall somewhat with the nearby wall, but ended up landing on the right shoulder. Incident happened about 1 hour ago. Did not hit head, denies LOC. During the fall, scraped his left elbow on something, unsure as to what. Patient is having decreased ROM and pain in the right shoulder. No past injuries to this arm. Denies neck pain or right elbow, wrist or hand. Pain is the anterior aspect of the right shoulder, increases with any type of ROM.

(Joint Exhibit 1, page 1) X-rays were taken which showed "subtle cortical irregularly potentially non-displaced avulsion fracture of the greater tuberosity, with overlying point tenderness." (Jt. Ex. 1, p. 2) He also had a greater trochanter fracture. He was provided medications and a sling. His left elbow laceration repaired with sutures.

Mr. Clary was evaluated at Occupational Medicine West on October 9, 2018, and then underwent an MRI of the right shoulder on October 16, 2018, which demonstrated a complete tear and a rupture of the long head of the biceps tendon. (Jt. Ex. 3) He was quickly referred to Kyle Galles, M.D., an orthopedic surgeon. Dr. Galles recorded the following history on November 6, 2018.

49-year-old right-handed male presents today for further evaluation and management of RIGHT shoulder injury. Problems began when a ladder folded and went tumbling down on 10/05/18. Since then, significant shoulder pain and weakness. He denies trouble with his RIGHT shoulder before that episode. Some occasional tingling in the RIGHT hand but that is intermittent and infrequent since this occurred. He is otherwise in good health with no history of heart disease, hypertension or diabetes. He has been working primarily installing garage doors for about 20 years.

(Jt. Ex. 4, p. 19) Dr. Galles documented the loss of range of motion and strength on the right side and diagnosed "complete rotator cuff tear involving subscapularis." (Jt. Ex. 4, p. 20) Dr. Galles recommended surgery.

Surgery was performed on November 12, 2018. (Jt. Ex. 5) Thereafter, Mr. Clary underwent a normal course of post-surgical treatment, including medications, restrictions and physical therapy. (Jt. Ex. 4, pp. 22-27) Mr. Clary testified that he was under significant restrictions during his recovery and asked Dr. Galles if the restrictions could be lifted somewhat to allow him to see what he could do. "I told him I wanted to see what I could - - I wanted him to release me, you know, to do something. At the time he wanted - - he had me lifting nothing, he had me doing nothing. I just wanted to see

what I could do, ... I just asked him to lift some of the restrictions." (Tr., p. 20) Dr. Galles lifted all the restrictions and placed Mr. Clary at maximum medical improvement on February 28, 2019. "Very pleased with his outcome and feels as though he is ready to be released without restriction." (Jt. Ex. 4, p. 28) Dr. Galles did note the ongoing symptoms of pain and impairment. "The pain is sharp." (Jt. Ex. 4, p. 28) In retrospect, Mr. Clary testified this was a miscommunication or mistake. (Tr., p. 20) Mr. Clary testified that when Dr. Galles released him he did no strength testing. "The only thing Galles had me do was lift my arm, see how far I could lift it up to the side and that was it." (Tr., p. 29)

In any event, Mr. Clary was released and returned to work for the employer. He was examined by his physical therapist on March 21, 2019, who noted that a number of his therapy goals had not been met including improving shoulder strength, performing overhead work for at least 3 minutes (light to moderate tasks) and demonstrating good lifting mechanics of heavier items from floor to waist. (Jt. Ex. 6, p. 37) The following is documented.

*Note: In my professional opinion, this pt was not fully ready to return to full-duty. His work requires him to lift very heavy doors (>50#) overhead. Due to his lack of ROM, pain levels and weakness, he did not appear to be ready for this. He could only tolerate very light lifting in the clinic due to pain and we had not yet begun any OH lifting to simulate work tasks. Pt was strongly encouraged to continue HEP on own to continue strengthening of the R shoulder.

(Jt. Ex. 6, p. 37) Nevertheless, formal physical therapy ended after Mr. Clary was placed at MMI.

In fact, Mr. Clary testified he was not required to perform all the lifting and other heavy duties in his position. He testified specifically about the work activities which gave him difficulty. (Tr., pp. 23-25) He testified he was unable to get the work done and other crews had to help finish jobs he started. (Tr., p. 22) He testified his helper had to pick up slack for him and perform the heavier parts of the job he could no longer do. "I had to switch everything mostly to my left - - my left side, and I did what I could. What I couldn't do, I just had to - - my helper had to pick up a lot of slack." (Tr., p. 23) On cross examination, he admitted that he had never been disciplined for his work performance. (Tr., p. 37)

On April 15, 2019, Dr. Galles prepared a report which assigned a 3 percent upper extremity impairment rating due to loss of range of motion. (Jt. Ex. 4, p. 33) This was based upon his February 2019 examination. On April 25, 2019, Mr. Clary returned to Dr. Galles. Dr. Galles documented his pain at a 3 (on a scale of 0-10) and described it as aching. "Returns today because of some concerns of abduction stiffness." (Jt. Ex. 4, p. 30) "As I discussed with him today, I would expect some loss of mobility after his repair but overall he seems to have a good result with a stable strong shoulder." (Jt. Ex. 4, p. 31) Mr. Clary testified that Dr. Galles showed him a diagram of the shoulder and told him he would "never have full use of that shoulder." (Tr., p. 22) In any event, Dr.

Galles did not place any restrictions on him.

Mr. Clary continued to work for the employer, technically unrestricted, from March 2019, through April 2, 2020. Mr. Clary testified he was fired. He was "floored" when he learned of his termination. (Tr., p. 25) There are no employment records in evidence which document his separation from employment and no one testified on behalf of the employer. The employer did submit an interrogatory answer where they indicated under oath that due "to a reduction in force, Claimant was terminated on or about April 2, 2020." (Def. Ex. E, p. 17) At his deposition, he testified his employer told him the layoff was due to the economic slowdown and Covid-19. (Def. Ex. F, Clary Depo, p. 10) Mr. Clary, however, testified that business had not, in fact, slowed down.

Since his employment separation, Mr. Clary has received unemployment and has performed a work search, looking for jobs that do not require lifting. He testified credibly that he is unable to use his right arm much without symptoms and he is unable to perform many of his past hobbies or recreational activities, such as working on cars, golfing, basketball and softball. He testified that his right arm goes to sleep when he drives or holds his right arm at shoulder level for any period of time. "I can't turn my neck to the - - or my head to the right all the way (indicating), not even halfway." (Tr., p. 26)

Mr. Clary testified that he has had neck issues since he was injured, but that none of the physicians ever evaluated his neck until his independent medical evaluation. (Tr., p. 30) He testified, however, that he did tell Dr. Galles about his neck problems. (Tr., p. 34) None of the treating medical records in evidence discuss the symptoms Mr. Clary claims he has continually experienced in his neck.

On July 1, 2019, Jacqueline Stoken, D.O., examined Mr. Clary for purposes of an 85.39 independent medical evaluation (IME). She took history, reviewed appropriate records and examined him. (Cl. Ex. 1, pp. 1-4)

Currently, he complains of pain in his neck that he describes as aching, shooting, sharp and exhausting. It ranges from 3-9/10. It averages 6/10. Right now, it is 5/10. He states that nothing makes the pain go away. Using his arms and turning his head makes it worse.

He complains of pain in his right shoulder that he describes as aching, throbbing, shooting, sharp, exhausting and nagging. It ranges from 1-10/10. It averages 7/10. Right now, it is 6/10. Sleeping makes it better. Using it makes it worse.

(Cl. Ex. 1, p. 3) She diagnosed right rotator cuff tear, avulsion fracture of the right greater tuberosity, and right neck strain, as well as chronic pain of the right shoulder and neck. She causally connected these conditions to his work injury. (Cl. Ex. 1, p. 5) She assigned a 5 percent whole body rating for the cervical condition and a 30 percent right upper extremity rating for the right shoulder condition. (Cl. Ex. 1, p. 5) While her shoulder diagnosis was quite specific, her only diagnosis of the neck is "chronic pain."

(Cl. Ex. 1, p. 5) The combined ratings came to 22 percent whole person. She recommended restrictions of avoiding work at or above shoulder level and lifting restrictions of 10-20 pounds. (Cl. Ex. 1, p. 6)

Advantage Physical Therapy performed a functional capacity evaluation (FCE) in August 2020, which came back valid. (Cl. Ex. 2, p. 14) The FCE placed Mr. Clary in the sedentary work classification and recommended significant lifting, carrying and pushing/pulling restrictions and avoiding any significant work at shoulder height or above. (Cl. Ex. 2, p. 17-19, 21-25) In a follow up report, Dr. Stoken reviewed the FCE report and endorsed the restrictions. (Cl. Ex. 1, p. 10) She also further described and defined where the subscapularis muscle is in the body. "The subscapularis muscle is a large and powerful triangle shaped muscle originating at subscapular fossa and inserting at the lesser tubercle of the humerus." (Cl. Ex. 1, p. 10) She provided a diagram showing that the muscle attaches to the shoulder but extends all the way into the trunk of the body underneath the chest. (Cl. Ex. 1, p. 12)

Dr. Galles prepared a number of reports for defense counsel and claimant's counsel clarifying his opinions. (See Cl. Ex. 4; Def. Ex. A) In essence, he disagreed with Dr. Stoken's rating and the FCE, even going so far as to suggest something new must have occurred because when he last saw Mr. Clary in April 2019, he had made a full recovery.

I do not have a good explanation for the FCE findings which are much different than my last evaluation of his shoulder a year earlier. I do not know what may have happened during that year span that may have negatively affected his shoulder.

(Cl. Ex. 4, p. 26) I do not find these medical opinions persuasive.

CONCLUSIONS OF LAW

The primary question submitted is the nature of Mr. Clary's permanent disability caused by his stipulated work injury. The secondary question is the extent of the permanent disability. The claimant asserts that he sustained an injury to his whole body under Iowa Code section 85.34(2)(v) because the condition extends to his neck and subscapular region in the trunk of his body. The defendants contend that the claimant is limited to functional disability benefits (defined as the impairment rating assigned under The AMA Guides) because the condition is limited to the right shoulder under Iowa Code section 85.34(2)(n). The initial question then, is really a question of causal connection.

The claimant has the burden of proving by a preponderance of the evidence that the injury is a proximate cause of the disability on which the claim is based. A cause is proximate if it is a substantial factor in bringing about the result; it need not be the only cause. A preponderance of the evidence exists when the causal connection is probable rather than merely possible. George A. Hormel & Co. v. Jordan, 569 N.W.2d 148 (Iowa

1997); Frye v. Smith-Doyle Contractors, 569 N.W.2d 154 (Iowa App. 1997); Sanchez v. Blue Bird Midwest, 554 N.W.2d 283 (Iowa App. 1996).

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

The claimant alleges that the assessment of his disability must fall under subsection (n) because the permanent impairment is in his neck, as well as his subscapularis muscle.

I first will address the claim of the neck disability.

At the outset, I note that I found Mr. Clary to be a highly credible witness. I believe him that he has some neck symptoms. And I also believe him that, at some point, he reported those symptoms to Dr. Galles. There has been, however, no medical workup or treatment of this condition. There has been no diagnosis or even mention of the neck symptoms by any treating physician. The only physician to do any review of the condition of the neck is claimant's expert. She did not provide a specific diagnosis, but rather rated the "chronic pain." Even after obtaining the IME, claimant has not requested additional medical treatment or workup for the neck. The claimant is entitled to such treatment. Nevertheless, it is the claimant's burden to prove that he sustained a permanent neck condition as a result of his work injury. In this record of evidence, I find he has failed to meet his burden.

The next issue is whether the impairment of the subscapularis muscle causes this disability to fall under subsection (v), as opposed to (n).

The Commissioner filed two appeal decisions which are controlling on the legal issue. The first was Deng v. Farmland Foods, File No. 5061883 (Appeal September 29, 2020). In Deng, the Commissioner held that the 2017 amendments to Chapter 85 were ambiguous as to the definition of the shoulder. He therefore undertook an effort to construe the statute by looking to the intent of the legislature. Id. at 5. He ultimately concluded the following:

I recognize the well-established standard that workers' compensation statutes are to be liberally construed in favor of the worker, as their

primary purposes is to benefit the worker. See Des Moines Area Reg'l Transit Auth. v. Young, 867 N.W.2d 839, 842 (Iowa 2015) (citations omitted); see also Jacobson Transp. Co. v. Harris, 778 N.W.2d 192, 197 (Iowa 2010); Xenia Rural Water Dist. v. Vegors, 786 N.W.2d 250, 257 (Iowa 2010) ("We apply the workers' compensation statute broadly and liberally in keeping with its humanitarian objective...."); Griffin Pipe Prods. Co. v. Guarino, 663 N.W.2d 862, 865 (Iowa 2003) ("[T]he primary purpose of chapter 85 is to benefit the worker and so we interpret this law liberally in favor of the employee."). This liberal construction, however, cannot be performed in a vacuum. As discussed above, several of the principles of statutory construction indicate the legislature did not intend to limit the definition of "shoulder" under section 85.34(2)(n) to the glenohumeral joint. For these reasons, I conclude "shoulder" under section 85.34(2)(n) is not limited to the glenohumeral joint.

Claimant's injury in this case was to the infraspinatus muscle. As discussed, the infraspinatus is part of the rotator cuff, and the rotator cuff's main function is to stabilize the ball-and-socket joint. As noted by both Dr. Bansal and Dr. Bolda, the rotator cuff is generally proximal to the joint. However, because the rotator cuff is essential to the function of the glenohumeral joint, it seems arbitrary to exclude it from the definition of "shoulder" under section 85.34(2)(n) simply because it "originates on the scapula, which is proximal to the glenohumeral joint for the most part." (Def. Ex. A, [Depo. Tr., 27]). In other words, being proximal to the joint should not render the muscle automatically distinct.

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). The deputy commissioner's determination that claimant's infraspinatus injury is a whole body injury that should be compensated industrially under section 85.34(2)(v) is therefore respectfully reversed.

Deng, at 10-11.

The second is Chavez v. MS Technology, LLC, File No. 5066270 (App. September 30, 2020), which was filed the day after Deng. In Chavez, 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 acromion 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).

I therefore find none of claimant's injuries are compensable as unscheduled, whole body injuries under section 85.34(2)(v). The deputy commissioner's finding that claimant sustained an injury to her body as a whole is therefore respectfully reversed.

Chavez, at 6.

The key holdings of Deng and Chavez are:

1. The definition of a "shoulder" is ambiguous in Section 85.34(2)(n). Deng, at 4.
2. There is no "ordinary" meaning of the word shoulder. Deng, at 5.
3. The appropriate way to interpret the statute is to examine the legislative history. Deng, at 5.
4. The well-established history of "liberal construction" of workers' compensation statutes is inapplicable here because to do so would be to ignore the legislature's intent to limit compensation to injured workers in the 2017 amendments.¹ Deng, at 10-11.
5. The legislature did not intend to limit the definition of a "shoulder" to the glenohumeral joint. Rather, the legislature intended to include the entwinement of the glenohumeral joint and the muscles that make up the rotator cuff. Deng, at 11.

¹ The fundamental guiding principle of statutory construction in a workers' compensation case is that the statute is to be interpreted liberally in favor of the injured worker and their family. "Any doubt in its construction is thus resolved in favor of the employee." Teel v. McCord, 394 N.W. 2d 405, 407 (Iowa 1986). Workers' compensation laws are to be construed in favor of the injured worker. Myers v. F.C.A. Services, Inc., 592 N.W.2d 354, 356 (Iowa 1999). The beneficent purpose is not to be defeated by reading something into the statute that is not there. Cedar Rapids Community School v. Cady, 278 N.W.2d 298 (Iowa 1979). This, combined with the legal principle that the legislature is presumed to know the prior construction of the law. State ex rel. Palmer v. Board of Supervisors of Polk County, 365 N.W.2d 35, 37 (Iowa 1985), would lead me to side with the claimant in this case. This, however, is not what the Commissioner held. Deng and Chavez are binding precedent.

Applying this interpretation of the facts of this case, I find the claimant suffered an injury to his "shoulder" under Iowa Code section 85.43(2)(n). The claimant did present expert evidence from Dr. Stoken that his impairment involves the subscapularis muscle which is a large muscle extending into the trunk of his body. I cannot, however, credibly distinguish this muscle from the supraspinatus muscle, which the Commissioner has previously held is part of the shoulder. As such, his disability shall be assessed as a scheduled disability under subsection (n).

The next issue is the extent of claimant's permanent partial disability.

Since I have found that the claimant suffered a disability to his right shoulder under Iowa Code section 85.43(2)(n) (2019), claimant's disability shall be assessed as a scheduled disability, which means I am arbitrarily limited to choosing between the impairment ratings of the expert physicians.

In all cases of permanent partial disability described in paragraphs "a" through "t", or paragraph "u" when determining functional disability and not loss of earning capacity, the extent of loss or percentage of permanent impairment shall be determined solely by utilizing the guides to the evaluation of permanent impairment, published by the American Medical Association, as adopted by the workers' compensation commissioner by rule pursuant to chapter 17A. Lay testimony or agency expertise shall not be utilized in determining loss or percentage of permanent impairment pursuant to paragraphs "a" through "t", or paragraph "u" when determining functional impairment and not loss of earning capacity.

Iowa Code section 85.34(2)(x) (2019). In other words, the law, as written, is not concerned with an injured worker's actual functional loss as determined by the evidence, but rather the impairment rating as assigned by the adopted version of The AMA Guides. The only function of the agency is to determine which impairment rating is most accurate.

I find that the rating of Dr. Stoken is the most credible rating of the claimant's right shoulder condition. I find that the rating of Dr. Galles was based upon his inaccurate perception that Mr. Clary had fully healed from his condition in February 2019. Being most generous to Dr. Galles, this could have been based upon a miscommunication between himself and Mr. Clary. Dr. Galles last examined Mr. Clary (prior to the rating) on February 28, 2019. At that time, Dr. Galles documented that Mr. Clary asked to have all restrictions removed. Mr. Clary disputes this and testified at hearing that he was simply asking to be able to use his arm more than he was at the time. I believe Mr. Clary, however, that Dr. Galles did not perform any type of formal testing other than asking Mr. Clary to raise his arm. At the time, Mr. Clary had been working under severe medical restrictions and had been using his right arm and shoulder very little. In other words, it is likely that because he was using his shoulder in such a limited manner at that time, that it was stronger and in better condition than it became after he began using it in a normal fashion. Based upon this record, it also appears Dr. Galles was invested in declaring his surgery a major success.

Dr. Stoken's rating is very high, however, she spent a great deal of time with Mr. Clary and carefully listened to and documented all of the symptoms he was having. She also had the benefit of performing her examination at a time when Mr. Clary was using his arm and shoulder in a normal fashion, attempting to perform some activities with it.

I conclude therefore, that claimant is entitled to 30 percent of 400 weeks of compensation, or 120 weeks of benefits commencing on February 28, 2019.

The final issue is penalty.

Claimant also seeks an award of penalty benefits pursuant to Iowa Code section 86.13. Iowa Code section 86.13(4) provides:

- a. If a denial, a delay in payment, or a termination of benefits occurs without reasonable or probable cause or excuse known to the employer or insurance carrier at the time of the denial, delay in payment, or termination of benefits, the workers' compensation commissioner shall award benefits in addition to those benefits payable under this chapter, or chapter 85, 85A, or 85B, up to fifty percent of the amount of benefits that were denied, delayed, or terminated without reasonable or probable cause or excuse.
- b. The workers' compensation commissioner shall award benefits under this subsection if the commissioner finds both of the following facts:
 - (1) The employee has demonstrated a denial, delay in payment, or termination in benefits.
 - (2) The employer has failed to prove a reasonable or probable cause or excuse for the denial, delay in payment, or termination of benefits.
- 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.

Claimant seeks penalty on the basis that defendants had no reasonable excuse for failing to treat his disability as an industrial disability based upon his neck symptoms. While I have found that claimant's neck condition is, in fact, connected to his work injury, I did not find that there is any permanent impairment or disability at this time. He is entitled to treatment for this condition. Since claimant did not specifically seek alternate medical care in the hearing report, I do not specifically order such care at this time. The defendants, however, did have a reasonable basis for assessing claimant's disability as a scheduled member disability.

ORDER

THEREFORE IT IS ORDERED:

Defendants shall pay the claimant one hundred and twenty (120) weeks of permanent partial disability benefits at the rate of five hundred and eighty-eight and 70/100 (\$588.70) per week from February 28, 2019.

Defendants shall pay accrued weekly benefits in a lump sum.

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


Defendants shall be given credit for the 12.429 weeks previously paid.

Defendants shall pay the IME expenses set forth in Claimant's Exhibit 1.

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

Costs are taxed to defendants.

Signed and filed this 28th day of July, 2021.


JOSEPH L. WALSH
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

John Dougherty (via WCES)

Jean Dickson (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.