

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

PAMELA CARMER (f/k/a HYDE),

Claimant,

vs.

NORDSTROM, INC.,

Employer,
Self-Insured,
Defendant.

File No. 1656062.01

ARBITRATION DECISION

Head Note Nos.: 1801, 1803.1, 2907,
4000

Claimant Pamela Carmer filed a petition in arbitration on March 17, 2020, alleging she sustained an injury to her right arm and body as a whole, while working for Defendant Nordstrom, Inc., self-insured ("Nordstrom"), on August 6, 2018. Nordstrom filed an answer, admitting Carmer sustained a work injury. Carmer moved to amend the petition, which was granted, averring she also sustained an injury to her left arm. Nordstrom filed an answer denying Carmer sustained an injury to her left arm.

An arbitration hearing was held *via* CourtCall video conference on March 2, 2021. Attorney Ben Roth represented Carmer. Carmer appeared and testified. Attorney James Peters represented Nordstrom. Joint Exhibits ("JE") 1 through 7, and Exhibits 1 through 10 and A through G were admitted into the record. The record was held open through April 9, 2021, for the receipt of post-hearing briefs. The briefs were received and the record was closed.

The parties submitted a Hearing Report, listing stipulations and issues to be decided. The Hearing Report was approved at the conclusion of the hearing. Nordstrom waived all affirmative defenses.

STIPULATIONS

1. An employer-employee relationship existed between Nordstrom and Carmer at the time of the alleged injury.
2. Carmer sustained an injury on August 6, 2018, which arose out of and in the course of her employment with Nordstrom.
3. The alleged injury is a cause of temporary disability during a period of recovery.

4. While entitlement to temporary benefits cannot be stipulated, Carmer was off work from February 28, 2019 through May 7, 2019.

5. The alleged injury is a cause of permanent disability.

6. The commencement date for permanent partial disability benefits, if any are awarded, is May 8, 2019.

7. At the time of the alleged injury Carmer's gross earnings were \$726.35 per week, she was single and entitled to three exemptions, and the parties believe the weekly rate is \$476.20.

8. Medical benefits are no longer in dispute.

9. Prior to the hearing, Carmer was paid sixteen weeks of permanent partial disability benefits at the rate of \$476.20 per week.

10. The costs listed in Exhibit 9 have been paid.

ISSUES

1. Has Carmer sustained a scheduled member disability to the right shoulder or an industrial disability because the injury extends past the shoulder into the body as a whole and/or because Carmer has sustained a sequela injury to the left side?

2. What is the extent of disability?

3. Is Carmer entitled to temporary benefits from February 28, 2019, through May 7, 2019?

4. Is Nordstrom entitled to a credit under Iowa Code section 85.38(2) for payment of sick pay/disability income in the amount of \$1,531.70?

5. Is Carmer entitled to penalty benefits for an injury extending into the body as a whole or otherwise being compensable under Iowa Code section 85.34(2)(v)?

6. Should costs be assessed against either party?

FINDINGS OF FACT

Carmer graduated from high school and was an average student. (Tr., p. 9) After high school Carmer studied fashion design and obtained a cosmetology degree from Capri Cosmetology. (Tr., p. 10) She also took medical assistant courses, but did not complete the medical assistant program. (Tr., p. 10) Carmer has not attended school for 20 years. (Tr., p. 10) Carmer has basic computer skills and describes her typing as "[t]wo-handed kind of chicken pecking." (Tr., p. 10) Carmer is right-hand dominant. (JE 3, p. 5; Tr., p. 9) At the time of the hearing Carmer was 52. (Tr., p. 9)

The parties did not produce treatment records referencing Carmer's shoulder problems before the August 6, 2018 work injury. Mark Taylor, M.D., received and reviewed records regarding prior treatment Carmer received after he conducted his initial independent medical examination in September 2019. (Ex. 1)

According to Dr. Taylor's supplemental report, in April 2003, Carmer underwent right shoulder magnetic resonance imaging, which revealed a labral tear and a focal abnormality in the tendon of the long head of the biceps, a mild rotator cuff tendinopathy, and minimal subacromial and subdeltoid bursal fluid. (Ex. 1, p. 11) Fred Pilcher, M.D., an orthopedic surgeon, examined Carmer and diagnosed her with rotator cuff and biceps tendinitis and administered a subacromial corticosteroid injection. (Ex. 1, p. 11) On July 10, 2003, Dr. Pilcher performed a manipulation under anesthesia, with arthroscopy of the shoulder with debridement of small rotator cuff tears and a subacromial decompression. (Ex. 1, p. 11) Carmer attended physical therapy and she was released to return to work without restrictions on August 25, 2003. (Ex. 1, p. 11)

Dr. Taylor further noted, following an automobile accident in July 2005, Carmer complained of neck pain and intermittent tingling in her left arm. (Ex. 1, p. 12) The records do not show an ongoing problem with her left arm. (Ex. 1, p. 12) Carmer testified she did not have any problems with her right shoulder after her surgery before the August 2018 work injury that is the subject of this case.. (Tr., p. 12)

In 2018, Carmer worked for Nordstrom in receiving, unboxing clothing and accessories, hanging merchandise on Nordstrom hangers, filling totes, and putting on labels. (Tr., pp. 37-38) The boxes she lifted weighed up to 50 to 70 pounds. (Tr., p. 38)

On August 6, 2018, Carmer was processing an order moving boxes to her right. (Tr., pp. 14-15) Carmer picked up a box while wearing gloves. (Tr., p. 15) The box slipped out of her hands and she went to grab it and felt immediate pain. (Tr., p. 15) Carmer reported her work injury to Nordstrom. (Tr., p. 16) Nordstrom sent Carmer for medical treatment. (Tr., p. 16)

At the time of her work injury Carmer was earning \$16.70 per hour and she received PEP incentive pay of \$20 to \$30 per pay period. (Tr., p. 14) Carmer worked mandatory overtime. (Tr., p. 14) Carmer's job with Nordstrom was the highest paying job she has held. (Tr., p. 14)

On August 7, 2018, Carmer received treatment from Alexi Becker, ARNP with Mercy Medical Center. (JE 1, p. 1) Carmer complained of right shoulder pain after she grabbed for a falling box of purses and heard a pop in her right shoulder while at work the evening of August 6, 2018. (JE 1, p. 1) Carmer reported the pain was worse with range of motion and on palpation and better with rest. (JE 1, p. 1) Becker documented Carmer reported she had a congenital shoulder condition that required surgery several years back, but she was uncertain which shoulder required surgery and she had arthralgias or pain in one or more joints. (JE 1, p. 1) Becker listed an impression of

acute right shoulder pain and abnormal musculoskeletal x-ray, and prescribed a sling and hydrocodone. (JE 1, pp. 2-3)

On August 9, 2018, Carmer underwent right shoulder magnetic resonance imaging. (JE 2, p. 4) The reviewing radiologist listed an impression of:

1. Large full-thickness superior rotator cuff tear in a location suggesting laceration against the lateral margin of the acromion. This is occurring against a background of severe diffuse superior rotator cuff tendinopathy.
2. Mild AC joint degeneration.
3. Mild glenohumeral chondromalacia.

(JE 2, p. 4)

On August 22, 2018, Carmer attended an appointment with Brendan Patterson, M.D., an orthopedic surgeon with the University of Iowa Hospitals and Clinics ("UIHC"), complaining of aching, burning, and pins and needles pain in her right shoulder, a burning and stabbing headache for the past two to three days, and burning and pins and needles sensations in her legs, noting she had not slept in a few days and she had developed a rash and lower extremity swelling. (JE 3, p. 5) Carmer reported the pain woke her at night and increased with lifting, reaching and internal rotation of her arm, the pain was greatest at the lateral aspect of her shoulder, and she was experiencing intermittent numbness that radiates from the mid-forearm to the long, ring, and small fingers of her right hand. (JE 3, p. 5) Carmer stated she had been working with restrictions while using a sling. (JE 3, p. 5) Dr. Patterson examined Carmer, reviewed her records, noted she had full cervical range of motion without tenderness, and documented the following findings on exam of her shoulders:

Right shoulder examination. Tender to palpation at anterior shoulder, lateral acromion and trapezius. Non-tender at AC joint. Right shoulder active elevation 150 degrees, extension 40 degrees. Right arm abduction 130 degrees, adduction 30 degrees. With right arm abducted at 90, active external rotation 40 degrees, internal rotation 40 degrees. With right arm at neutral, active external rotation 50 degrees. Right shoulder muscle strength with external rotation 4/5, internal rotation 4/5, abduction 4/5. Positive Neer's and Hawkins signs. Positive pain with cross-body adduction. Mild positive Speed's and Yergason's.

Left shoulder examination: Non-tender to palpation. Left shoulder active elevation 170 degrees, extension 40 degrees. Left arm abduction 170 degrees, adduction 40 degrees. With left arm abducted at 90, active external rotation 80 degrees, internal rotation 70 degrees. Left shoulder

muscle strength with external rotation 5/5, internal rotation 5/5, abduction 5/5.

(JE 3, p. 6) Dr. Patterson assessed Carmer with a right shoulder full-thickness rotator cuff tear, opined the work incident was a significant factor in her current findings and need for treatment, discussed surgery after getting her blood pressure under better control with her primary care provider, discontinued the sling to avoid stiffness, discontinued her hydrocodone, and prescribed physical therapy for gentle shoulder mobilization. (JE 3, pp. 7-8)

On October 24, 2018, Carmer returned to Dr. Patterson reporting her rash and high blood pressure problems had resolved. (JE 3, p. 9) Dr. Patterson noted on exam Carmer maintained "forward elevation to 120 degrees actively and passively to 150. She has 4 out of 5 strength with resisted abduction and external rotation. She has a negative belly press. She has positive impingement signs. She has no tenderness palpation along the biceps tendon." (JE 3, p. 9) Dr. Patterson imposed restrictions of no lifting, pushing, or pulling over five pounds with the right arm and no repetitive reaching away from the body or above chest height with the left arm. (JE 3, p. 10)

On December 6, 2018, Dr. Patterson performed a right shoulder arthroscopy rotator cuff repair, open subpectoral biceps tenodesis, "[e]xtensive debridement," and subacromial decompression on Carmer. (JE 3, p. 11) Dr. Patterson listed a post-operative diagnosis of right shoulder full-thickness rotator cuff tear, long head of the biceps tearing, and chondromalacia of the humeral head. (JE 3, p. 13) Dr. Patterson ordered Carmer to be nonweightbearing with the upper right extremity and sling immobilization with elbow, wrist, and hand range of motion permitted. (JE 3, p. 15)

Prior to surgery, Carmer performed light-duty work for Nordstrom in the cafeteria. (Tr., p. 18) During an appointment on December 19, 2018, Dr. Patterson imposed restrictions of no lifting over five pounds and no repetitive lifting or reaching. (JE 3, p. 17) On February 5, 2019, Nordstrom offered Carmer alternate modified work at Horizons. (Ex. B, pp. 28-29) Carmer accepted the offer on February 8, 2019, and she sat at the front desk and answered the telephone at Horizons. (Tr., p. 20)

Carmer last worked for Nordstrom at Horizons on or about February 27, 2019. Carmer reported her employment ended after an incident with the Cedar Rapids Police Department, which caused her mental distress, noting she was experiencing blood pressure problems and migraine headaches. (Tr., pp. 20-21, 61) Carmer admitted at hearing she was not off work due to her shoulder. (Tr., p. 61) Carmer's family physician and counselor restricted her from working due to the acute anxiety and stress caused by the incident with the police. (JE 5, pp. 21-26; JE 6) Carmer has not alleged she sustained a mental health injury as a result of her work at Nordstrom. Her absence from work after February 27, 2019 was not due to her right shoulder injury. No physician had restricted her from working due to her right shoulder injury after Dr. Patterson released her from care.

On April 4, 2019, Carmer's family physician, Qadnana Anwar, M.D., completed a concurrent disability and leave statement of incapacity form for Carmer for the Nordstrom Leave and Disability Unit. (JE 5, pp. 27-29) The form indicates the period of incapacity began on February 28, 2019 and ended on April 7, 2019. (JE 5, p. 27) Dr. Anwar diagnosed Carmer with acute anxiety, documented Carmer had been experiencing episodes of increased anxiety and stress from an acute stress reaction, and released her to full duty on April 8, 2019. (JE 5, p. 27)

On May 3, 2019, Nordstrom terminated Carmer's employment. (Tr., p. 21) Carmer reported she was having nightmares and difficulty sleeping and her counselor told her she had faxed paperwork to Nordstrom for a leave. (Tr., p. 21) When she contacted Nordstrom, Nordstrom informed Carmer they had not received the paperwork and that she had been terminated. (Tr., p. 21)

Carmer attended 17 physical therapy sessions from January 9, 2019 through May 6, 2019. (JE 4) During a session on May 6, 2019, the physical therapist documented Carmer reported her shoulder "has not been too painful over the past few weeks," she had not be doing any heavy lifting, she had been performing her home exercises without pain, her sleep had improved, and while she believed her range of motion had improved, her strength was still limiting her. (JE 4, p. 21)

On May 8, 2019, Carmer attended a follow-up appointment with Dr. Patterson. (JE 3, p. 18) Dr. Patterson documented Carmer was doing well overall, her pain was minimal, her shoulder felt very comfortable, and she had improved with physical therapy. (JE 3, p. 18) On physical exam, Dr. Patterson noted Carmer had,

forward elevation to 165 degrees. She has external rotation to 45 degrees. She has extension to 45 degrees. She has abduction and internal rotation to 70 degrees. She has abduction and external rotation to 90 degrees. She has abduction to 125 degrees. Cross body adduction to 45 degrees. She has 5 out of 5 strength with abduction external rotation negative belly press. Negative impingement signs. No Popeye deformity.

(JE 3, p. 18)

Dr. Patterson opined Carmer had reached maximum medical improvement and released her without restrictions, with use of her shoulder as tolerated, to be careful with her shoulder, and to avoid excessive heavy lifting. (JE 3, p. 18) Using the Guides to the Evaluation of Permanent Impairment (AMA Press, 5th Ed. 2001) ("AMA Guides"), Dr. Patterson assigned Carmer a four percent upper extremity or two percent whole person impairment, noting the rating "is the result of loss of shoulder flexion 1% per figure 16-40 on page 476, loss of shoulder abduction 2% per figure 16-43 on page 477, and loss of shoulder internal rotation 1% per figure 16-46 on page 479," which he converted to the whole person using Table 16-3 on page 439. (JE 3, p. 19)

Carmer did not seek employment after her last appointment with Dr. Patterson, due to problems with her mental state. (Tr., p. 25) Carmer's son and his girlfriend moved in with Carmer and his girlfriend helped Carmer with housework, laundry, and taking care of the dogs. (Tr., p. 25)

Carmer reported after her treatment with Dr. Patterson ended, her condition became worse. (Tr., p. 23) She was using her right arm close to her body and she started relying on her left upper extremity more for her activities of daily living. (Tr., pp. 24, 26) Carmer started using her left arm for driving, brushing her teeth, and putting on her makeup. (Tr., p. 26) Carmer testified she struggles to button pants and she cannot hook a bra. (Tr., pp. 26-27)

On September 10, 2019, Mark Taylor, M.D., an occupational medicine physician, conducted an independent medical examination for Carmer. (Ex. 1) Dr. Taylor reviewed Carmer's medical records and examined her. (Ex. 1) On examination, Dr. Taylor noted the following values for the right and left shoulder: (1) flexion 130/180 degrees; (2) extension 40/70 degrees; (3) abduction 110/170 degrees; (4) adduction 30/40 degrees; (5) internal rotation 60/75 degrees; and (6) external rotation 40/80 degrees. (Ex. 1, p. 5) Dr. Taylor documented palpation of the right shoulder "revealed tenderness over the anterior glenohumeral area as well as the bicipital groove region. She was also tender over the right AC joint and just inferior to the tip of the lateral acromion," and noted she had no tenderness on the left side. (Ex. 1, p. 5) He further documented she had good strength throughout her left side, but on the right side she demonstrated mild weakness with glenohumeral abduction, external rotation, and supination of the arm, and she had a mildly positive Yergason's test on the right, positive Speed's, Neer's, Hawkins' and Jobe's test on the right, and she was negative for all testing on the left side. (Ex. 1, pp. 5-6)

Dr. Taylor diagnosed Carmer with a large, full-thickness right sided rotator cuff tear, noted she had undergone a right-sided rotator cuff repair, subacromial decompression and acromioplasty, extensive debridement, and open supectoral biceps tenodesis. (Ex. 1, p. 6) Dr. Taylor opined Carmer's injury was directly and causally related to the work incident. (Ex. 1, p. 6)

Dr. Taylor did not recommend any additional treatment for Carmer and found she reached maximum medical improvement at the time of her last appointment with Dr. Patterson on May 8, 2019. Using the AMA Guides, Dr. Taylor opined:

[t]urning to Figures 16-40, 16-43, and 16-46, on pages 476-479, and compared to her unaffected left side, she would qualify for 10% right upper extremity impairment related to decreased motion. Turning to Table 16-3, on page 439, it is noted that 10% upper extremity impairment converts to a 6% whole person impairment. I am aware that this rating is higher than that which was assigned by Dr. Patterson. Her active range of motion measurements were noted above and multiple measurements were

obtained, and the rating was based on the aforementioned measurements.

(Ex. 1, p. 9) Dr. Taylor recommended restrictions of no lifting over 30 pounds with both arms together, any lifting should occur with the right arm as close to her body as possible, no lifting more than 15 to 20 pounds above chest level, rare overhead reaching with the right arm, occasional forward reaching with the right arm, and to avoid forceful pushing and pulling-type movements with the right arm. (Ex. 1, p. 9)

Dr. Taylor received and reviewed additional medical records for Carmer involving a prior surgery to her right shoulder, cervical and left arm symptoms following an automobile accident, and issued an opinion letter on September 18, 2020. (Ex. 1, pp. 11-13) Dr. Taylor found the additional records did not alter his previously stated opinions in his October 4, 2019 report, noting,

In the *Causation* portion of my report, I indicated that she had not previously experienced a right-sided rotator cuff tear. This was essentially accurate, although Dr. Pilcher identified small tears at the time of her 2003 surgery, which only required debridement. Also, there were no additional records to suggest any ongoing problems associated with the 2003 injury. Given this information, it is still my opinion that Ms. [Carmer's] injury and rotator cuff tearing was directly and causally related to her work-related incident in early August 2018.

(Ex. 1, pp. 12-13)

Carmer testified after her surgery she started experiencing pain in her left arm, which she ignored and tried to push through. (Tr., pp. 27, 65) Carmer reported before her right side injury she had never had problems with her left side. (Tr., p. 27) Carmer stated she had a hard time pinpointing when she started experiencing the left-sided symptoms started because she was in a lot of pain and that her symptoms must have gotten worse in 2020 and not in 2019 because while her shoulder hurt, it was not that bad, and in early 2020 it became worse. (Tr., pp. 55-57)

In the fall of 2020, Carmer requested medical care from Nordstrom. (Tr., p. 29) Carmer had not previously requested additional medical care from Nordstrom after Dr. Patterson released her from care. (Tr., p. 53) Carmer testified she did not know she could request treatment before because she had been released from care. (Tr., p. 29)

On January 8, 2021, James Milani, D.O., a family practice physician, conducted an independent medical examination for Nordstrom and issued his report on January 21, 2021. (Ex. A) Dr. Milani reviewed Carmer's medical records and examined her. (Ex. A)

On exam, Dr. Milani found Carmer's passive range of motion with her left upper extremity to be a little better than her active range of motion, but noted she reported

pain throughout all range of motion, noting her pain was not as bad for internal and external rotation when she had her elbow at her side. (Ex. A, p. 8) For the left shoulder during active range of motion, Dr. Milani found “[f]orward from 100 degrees, backwards extension 60 degrees, abduction 110 degrees, adduction 30 degrees [sic], internal rotation 30 degrees, external rotation 70 degrees. (Of note, when I have her do bilateral active range of motion together, her left shoulder actually has slightly better range of motion in her left).” (Ex. A, p. 8) Dr. Milani observed Carmer could not make a fist bilaterally with her hands and she had decreased range of motion in her bilateral digits, noting the PIP joints of her bilateral index and middle fingers were “extremely enlarged,” and her “other IP joints of the digits also are showing degenerative changes,” with no signs of active synovitis or warmth. (Ex. A, p. 8)

Dr. Milani listed a diagnosis of left shoulder pain “etiology uncertain: Most likely contributor to pain is underlying degenerative changes and/or progressive underlying systemic inflammatory arthritis/rheumatologic disorder that has not been diagnosed yet. It appears she has an advancing destructive joint disease/rheumatologic etiology that is affecting more than just her left shoulder.” (Ex. A, p. 9) Dr. Milani opined Carmer’s left shoulder symptoms were not causally related to the work injury, referring back to statements in the discussion section of his opinion, and he assigned no impairment rating. (Ex. A, p. 9)

In the discussion section of his opinion, Dr. Milani notes: (1) Carmer had a past history of “possible” rheumatoid arthritis; (2) Carmer had arthritic changes in her bilateral hands on exam on August 9, 2018; (3) she had worsening symptoms of arthritic changes in her bilateral hands noted on exam on September 10, 2019; (4) physicians found chondromalacia/degenerative changes with the August 9, 2018 magnetic resonance imaging and December 6, 2018 arthroscope; (5) “[s]ubjective and clinical findings of advancing/progressing joint pain and deformity in the hands, right shoulder (At time of MMI with Dr. Patterson she was doing well and has excellent range of motion with improving strength) and left shoulder. This would be most consistent with an advancing/progressive underlying systemic inflammatory arthritis;” and (6) there was no mention of left shoulder symptoms in her medical records and noting she had excellent range of motion and improving strength in her left shoulder. (Ex. A, p. 8) The medical record Dr. Milani referenced from August 9, 2018, was not produced at hearing.

Dr. Milani also cited Evaluating Causation for the Opposite Upper Limb from the July/August 2012 AMA Guides Newsletter, which he states is found in the AMA Guides to the Evaluation of Disease and Injury Causation 2nd Edition-Chapter 7-777, noting the article discusses and reviews “the ‘evidence-based medicine’ approach along with causation analysis [and i]n doing so, it is shown that “there are no credible studies that support such as a [sic] causative relationship.” (Ex. A, p. 9) Dr. Milani noted the article evaluated contralateral shoulder complaints, noting “[i]n most cases ‘favoring’ is not a probable cause of shoulder pathology,” and even if symptoms in a second limb develop after symptoms are present in the first limb “there is no scientific support for the concept of having symptoms in the first limb caused an increased rate of disease in the second limb. (Ex. A, p. 9)

Carmer acknowledged at hearing she has had a problem with her knuckles swelling. (Tr., p. 12) Carmer testified she did not have any problems with her hands prior to the August 2018 work injury. (Tr., p. 12) Carmer sought medical treatment for the swelling and reported her blood work was negative for rheumatoid arthritis. (Tr., p. 12) About six months before the hearing, Carmer started taking turmeric. (Tr., p. 64). Carmer testified the turmeric has made a “huge difference” with the problems with her hands. (Tr., p. 53) Carmer testified her hands were feeling really good at the time of the hearing and noted her swelling has gone down quite a bit since she started taking turmeric. (Tr., p. 13) Carmer reported the turmeric has not helped her pain from the August 2018 work injury. (Tr., p. 13) Carmer also denied having problems with her hips, knees, ankles, and elbows. (Tr., p. 13)

David Segal, M.D., a neurosurgeon, conducted an independent medical examination for Carmer and issued his report on January 27, 2021. (Ex. 2) Dr. Segal examined Carmer and reviewed her medical records. (Ex. 2) Dr. Segal personally reviewed the August 9, 2018 magnetic resonance imaging of Carmer’s right shoulder and reported he agreed with the radiologist’s interpretation. (Ex. 2, p. 23)

Dr. Segal documented Carmer reported she started doing more during the summer of 2019, including landscaping and that her right shoulder started bothering her more than her left shoulder, which she was using more to protect her right shoulder, started hurting. (Ex. 2, p. 20) Dr. Segal noted after the work injury and surgery, Carmer started relying on her arm for most activity, favoring her right arm, and overusing her left arm. (Ex. 2, p. 16)

On examination, Dr. Segal noted the following values for the right and left shoulder: (1) flexion 85/120 degrees; (2) extension 20/40 degrees; (3) abduction 90/110 degrees; (4) adduction 10/20 degrees; (5) internal rotation 70/40 degrees. (Ex. 2, p. 23) Dr. Segal performed rotator cuff testing noting positive bilateral findings for internal and external rotation and lag, empty can test, drop arm test, Hawkins test, Neer’s test for impingement, and Speed’s test for bicipital tendinitis. (Ex. 2, p. 23)

Dr. Segal found the work injury caused a permanent aggravation of a preexisting right shoulder injury. (Ex. 2, p. 29) Dr. Segal diagnosed Carmer with a large full-thickness superior rotator cuff tear with retraction, severe diffuse superior rotator cuff tendinopathy, biceps tendon intrasubstance tearing and synovitis, a permanent aggravation of preexisting mild AC joint degeneration with spur, a permanent aggravation of preexisting mild glenohumeral chondromalacia, and noted she was status post right shoulder arthroscopic rotator cuff repair, open subpectoral biceps tenodesis, and subacromial decompression. (Ex. 2, p. 29) With respect to the left shoulder, Dr. Segal diagnosed Carmer with left shoulder arthropathy caused in part by overuse and compensation due to the right shoulder injury and noted Carmer’s signs and symptoms are consistent with rotator cuff tendinopathy or tearing. (Ex. 2, p. 29)

Dr. Segal found Carmer reached maximum medical improvement for her right shoulder on December 6, 2019, one year after surgery when her symptoms stabilized.

(Ex. 2, p. 36) For her left shoulder, Dr. Segal opined Carmer's left shoulder had not been properly evaluated and that she was probably not at maximum medical improvement. (Ex. 2, p. 36) In the event she did not seek additional treatment, Dr. Segal opined she reached maximum medical improvement one year after her shoulder symptoms stabilized. (Ex. 2, p. 36)

Using the AMA Guides, Dr. Segal assigned an impairment rating for range of motion, strength deficit and for pain. For range of motion, Dr. Segal took measurements using a goniometer three times, using the largest measurement and remeasuring. He found the following measurements and assigned the following ratings for the left and right shoulders:

Degrees (%UEI)	Flex	Ext	Abd	Add	IR	ER
Left	120 (4%)	40 (1%)	110 (3%)	20 (1%)	40 (3%)	50 (1%)
Right	85 (7%)	20 (2%)	90 (4%)	10 (1%)	50 (2%)	50 (1%)

For total range of motion, Dr. Segal assigned a 13 percent impairment to the left upper extremity, which he converted to an eight percent whole person impairment, and a 17 percent impairment to the right upper extremity, which he converted to a 10 percent whole person impairment. (Ex. 2, pp. 36-37) For strength deficit, Dr. Segal observed the following measurements:

Muscle Group	Right (%UEI)	Left (%UEI)
Shoulder Abduction	4-/5 (4%)	4/5 (3%)
Shoulder Adduction	5-/5	5/5
Shoulder Internal Rotation	5/5	5/5
Shoulder External Rotation	4-/5 (3%)	4+/5 (2%)
Shoulder Forward Flexion	4-/5 (7%)	4+/5 (5%)
Shoulder Extension	4+/5 (2%)	4+/5 (2%)

For total strength deficit, Dr. Segal assigned a 12 impairment to the left upper extremity, which he converted to a seven whole person impairment, and a 15 percent impairment to the right upper extremity, which he converted to a nine percent whole person impairment. (Ex. 2, p. 37)

For both shoulders, using Chapter 18 of the AMA Guides, Dr. Segal assigned an impairment rating for pain causing impairment beyond the limitation in range of motion and strength, particularly with working overhead, and added an additional three percent whole person impairment to each shoulder, for unaccounted for pain under the range of motion and weakness values. (Ex. 2, p. 37) Dr. Segal combined the values and assigned a 17 percent whole person impairment for the left shoulder and a 20 percent whole person impairment for the right shoulder, for a combined 34 percent whole person impairment. (Ex. 2, pp. 37-38)

Dr. Segal recommended permanent restrictions of no lifting overhead, lifting to waist height with both arms up to 10 pounds frequently and 11 pounds to 30 pounds rarely, lifting to shoulder height with both arms up to ten pounds frequently and 11 to 30 pounds rarely, repetitive lifting with the noted weight restrictions to tolerance, carrying up to 10 pounds up to 50 feet frequently on wheels, carrying 11 to 40 pounds up to 50 feet rarely on wheels, pushing and pulling with 20 pounds of force frequently, pushing and pulling with 21 to 40 pounds of force rarely, and no pushing and pulling with greater than 40 pounds of force, and fine motor limited due to pain in arms. (Ex. 2, p. 39)

Dr. Segal recommended additional evaluation of the left shoulder by an orthopedic surgeon with imaging and possible treatment, and reevaluation of the right shoulder, noting Carmer may need additional treatment including pain management, imaging, studies, and surgery. (Ex. 2, pp. 38-39)

Dr. Segal reviewed Dr. Milani's report, including his opinion that Carmer's left shoulder symptoms are not causally related to the work injury and responded in a rebuttal opinion. (Ex. 2, p. 24) Dr. Segal opined Carmer's finger joint tenderness and swelling are most consistent with osteoarthritis and not inflammatory or rheumatoid arthritis, noting she had two negative workups for rheumatoid arthritis and on exam, while he found some tenderness to palpation in the finger joints, the findings were most consistent with osteoarthritis. (Ex. 2, p. 24) Dr. Segal further opined while the August 9, 2018 and September 10, 2019 records note arthritic changes in Carmer's bilateral hands and a worsening of symptoms, and he found the records are limited and insufficient to conclude an inflammatory or autoimmune process caused her left shoulder symptoms. (Ex. 2, p. 25) With respect to the chondromalacia or degenerative changes on magnetic resonance imaging and arthroscopy, Dr. Segal opined the findings are consistent with general osteoarthritis following a prior injury. (Ex. 2, p. 25)

Dr. Segal agreed while Dr. Patterson found Carmer was doing well and had excellent range of motion in her right shoulder, his exam occurred at her peak improvement after surgery and physical therapy, noting it is common for regression to occur, and that Dr. Taylor's exam five months later showed a worsening of symptoms and range of motion and Dr. Taylor did not indicate inflammatory arthritis was the cause. (Ex. 2, p. 25) Dr. Segal opined simultaneous progression in bilateral shoulders is common with rheumatoid arthritis because it is systemic, noting Carmer's right shoulder pain and range of motion began to decline months before her left shoulder

became symptomatic and she did not have parallel symptoms at the time of onset. (Ex. 2, p. 25)

Dr. Segal noted the AMA Guides are binding in determining causation. He agreed there are no randomized or double blind studies involving overuse injuries to second limbs, and while a temporal relationship alone does not prove causation, it is a relevant factor in the causation analysis, noting the progression in this case over time. (Ex. 2, p. 25) Dr. Segal correctly points out the article Dr. Milani cited to does not follow Iowa law, stating to conclude occupational exposure, "the preponderance of evidence supports that the disease or injury is occupational rather than nonoccupational in origin." (Ex. 2, p. 26) Dr. Segal noted in Iowa, a preponderance of the evidence must support the disease or injury has one material factor arising from occupational rather than nonoccupational origin.

Dr. Segal further opined, even using the authors' logic, Carmer qualified for an exception to the authors' conclusion, noting Carmer developed her left-sided symptoms as she increased her activity and, therefore, she satisfied the overuse definition of her left shoulder using the authors' criteria on page four. (Ex. 2, p. 26) Dr. Segal then cited to literature showing after a large rotator cuff tear like Carmer's the contralateral side may develop rotator cuff symptoms. (Ex. 2, pp. 26-27) Dr. Segal opined Carmer's history, symptoms, and exams support the overuse of her left shoulder due to the work injury is one material factor in the cause of her left shoulder symptoms, and there is insufficient evidence to suggest the only cause of Carmer's left-sided symptoms is inflammatory arthritis. (Ex. 2, p. 28)

After receiving a copy of Dr. Segal's independent medical examination report, Dr. Milani provided a rebuttal opinion. (Ex. A, pp. 19-23) Dr. Milani stated Carmer has not had a full "joint/rheumatological work-up for her progressive joint problems," which he has opined is the cause of her left shoulder problems. (Ex. A, p. 21) He also disagreed with Dr. Segal's opinion that her hand conditions are consistent with osteoarthritis and again relied on the article from the AMA Guides newsletter to support his contention Carmer's left sided symptoms are not due to the work injury, but rather due to underlying rheumatoid arthritis. (Ex. A, p. 21) Dr. Milani did not reference or distinguish the articles relied on by Dr. Segal. (Ex. A, p. 21) Dr. Milani then attacked Dr. Segal's impairment methodology, stating under page 508 of the AMA Guides, decreased strength cannot be rated in the presence of decreased motion, painful conditions, deformities, or absence of parts. (Ex. A, p. 22)

Carmer testified she has pain on the top of her right shoulder across her back, which is not in her neck and runs across her shoulder blades. (Tr., pp. 29-30) Carmer described the pain as a burning sensation, like a snake bite with pins and needles. (Tr., p. 30) Carmer reported the pain gets worse toward evening, but she has some pain all the time, even when she is not using her right arm, relayed she has trouble sleeping, and that motion over her head is worse. (Tr., pp. 30-32) Carmer takes ibuprofen and applies heat and ice every night for the pain. (Tr., p. 31) Carmer testified her right arm is not as strong as it was before the work injury. (Tr., p. 31) Carmer uses light weights

of three or five pounds and reported she often drops an item when she tries to grab it. (Tr., p. 32)

Carmer testified she continues to experience pain on her left side from the top of her shoulder down to her elbow and straight across her shoulder blades. (Tr., p. 32) Carmer described the pain as a burning sensation with pins and needles and noted she has the pain all the time. (Tr., p. 32) She relayed lifting anything with weight above her head causes pain. (Tr., p. 33) Carmer reported she can reach out from her body better with her left arm than her right arm, as long as there is no weight with it. (Tr., p. 33) Carmer also applies ice and heat to her left arm and she uses a hot tub to help with the pain. (Tr., p. 33) Carmer reported her left arm is weaker than it used to be and she cannot move her left arm as far as she could before the work injury. (Tr., p. 33)

At the time of the hearing Carmer was working full-time for Keystones, a senior independent living center, as a concierge, earning \$11.33 per hour. (Tr., pp. 34, 36) Carmer sits at the front desk, delivers newspapers, places emergency calls for medical care, assists residents with opening and closing blinds and using the television, pours coffee and puts on lids for breakfast with her left hand, and uses a hokey vacuum. (Tr., p. 35) Carmer reported she loves her job and she does not have any physical difficulty performing her job. (Tr., p. 35)

Before receiving her position as a concierge, Carmer applied for a housekeeping position with Keystones, which she did not think she could do. (Tr., p. 36) She also applied for a temporary position putting fruit roll-ups and granola bars in boxes, which she thought she could do left-handed, but after speaking with the temporary service agency she declined the job because it required her to lift more than 50 pounds. (Tr., pp. 36-37)

Carmer testified she would have a difficult time returning to her past relevant work as a stocker at a grocery store, resident manager, packager of greeting cards, guest books, and other funeral items, housekeeper, laundry worker, custodian, line worker, and hairdresser due to the lifting requirements and repetitive nature of the work. (Tr., pp. 38-42)

Before her work injury, Carmer enjoyed camping, fishing, kayaking, and working in her yard. (Tr., p. 42) She used to enjoy bowling, and since her work injury she cannot bowl. (Tr., p. 42) Carmer reported she can work in the planters at home if she uses a table, she can water some planters with a small watering pail, and she can operate a riding lawn mower after her husband starts it up, but she cannot do other yard work. (Tr., pp. 42-43) Carmer testified she cannot use the snowblower or vacuum, do laundry, or put away the dishes because the cupboards are elevated. (Tr., p. 43)

Carmer reported she has difficulty sleeping because when she lies on her arms the pressure makes a pins and needles feeling. (Tr., p. 44) Carmer typically sleeps two to three hours without waking up, and sleeps a total of four to five hours per night. (Tr.,

p. 44) Carmer reported she is tired when she is awake and her injuries make her grumpy and she cries more. (Tr., p. 44)

CONCLUSIONS OF LAW

I. Applicable Law

This case involves the issues of nature and extent of disability, temporary benefits, credits, penalty benefits, and costs under Iowa Code sections 85.34, 86.13, and 86.40. 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 85.16, 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. This case involves an injury occurring after July 1, 2017, therefore, the provisions of the new statute involving nature and extent of disability and temporary benefits under Iowa Code section 85.34 apply to this case.

The calculation of interest is governed by Deciga-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. Again, given this case concerns an injury occurring after July 1, 2017, the new provision on interest applies to this case.

II. Causation – Left Upper Extremity

The parties stipulated Carmer sustained an injury on August 6, 2018, which arose out of and in the course of her employment with Nordstrom involving her right upper extremity. Carmer avers she sustained a sequela injury to her left upper extremity. Nordstrom disputes her left upper extremity symptoms were caused by the work injury, contending Carmer has underlying rheumatoid arthritis or joint problems that are the cause of her left upper extremity symptoms.

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 Co. 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. Wills, 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., Kingsley v. Manning, 286 N.W.2d 174, 177 (Iowa 1979).

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 v. Smith-Doyle Contractors, 569 N.W.2d 154,156 (Iowa Ct. App. 1997). 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).

Two physicians have provided causation opinions regarding Carmer's left upper extremity, Dr. Milani, a family medicine physician who conducted an independent medical examination for Nordstrom and Dr. Segal, a neurosurgeon who conducted an independent medical examination for Carmer.

Nordstrom challenges Dr. Segal's opinion, based, in part, on the discipline he received by the Iowa Board of Medicine. (Ex. G) On December 16, 2016, Dr. Segal entered into a Settlement Agreement with the Iowa Board of Medicine agreeing to a \$5,000.00 civil penalty and citation and warning for failing to provide appropriate neurosurgical care regarding epidural blood patches, neurostimulator management and coverage call arrangements, and for maintaining pre-signed prescriptions. (Ex. G, p. 47) The Settlement Agreement provides Dr. Segal discontinued his surgical practice due to his health condition of Parkinsonism which impacts the steadiness of his hands during surgery and that he was continuing to provide non-surgical medical services, including, but not limited to, medical consultations, medical record reviews, and independent medical examinations. (Ex. G, p. 47) Dr. Segal voluntarily agreed he would not practice surgery and to complete the Professional/Problem Based Ethics program. (Ex. G, p. 48) The Settlement Agreement relates to practice concerns involving direct patient surgical care and pre-signed prescriptions. (Ex. G) Nothing in the Settlement Agreement questions Dr. Segal's honesty or ability to render valid opinions for the purposes of providing medical consultations, medical record reviews, and independent medical examinations. (Ex. G)

I find Dr. Segal's opinion on causation more persuasive than Dr. Milani's opinion. Dr. Segal has superior training to Dr. Milani. Dr. Milani relies on the condition of Carmer's hands to support his contention her left shoulder problems were caused by underlying rheumatoid arthritis and overuse of the left upper extremity could not be the cause of Carmer's left upper extremity problems, citing to an article for support. He did not respond to the articles cited by Dr. Segal in Dr. Segal's report.

Contrary to Dr. Milani's opinion, there is no evidence Carmer has rheumatoid arthritis or that an autoimmune or systemic rheumatological disease or process is the cause of her left-sided symptoms. It is undisputed Carmer has swelling and deformity in her hands. Carmer testified she underwent testing to determine if she had rheumatologic disease, which was negative. Even if Carmer has underlying arthritis in her left shoulder, which is not supported by her medical records, I do not find Nordstrom has proven underlying preexisting arthritis is the sole cause of Carmer's left shoulder symptoms.

The evidence supports that after her right shoulder surgery and physical therapy, Carmer's condition improved at the time Dr. Patterson released her from care. Carmer testified at hearing her symptoms later increased in her right upper extremity and she started relying more on her left upper extremity following surgery and that she did not recognize the seriousness of the problems with her left upper extremity at first. While

Carmer struggled to recall dates during the hearing, I found her generally to be a credible witness, given she maintained appropriate eye contact and did not engage in furtive movements during the hearing. Objective testing performed by Dr. Taylor six months after Dr. Patterson released her from care shows a decline in her right upper extremity, consistent with Dr. Segal's opinion and her testimony. Dr. Segal cited to authority supporting his contention overuse of the opposite limb following an injury can cause pathology. This finding is consistent with Carmer's credible testimony in this case. I find Carmer has established she sustained a sequela to her left upper extremity caused by the work injury.

III. Nature of the Injury: Shoulder or Body as a Whole

As discussed in greater detail below, shoulder injuries resulting in disabilities were classified as industrial disabilities prior to 2017. The parties dispute the nature of Carmer's injury. Carmer avers her original injury to her right upper extremity extends into the body as a whole, as does her left upper extremity injury. Nordstrom rejects her assertion, and contends established agency precedent supports Carmer's right upper extremity injury is to the shoulder, a scheduled member.

On December 6, 2018, Carmer underwent a right shoulder arthroscopy rotator cuff repair, open subpectoral biceps tenodesis, "[e]xtensive debridement," and subacromial decompression with Dr. Patterson. (JE 3, p. 11) Dr. Patterson listed a post-operative diagnosis of right shoulder full-thickness rotator cuff tear, long head of the biceps tearing, and chondromalacia of the humeral head. (JE 3, p. 13)

Workers' Compensation Commissioner Joseph Cortese, II has issued two opinions governing the nature of alleged shoulder injuries, which are binding in this case and are incorporated by reference. Deng v. Farmland Foods, Inc., File No. 5061883, 2020 WL 5893577 (Sept. 29, 2020 Iowa Workers' Comp. Comm'n); Chavez v. MS Technology, LLC, File No. 5066270, 2020 WL 6037534 (Sept. 30, 2020 Iowa Workers' Comp. Comm'n). As a deputy workers' compensation commissioner, I am bound to follow Commissioner Cortese's opinions.

In Deng, the claimant sustained injuries to her infraspinatus and labrum. The claimant conceded the labrum is part of the shoulder joint, but argued the infraspinatus muscle is not part of the shoulder joint. Commissioner Cortese noted the infraspinatus muscle is part of the rotator cuff, and that the rotator cuff's main function is to stabilize the ball-and-socket joint, and held the muscles that make up the rotator cuff, including the infraspinatus are included in the definition of the shoulder.

In Chavez, the claimant sustained tears to several muscles in her rotator cuff, including the supraspinatus, infraspinatus, and subscapularis, along with tearing of the biceps tendon and labrum, and underwent "extensive debridement of the labrum, biceps tendon, and subacromial space with biceps tenotomy, [and] subacromial decompression." Based on Deng, Commissioner Cortese held the claimant's rotator cuff tear should be compensated as a shoulder, leaving the labral tear and subacromial

decompression for consideration. Commissioner Cortese determined “like the rotator cuff, the labrum is not only extremely close in proximity to the glenohumeral joint (if not wholly contained within the joint space), but is crucial to the proper functioning of the joint,” concluding the claimant’s labral tear should be compensated as a shoulder. Commissioner Cortese noted the surgeon used a shaver “on the underside to remove the areas of scar tissue and fraying that was seen between the anterior aspect of the supraspinatus and the undersurface of the anterior acromion,” noting the acromion forms part of the socket that helps protect the glenoid cavity, which he found is closely interconnected with the glenohumeral joint in both location and function and that the claimant’s subacromial decompression impacted two anatomical parts that are essential to the functioning of the glenohumeral joint, and thus should be compensated as a shoulder.

Dr. Patterson performed a right shoulder arthroscopy rotator cuff repair, open subpectoral biceps tenodesis, extensive debridement and subacromial decompression on Carmer. Under Deng and Chavez, I find her injury is to a shoulder.

Dr. Segal diagnosed Carmer with left shoulder arthropathy caused, in part, by overuse and compensation due to her right shoulder injury and noted that her signs and symptoms are consistent with rotator cuff tendinopathy or tearing. (Ex. 2, p. 29) Again, based under Deng and Chavez, I find her injury is to a shoulder. Thus, I find Carmer sustained an injury to her right shoulder on August 6, 2018, and a sequela injury to her left shoulder.

IV. Scheduled Member Disability Under Iowa Code Section 85.34(2)(n) or “All Other” Disability Under Iowa Code Section 85.34(2)(v)

I found Carmer sustained an injury to her right shoulder on August 6, 2018, and a sequela injury to her left shoulder caused by her right shoulder injury, as opposed to injuries to the body as a whole under Deng and Chavez. Carmer next avers if she sustained an injury to her right shoulder and a sequela injury to her left shoulder, her injuries should be compensated industrially under the “all other” disability section under Iowa Code section 85.34(2)(v). Nordstrom rejects her assertion, contending an injury to a shoulder is compensated under the schedule, citing to two opinions of deputy workers’ compensation commissioners. Commissioner Cortese has not addressed this issue to date.

The parties’ arguments raise issues involving statutory interpretation. The goal of statutory interpretation is “to determine and effectuate the legislature’s intent.” Rameriz-Trujillo v. Quality Egg, L.L.C., 878 N.W.2d 759, 769 (Iowa 2016) (citing United Fire & Cas. Co. v. St. Paul Fire Marine Ins. Co., 677 N.W.2d 755, 759 (Iowa 2004)). The court begins with the wording of the statute. Myria Holdings, Inc. v. Iowa Dep’t of Rev., 892 N.W.2d 343, 349 (Iowa 2017). When determining legislative intent, the court looks at the express language of the statute, and “not what the legislature might have said.” Id. (citing Schadendorf v. Snap-On Tools Corp., 757 N.W.2d 330, 337 (Iowa 2008)). If the express language is ambiguous the court looks to the legislative intent

behind the statute. Sanford v. Fillenwarth, 863 N.W.2d 286, 289 (Iowa 2015) (citing Kay-Decker v. Iowa State Bd. of Tax Review, 857 N.W.2d 216, 223 (Iowa 2014)). A statute is ambiguous when reasonable persons could disagree as to the statute's meaning. Rameriz-Trujillo, 878 N.W.2d at 769 (citing Holstein Elect. v. Brefogle, 756 N.W.2d 812, 815 (Iowa 2008)). An ambiguity may arise when the meaning of particular words is uncertain or when considering the statute's provisions in context. Id.

When the legislature has not defined a term in a statute, the court considers the term in the context in which it appears and applies the ordinary and common meaning to the term. Id. (citing Rojas v. Pine Ridge Farms, L.L.C., 779 N.W.2d 223, 235 (Iowa 2010)). Courts determine the ordinary meaning of a term by examining precedent, similar statutes, the dictionary, and common usage. Sanford, 863 N.W.2d at 289.

Iowa Code section 85.34(2) governs compensation for permanent partial disabilities. The law distinguishes between scheduled and unscheduled disabilities. The Division of Workers Compensation evaluates disability using two methods, functional and industrial. Simbro v. Delong's Sportswear, 332 N.W.2d 886, 887 (Iowa 1983).

The Division applies the functional method for a scheduled injury to each part of the body listed in the statute, including: (1) a thumb; (2) a first finger; (3) a second finger; (4) a third finger; (5) a fourth finger; (6) a first or distal phalange of the thumb or any finger; (7) loss of more than one phalange of the thumb or a finger; (8) a great toe; (9) one of the toes other than the great toe; (10) a first phalange of any toe; (11) loss of more than one phalange of any toe; (12) a hand; (13) an arm; (14) a shoulder (added in 2017); (15) a foot; (16) a leg; (17) an eye; (18) "loss of an eye, the other eye having been lost prior to the injury;" (19) hearing, other than occupational loss; (20) occupational hearing loss; (21) "loss of both arms, or both hands, or both feet, or both legs, or both eyes, or any two thereof, caused by a single accident;" and (22) disfigurement of the face or head. Iowa Code § 85.34(a)-(u); Westling v. Hormel Foods Corp., 810 N.W.2d 247, 252 (Iowa 2012). Each of these subsections provides a maximum number of weeks of compensation for the complete loss of a scheduled member or body part.

Since 2017, compensation or functional loss for scheduled injuries is determined by taking the number of weeks allowed for a complete loss of the body part or scheduled member, multiplied by a percentage of impairment determined using the AMA Guides. Iowa Code § 85.34(2)(x). The statute also requires compensation be awarded for functional loss if an employee returns to work or is offered work "for which the employee receives or would receive the same or greater salary, wages, or earnings than the employee received at the time of the injury." Id. § 85.34(2). That provision does not apply in this case.

The Division uses the industrial method for "all cases of permanent partial disability other than those" set forth in Iowa Code section 85.34(a) through (u). All other cases are classified as "unscheduled injuries." Westling, 910 N.W.2d at 252-53.

Compensation for unscheduled injuries is determined examining the reduction of earning capacity. Id. at 53.

In 2017, the Iowa Legislature made substantial changes to Iowa Code chapter 85, including a change to how compensation is determined for an injury “for a loss of a shoulder.” Before 2017, shoulder injuries were treated as injuries to the body as whole and were compensated industrially what is now Iowa Code section 85.34(2)(v) (2017), formerly Iowa Code section 85.34(2)(u) (2016). Second Injury Fund of Iowa v. Nelson, 544 N.W.2d 258 (Iowa 1995). In 2017, the Legislature enacted Iowa Code section 85.34(2)(n), which provides “compensation shall be paid as follows . . . (n) For the loss of a shoulder, weekly compensation during four hundred weeks.”

Iowa Code section 85.34(2), contains a provision addressing the loss of both arms, both hands, both feet, both legs, both eyes, or “any two thereof, caused by a single accident,” setting compensation at 500 weeks unless the employee is permanently and totally disabled as set forth in Iowa Code section 85.34(3). Iowa Code § 85.34(2)(t). The compensation for these injuries is not determined based on industrial or loss of earning analysis.

The statute is silent on how an injury to both shoulders caused by a single accident should be compensated. What is clear is the statute’s mandate is in all other cases of permanent partial disability not set forth in paragraphs (a) through (u) of Iowa Code section 85.34(2) “compensation **shall** be paid during the number of weeks in relation to five hundred weeks as the reduction in the employee’s earning capacity caused by the disability bears in relation to the earning capacity that the employee possessed when the injury occurred.” Id. § 85.34(2)(v) (emphasis added). Thus, if a body part or parts are not included in Iowa Code section 85.34(2)(a)-(u), the industrial analysis applies, examining the claimant’s loss of earning capacity.

The statute refers to “the loss of a shoulder,” and sets compensation at 400 weeks. Iowa Code § 85.34(2)(n). Certainly when the Legislature enacted this provision it was aware of the mandate in Iowa Code section 85.34(2)(v), as well as the provisions allowing for 500 weeks of compensation for injuries to both arms, both hands, both legs, both eyes, or “any two thereof, caused by a single accident” found in Iowa Code section 85.34(2)(t). If the compensation schedules set forth subparagraphs (a) through (q) applied to injuries involving to more than one side of the body, there would be no need for clarification regarding the loss of an eye when the other eye had been lost prior to the injury under subparagraph (r) or for the loss of both arms, both hands, both legs, both eyes, or “any two thereof, caused by a single accident” under subparagraph (t). The Legislature could have included a provision that injuries to both shoulders caused by a single accident are compensated based on 500 weeks, 800 weeks, or some other number of weeks. The Legislature did not include such a provision. The two deputy workers’ compensation opinions cited by Nordstrom, which are not binding, do not contain similar analysis using principles of statutory interpretation. Manuel v. Gannett Pub. Servs., File No. 5067758, 2021 WL 2624653 (Feb. 18, 2021 Iowa Workers’ Comp.

Comm'n); Lund v. Mercy Med. Ctr., File No. 5066398, 2021 WL 2624632 (March 9, 2021 Iowa Workers' Comp. Comm'n).

Carmer did not sustain an injury to a single shoulder in this case, she sustained an injury to her right shoulder and a sequela injury to her left shoulder caused by the effects of her original injury. Because the statute does not contain a provision addressing this situation under the schedule, her injury must be compensated industrially under Iowa Code section 85.34(2)(v).

V. 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)(v). When considering the extent of disability, the deputy commissioner considers all evidence, both medical and nonmedical. Evenson v. Winnebago Indus., Inc., 881 N.W.2d 360, 370 (Iowa 2016). The Iowa Supreme Court has held, "it is a fundamental requirement that the commissioner consider all evidence, both medical and nonmedical. Lay witness testimony is both relevant and material upon the cause and extent of injury." Evenson, 881 N.W.2d 360, 369 (Iowa 2016) (quoting Gits Mfg. Co. v. Frank, 855 N.W.2d 195, 199 (Iowa 2014)).

Three physicians provided opinions on extent of disability and the need for restrictions involving Carmer's right shoulder, Drs. Patterson, Taylor, and Segal. I find Dr. Taylor's opinion, including his recommended restrictions, as supported by Dr. Segal's opinion regarding Carmer's right upper extremity to be most persuasive. Two physicians provided opinions on causation with respect to Carmer's left shoulder, Drs. Milani and Segal. As noted above, I found Dr. Segal's opinion on causation with respect to Carmer's left shoulder to be most persuasive. No other physician has provided a rating in this case.

Following Carmer's last appointment on May 8, 2019, Dr. Patterson assigned Carmer a four percent upper extremity or two percent whole person impairment for her right upper extremity. (JE 3, p. 19) Dr. Patterson listed findings on examination of the right upper extremity of:

forward elevation to 165 degrees. She has external rotation to 45 degrees. She has extension to 45 degrees. She has abduction and internal rotation to 70 degrees. She has abduction and external rotation to 90 degrees. She has abduction to 125 degrees. Cross body adduction to 45 degrees. She has 5 out of 5 strength with abduction external rotation negative belly press. Negative impingement signs. No Popeye deformity.

(JE 3, p. 18) Dr. Patterson did not document any findings he made in comparison to the left upper extremity.

Dr. Patterson recommended no permanent restrictions, but instructed Carmer to use her shoulder "as tolerated," and to be careful with her shoulder and to avoid heavy lifting. (JE 3, p. 18) After this appointment, Carmer experienced a decline in her condition, which she testified to. As noted above, I found her testimony regarding the decline in her condition credible.

During his exam six months after Dr. Patterson's exam, Dr. Taylor noted changes in Carmer's physical exam, comparing the right to left upper extremities as follows: (1) flexion 130/180 degrees; (2) extension 40/70 degrees; (3) abduction 110/170 degrees; (4) adduction 30/40 degrees; (5) internal rotation 60/75 degrees; and (6) external rotation 40/80 degrees. (Ex. 1, p. 5) He then assigned Carmer a 10 percent upper extremity impairment, which he converted to a six percent whole person impairment, explaining Carmer's range of motion measurements had changed since she saw Dr. Patterson. (Ex. 1, p. 9)

Dr. Taylor recommended restrictions of no lifting over 30 pounds with both arms together, any lifting should occur with the right arm as close to her body as possible, no lifting more than 15 to 20 pounds above chest level, rare overhead reaching with the right arm, occasional forward reaching with the right arm, and to avoid forceful pushing and pulling-type movements with the right arm. (Ex. 1, p. 9) Nordstrom did not request a subsequent opinion from Dr. Patterson after Dr. Taylor issued his report. I find Dr. Taylor's opinion to be more persuasive than Dr. Patterson's opinion because he most recently examined Carmer. I adopt his restrictions as Carmer's permanent restrictions for her right upper extremity.

During his examination in January 2021, Dr. Segal noted the following values for Carmer's right and left shoulders: (1) flexion 85/120 degrees; (2) extension 20/40 degrees; (3) abduction 90/110 degrees; (4) adduction 10/20 degrees; (5) internal rotation 70/40 degrees. (Ex. 2, p. 23) The right shoulder values again show a decline over those found by Dr. Taylor, with the exception of internal rotation, which improved slightly. This is again consistent with Carmer's testimony and with Dr. Segal's opinion.

For loss of range of motion Dr. Segal assigned a 17 percent permanent impairment to the right upper extremity, which he converted to a 10 percent whole person impairment, and a 13 percent impairment to the left upper extremity, which he converted to an eight percent whole person impairment. (Ex. 2, p. 36) He then

assigned additional impairment for loss of strength. (Ex. 2, p. 37) For the right upper extremity, he assigned an additional 15 percent impairment, which he converted to a nine percent whole person impairment, and for the left upper extremity, he assigned an additional 12 percent impairment, which he converted to a seven percent whole person impairment. (Ex. 2, p. 37) Next, he assigned an additional three percent whole person impairment to each shoulder for unaccounted for pain. (Ex. 2, p. 37) Dr. Segal assigned Carmer a combined 20 percent whole person impairment for her right shoulder and a 17 percent whole person impairment for her left shoulder, for a combined 34 percent whole person impairment, for loss of range of motion, strength, and for unaccounted for pain under the range of motion and weakness values. (Ex. 2, pp. 37-38)

Dr. Segal recommended permanent restrictions of no lifting overhead, lifting to waist height with both arms up to 10 pounds frequently and 11 pounds to 30 pounds rarely, lifting to shoulder height with both arms up to 10 pounds frequently and 11 to 30 pounds rarely, repetitive lifting with the noted weight restrictions to tolerance, carrying up to ten pounds up to 50 feet frequently on wheels, carrying 11 to 40 pounds up to 50 feet rarely on wheels, pushing and pulling with 20 pounds of force frequently, pushing and pulling with 21 to 40 pounds of force rarely, and no pushing and pulling with greater than 40 pounds of force, and fine motor limited due to pain in arms. (Ex. 2, p. 39)

Dr. Milani challenges Dr. Segal's report, averring under page 508 of the AMA Guides, decreased strength cannot be rated in the presence of decreased motion, painful conditions, deformities, or absence of parts. (Ex. A, p. 22) The AMA Guides at page 508 provide, in part,

[i]n a rare case, if the examiner believes the individual's loss of strength represents an impairing factor that has not been considered adequately by other methods in the [AMA Guides], the loss of strength may be rated separately. An example of this situation would be loss of strength due to a severe muscle tear that healed leaving a palpable muscle defect. If the examiner judges that loss of strength should be rated separately in an extremity that presents other impairments, the impairment due to loss of strength *could be combined* with the other impairments, *only* if based on unrelated etiologic or pathomechanical causes. *Otherwise, the impairment ratings based on objective anatomic findings take precedence.* Decreased strength, *cannot* be rated in the presence of decreased motion, painful conditions, deformities, or absence of parts (eg, thumb amputation) that prevent effective application of maximal force in the region being evaluated.

Dr. Segal's report does not mention how Carmer's situation falls into the rare category and he also included decreased strength in his rating in the presence of decreased motion. I do not find his inclusion of loss of strength proper in this case. I do find his causation opinion persuasive and conclusions regarding loss of motion in the left upper extremity.

At the time of the hearing Carmer was 52. (Tr., p. 9) Carmer is a high school graduate. (Tr., p. 9) Following high school she studied fashion design and obtained a degree in cosmetology. (Tr., p. 10) I found Carmer to be articulate and I do believe, despite her age, she is capable of retraining.

Carmer is motivated to work and has been working full-time for Keystones, a senior independent living center, as a concierge, earning \$11.33 per hour. (Tr., p. 34, 36) Carmer is able to perform her job duties without accommodation and she enjoys her work. Carmer had not previously worked in this field. Based on her work injury and restrictions, I do not find Carmer would be able to return to her other past relevant work as a stocker at a grocery store, resident manager, packager of greeting cards, guest books, and other funeral items, housekeeper, laundry worker, custodian, line worker, or hair dresser due to the lifting requirements and repetitive nature of the work. It is fortunate Carmer is so motivated to work and that she has found work she is capable of engaging in. Considering all of the factors of industrial disability, I find Carmer has sustained a 70 percent industrial disability, entitling her to 350 weeks of permanent partial disability benefits, at the stipulated rate of \$476.20, commencing on the stipulated commencement date of May 8, 2019.

VI. Temporary Benefits

Carmer seeks temporary benefits from February 28, 2019 through May 7, 2019. While Nordstrom admits Carmer was off work during this period of time, Nordstrom avers Carmer is not entitled to temporary benefits.

Iowa Code section 85.33 (2018) 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.

“[A] claim for permanent disability benefits is not ripe until maximum medical improvement has been achieved.” Bell Bros. Heating & Air Conditioning v. Gwinn, 779 N.W.2d 193, 201 (Iowa 2010). “Stabilization of the employee’s condition ‘is the event that allows a physician to make the determination that a particular medical condition is permanent.’” Dunlap, 824 N.W.2d at 556 (quoting Gwinn, 779 N.W.2d at 200). If the employee has a permanent disability, then payments made prior to permanency are healing period benefits. Id. If the injury has not resulted in a permanent disability, then the employee may be awarded temporary total benefits. Id. at 556-57. In this case I found Carmer sustained a permanent disability, therefore, any temporary benefits she is entitled to are healing period benefits.

Following surgery, Carmer attended an appointment with Dr. Patterson on December 19, 2018. Dr. Patterson imposed restrictions of no lifting over five pounds and no repetitive lifting or reaching. (JE 3, p. 17) No physician restricted Carmer from working due to her right shoulder injury after December 19, 2018.

On February 5, 2019, Nordstrom offered Carmer alternate modified work at Horizons. (Ex. B, pp. 28-29) Carmer accepted the offer on February 8, 2019, and she commenced work for Nordstrom at Horizons. Carmer last worked for Nordstrom at Horizons on or about February 27, 2019. After that date she was taken off work by her primary care physician and counselor due to mental health issues she was experiencing following an encounter with the Cedar Rapids Police Department. (Tr., pp. 20-21) Carmer has not alleged she sustained a mental health injury as a result of her work at Nordstrom. Her absence from work after February 27, 2019 was not due to her right shoulder injury. No physician had restricted her from working due to her right shoulder injury. I do not find Carmer is entitled to additional temporary benefits after February 27, 2019.

VII. Credit for Sick Pay/Disability Income

On the Hearing Report Nordstrom asserted it was entitled to a credit for sick/pay disability income in the amount of \$1,531.70. Carmer disputed the issue. Nordstrom did not address the credit issue in its post-hearing brief. By failing to do so, I find Nordstrom waived the issue of the credit. Even assuming Nordstrom preserved the issue, Nordstrom has not demonstrated it is entitled to a credit for the \$1,531.70 in disability benefits it paid.

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, Nordstrom 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.

The evidence reveals Carmer received some benefits under the Nordstrom Leave and Disability Program. Nordstrom produced Exhibit D, page 36 at hearing, which shows it issued a check to Carmer for March 6, 2019 through April 7, 2019, and a letter informing Carmer her request for an extension had not been approved, Exhibit D, pages 32 through 35. A copy of the plan documents were not produced at hearing. Without the plan documents, I have nothing to review. Nordstrom is not entitled to a credit for the disability benefits paid to Carmer.

VIII. Penalty Benefits

Carmer seeks an award of penalty benefits in this case for Nordstrom's alleged failure to pay her permanency benefits after Dr. Patterson found she had reached maximum medical improvement and issued his impairment rating during her appointment on May 8, 2019. Nordstrom avers no penalty benefits should be awarded to Carmer because Dr. Patterson did not sign the note until May 11, 2019, there is no evidence Nordstrom received it, and Nordstrom actually sent a check to Carmer for \$1,789.84 on June 6, 2019.

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." Robbennolt 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. Robbenolt, 555 N.W.2d at 237.

Dr. Patterson was the treating surgeon Nordstrom selected in this case. The undisputed evidence demonstrates Dr. Patterson issued his opinion on May 11, 2019. According to Exhibit 7, Nordstrom issued “First PPD” check to Carmer for the period of May 8, 2019 to June 4, 2019, on June 6, 2019, nearly one month after Dr. Patterson issued his impairment rating. No one testified on behalf of Nordstrom regarding the delay at hearing, nor was any documentary evidence provided establishing an excuse for the delay. No letter was produced at hearing communicating any reason for the delay to Carmer. Nordstrom delayed paying weekly permanency benefits to Carmer after Dr. Patterson issued his impairment rating. Nordstrom did not communicate the reason for the delay. I find Carmer is entitled to an award of \$250.00 in penalty benefits.

IX. Costs

On the Hearing Report Carmer provided she was seeking to recover costs she paid. The Hearing Report refers to Exhibit 9 as containing the costs. The costs are actually found in Exhibit 10. Carmer seeks to recover \$557.22 for medical mileage, \$103.00 filing fee, the \$25.00 abstract of medical records charged by Dr. Taylor for September 18, 2020, the \$380.00 cost of Dr. Taylor’s September 18, 2020 letter, the \$2,375.00 cost of Dr. Segal’s independent medical examination, and the \$70.00 cost of Carmer’s deposition transcript set forth in Exhibit 10.

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); Gwinn, 779 N.W.2d at 204.

The \$557.22 Carmer seeks to recover is for mileage Carmer incurred to attend appointments related to her work injury. Nordstrom is responsible for the costs.

Nordstrom contends Carmer cannot recover the \$405.00 report from Dr. Taylor because it already paid for his initial independent medical examination, and Carmer may not recover the payment of a second independent medical examination from Dr. Segal.

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 Iowa Administrative Code 4.33, provides costs may be taxed by the deputy workers’ compensation commissioner for: (1) the attendance of a certificated shorthand reporter for hearings and depositions; (2) transcription costs; (3) the cost of service of the original notice and subpoenas; (4) witness fees and expenses; (5) the cost of doctors’ and practitioner’s deposition testimony; (6) the reasonable cost of obtaining no more than two doctors’ or practitioners’ reports; (7) filing fees; and (8) the cost of persons reviewing health service disputes.

The administrative rule expressly allows for the recovery of the filing fee, the deposition expense and the cost of two doctors’ reports. Iowa Code section 85.39 also allows for the recovery of the cost of an independent medical examination. The statute does not allow for the recovery of two independent medical examinations. The statute and rule do not preclude the claimant from recovering the cost of a second report from a physician. Dr. Segal’s total bill for the independent medical examination is \$3,750.00. The bill is itemized. Dr. Segal charged \$562.50 for records review, \$812.50 for the independent medical examination, and \$2,375.00 for the report. I find Nordstrom should be assessed the \$2,375.00 cost of the report. Dr. Taylor’s bill is itemized with a charge of \$25.00 for abstract of medical records \$380.00 for a letter. Carmer is only entitled to recover the cost of the report, not the abstract. Nordstrom is assessed the \$103.00 cost of the filing fee, the \$70.00 cost of the deposition, the \$2,375.00 cost Dr. Segal’s report, and the \$380.00 cost of Dr. Taylor’s second report.

ORDER

IT IS THEREFORE ORDERED, THAT:

Defendant shall pay Claimant three hundred (350) weeks of permanent partial disability benefits, at the stipulated rate of four hundred seventy-six and 20/100 dollars (\$476.20), commencing on the stipulated commencement date of May 8, 2019.

Defendant is entitled to a credit for the permanent partial disability benefits paid to date.

Defendant shall pay accrued weekly benefits in a lump sum together with interest 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.

Defendant shall pay Claimant five hundred and 00/100 dollars (\$250.00) in penalty benefits.

Defendant shall reimburse Claimant five hundred fifty-seven and 22/100 dollars (\$557.22) for medical mileage, one hundred three and 00/100 dollars (\$103.00) for the filing fee, seventy and 00/100 dollars (\$70.00) for the cost of the deposition, three hundred eighty and 00/100 dollars (\$380.00) for Dr. Taylor's second report, and two thousand three hundred seventy-five and 00/100 dollars (\$2,375.00) for Dr. Segal's report.

Defendant 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 13th day of September, 2021.



HEATHER L. PALMER
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Benjamin Roth (via WCES)

James Peters (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.