BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

WENDY RECTOR,

Claimant,

vs.

WATERLOO COMMUNITY SCHOOL DISTRICT,

Employer,

and

UNITED HEARTLAND,

Insurance Carrier,
Defendants.

File No. 5055506

ARBITRATION DECISION

Head Note Nos.: 1803, 2501, 2601, 4000.2

STATEMENT OF THE CASE

This is a proceeding in arbitration. The contested case was initiated when claimant, Wendy Rector, filed her original notice and petition with the Iowa Division of Workers' Compensation. The petition was filed on January 27, 2016. Claimant alleged she sustained a work-related injury on February 6, 2014. (Original notice and petition.)

For purposes of workers' compensation, the Waterloo Community School District, defendant, is insured by United Heartland, defendant. A first report of injury was filed on February 24, 2014. Defendants filed their answer on February 29, 2016. They admitted the occurrence of the work injury.

The hearing administrator scheduled the case for hearing on February 14, 2017. The hearing took place in Waterloo, Iowa at the Iowa Workforce Development Building. The undersigned appointed Ms. Terri S. Pals, as the certified shorthand reporter. She is the official custodian of the records and notes.

Claimant testified on her own behalf. Defendants called Ms. Staci Dee Tiedt, a kitchen manager, for three schools in the Waterloo Community School District to testify. Defendants also called Ms. Michaela Waschkat, a human resource specialist for the school district as a witness.

The parties offered exhibits. Claimant offered exhibits marked 1 through 7. Defendants offered exhibits marked A through C. All proffered exhibits were admitted as evidence in the case.

Post-hearing briefs were filed on February 24, 2017. The case was deemed fully submitted on that date.

STIPULATIONS

The parties completed the designated hearing report. The various stipulations are:

1. There was the existence of an employer-employee relationship at the time of the alleged injury;

2. Claimant sustained an injury on February 6, 2014, which arose out of and in the course of her employment;

3. Temporary benefits are no longer an issue;

4. The parties agree if permanency is found, the permanency is an industrial disability;

5. The parties agree, if a permanent work injury is determined, claimant reached maximum medical improvement on December 22, 2014;

6. The parties agree, the weekly benefit rate is $279.56; and

7. The parties agree certain costs that are detailed were paid by claimant.

ISSUES

The issues presented are:

1. Did the work injury on February 6, 2014 cause a temporary disability?

2. Did the work injury on February 6, 2014 cause a permanent disability?

3. If so, to what extent is claimant's permanent partial disability?

4. Is claimant entitled to the payment of certain medical costs pursuant to Iowa Code section 85.27?

5. Is claimant entitled to an independent medical examination pursuant to Iowa Code section 85.39?

6. For which costs are defendants liable?

FINDINGS OF FACT

This deputy, after listening to the testimony of claimant and the other two witnesses at hearing, after judging the credibility of all who testified, and after reading the evidence, and the post-hearing briefs, makes the following findings of fact and conclusions of law:

The party who would suffer loss if an issue were not established has the burden of proving the issue by a preponderance of the evidence. Iowa Rule of Appellate Procedure 6.14(6).

Claimant is 48 years old and right-hand dominant. She is married with two adult children. Claimant has a high school diploma, but no other formal education. She took a one day seminar, "Serve-Safe," in order to qualify as a food service worker for the Waterloo Community School District.

Claimant has been an employee of the school district since December of 2004. Her work history includes working as a commercial janitor, working in a Maid Rite restaurant and cashiering for a local Hy-Vee store. There were long periods of time when claimant did not work outside of the home. She performed a myriad of duties as a homemaker and mother.

Claimant slipped and fell on a wet floor on February 6, 2014. It was near the end of the day. Both feet slipped from underneath claimant. She landed on the right side of her body with her right arm extended above her head. Claimant testified her right armpit was flat on the floor.

Claimant was able to ambulate on her own accord. She filled out appropriate papers for the school. She attempted to seek treatment at Allen Occupational Medical Clinic, but it had closed for the day.

As a result, claimant presented to Covenant Medical Center Emergency Room on the evening of the work injury. (Exhibit 1) Claimant reported pain in her right shoulder, her right hip, and swelling on the left side of her face and neck. (Ex. 1, p. 1) Claimant denied any loss of consciousness. (Ex. 1, p. 1) Claimant expressed specific pain in her right upper arm, pain in her right shoulder with movement, bilateral neck pain, and rib pain. (Ex. 1, p. 2) Robert Root, M.D., diagnosed claimant with:

> DIFFUSELY TENDER LEFT UPPER ARM. LEFT ANTERIOR AXILLARY LINE IS TENDER TO PALPATION ON THE FOURTH RIB.
>
> **Primary Diagnosis**
>
> History of fall
>
> Contusion of arm

Contusion of hip

Cervical muscle sprain

Contusion of chest

(Ex. 1, p. 3)

On February 10, 2014, claimant presented to David Kirkle, D.O., a physician at Covenant Occupational Health. (Ex. 2, p. 1) Claimant provided the following medical history to Dr. Kirkle:

> CURRENT CHIEF COMPLAINT Wendy's primary problem is pain located in the right side of body. It has been 4 days since the onset of the pain. Wendy says that it seems to be constant. She also notes that it is accompanied by numbness [*sic*] fingers. She feels it is improving. Her pain level is 3/10. Having pain right shoulder, elbow, hand, foot, ankle and neck. Was seen in ER 2/6/2014.

(Ex. 2, p. 1)

Dr. Kirkle conducted an examination of claimant. The physician noted:

> **OBJECTIVE:** On exam, her C-spine has full range of motion. Some spasming to her left CSM. Her right shoulder is very limited in range of motion, can only abduct 10 degrees, forward flex about the same. Speed and Yergason are negative. Has positive impingement sign with just minimal movement. No discoloration, no swelling. Right hip has full range of motion with just minimal discomfort to palpate over the greater trochanter. Has no swelling or discoloration. Neurovascular is intact distally. Right foot and ankle have full range of motion. No swelling or discoloration. Neurovascular is intact distally.
>
> **DIAGNOSIS:** Contusion/sprain, right shoulder and hip and cervical area.

(Ex. 2, p. 3)

Dr. Kirkle prescribed 500 mg of Naproxen, claimant was to continue to use oxycodone, and to employ moist heat. (Ex. 2, p. 3) Dr. Kirkle also imposed work restrictions. They included:

> Work restrictions of lift, carry, push, pull up to 2 pounds rarely on the right. Bend and twist of the neck rarely. Not to do any reaching with the right arm. Not to do any climbing of ladders or stairs. No squatting or kneeling. Stand, sit, walk as tolerated. Not to work at or above shoulder height on

the right. May use the right arm just rarely. No operating hazardous machinery when using oxycodone.

(Ex. 2, p. 3)

Claimant returned to Dr. Kirkle just two days later. (Ex. 2, p. 4) Claimant was complaining about intermittent pain in both eyes. She stated she had blurred near vision. (Ex. 2, p. 4) Claimant also reported swelling in her right wrist. She requested a sling for her right arm. (Ex. 2, p. 4)

Dr. Kirkle examined the right shoulder. He noted:

Right Shoulder: An abrasion is not present. Bruising is not present. Erythema is not present. An open wound is not present. A rash is not present. Swelling is not present. Pain on motion is present over the lateral arm. Pain to palpation is present over the lateral arm. Range of motion is very limited. Strength is limited. Yergason's test is negative. Speed's maneuver is negative. Neurovascular intact distally, good capillary refill. FROM to rest of upper extremity.

Right Hip: An abrasion is not present. Bruising is not present. Erythema is not present. An open wound is not present. Pain on motion is not present. A rash is not present. Swelling is not present. Range of motion is normal. Strength is normal. Minimal pain to palpation is present over the lateral thigh.

Neurological: Cranial nerve function II-XII is intact. Light touch sensation is normal. Vibratory sensation is normal. Pain sensation is normal. Coordination/equilibrium tests are normal. Plantar response is downgoing bilaterally. Reflexes are normal. EENT clear & normal.

DIAGNOSIS: 1. Sprains/strains; neck (847.0). 2. Sprain, Shoulder, Right (840.9). 3. Strain, Hip, Right (843.9). 4. Contusion, Multiple sites (924.8).

(Ex. 2, p. 5)

Dr. Kirkle ordered physical therapy. He returned claimant to work on restricted duty. The sling for the right arm was ordered. (Ex. 2, pp. 5-6) Claimant testified she had to sign Exhibit 2, page 6 with her left hand because she could not use her right hand. The signature was very difficult to read.

Subsequently, claimant was involved in a motor vehicle accident on the evening of February 14, 2014. She and her husband were rear-ended by another vehicle. Claimant was riding on the passenger's side of the vehicle. Claimant testified she was flung forward in her vehicle. She did not recall if her seat belt was secured. She did recall the belt struck the top of her right shoulder.

The first medical treatment claimant sought after the motor vehicle accident was on February 18, 2014. Claimant consulted with J. Musgrave, M.D. at Covenant Clinic. Dr. Musgrave is claimant's personal physician. Claimant reported the subsequent medical history to her physician:

> S: She was involved in a motor vehicle accident four days ago but also has her right arm in an immobilizer from a fall at work recently. Ever since this motor vehicle accident she has been complaining of pain in the left sacroiliac area. Also complaining of continued left maxillary sinus pain and pressure. She states it really has not improved. Not worsened but just has not resolved.

(Ex. 3, p. 1)

Dr. Musgrave ordered physical therapy for left sacroiliac pain. (Ex. 3, p. 1) Claimant did not report any injury to her right shoulder during her first appointment with Dr. Musgrave on February 18th. (Ex. 3, p. 1)

Claimant commenced physical therapy at Accelerated Rehabilitation Centers per orders of Dr. Kirkle on February 24, 2014. (Ex. 4, p. 1) Claimant did mention her vehicle accident on February 14th, but she did not discuss the body parts that were affected. (Ex. 4, p. 1) Claimant indicated she had significant problems performing her work and daily activities with her right upper extremity. There was moderate tenderness to palpation throughout the upper trapezius, the anterior and posterior cervical musculature bilaterally, and throughout the entire right shoulder. (Ex. 4, p. 1)

On February 27, 2014, claimant again returned to physical therapy. (Ex. A, p. 2) Claimant reported both her work injury and her motor vehicle accident to the physical therapist. Leslie Frost, PT, wrote the following in the physical therapy notes:

> **Subjective**: Pt reported the [*sic*] her pain throughout the neck and R arm are better with pt rating her average pn with use and movements at 6/10. Pt continues to rate her right hip at 4/10. However she is unable to consistentiy teii therapy staff what of her hip and ieg pn complaints are related to the work injury and what is from the MVA the following week. Throughout tx session pt will comment that her pn is better and swelling is down, but then a few minutes laster [*sic*] she will make a contradictory statement. Pt. could not say of [*sic*] the neck & shld pn give her HA's.

(Ex. A, p. 2)

Claimant saw Dr. Kirkle on February 28, 2014 for a follow-up appointment. Claimant failed to mention the motor vehicle accident on February 18, 2014. She did report the following to Dr. Kirkle:

> CURRENT CHIEF COMPLAINT: Wendy's primary problem is pain located in the Right shoulder, neck and Rigjht [*sic*] arm/elbow and Right

> hip. She describes it as shooting. She considers it to be excruciating. It has been 22 days since the onset of the pain. Wendy says that it seems to be constant. She has noticed that it is made worse by lifting [*sic*] arm. It is improved with therapy and ice. She also notes that it is accompanied by swelling and shooting pain, decreased range of motion. She feels it is improving. Her pain level is 5/10.

(Ex. 2, p. 7)

Once again, Dr. Kirkle conducted an examination of claimant. He found no bruises, abrasions, or swelling. (Ex. 2, p. 7) With respect to the right shoulder, Dr. Kirkle found:

> Right Shoulder: An abrasion is not present. Bruising is not present. Erythema is not present. An open wound is not present. A rash is not present. Swelling is not present. Pain on motion is present over the lateral arm. Pain to palpation is present over the lateral arm. Range of motion is very limited. Strength is limited. Yergason's test is negative. Speed's maneuver is negative. Neurovascular intact distally, good capillary refill. FROM to rest of upper extremity. No change[.]
>
> Right Hip: An abrasion is not present. Bruising is not present. Erythema is not present. An open wound is not present. Pain on motion is not present. A rash is not present. Swelling is not present. Range of motion is normal. Strength is normal. [P]ain to palpation is present over the lateral thigh. No change.
>
> Neurological: Cranial nerve function II-XII is intact. Light touch sensation is normal. Vibratory sensation is normal. Pain sensation is normal. Coordination/equilibrium tests are normal. Plantar response is downgoing bilaterally. Reflexes are normal. EENT clear & normal.
>
> DIAGNOSIS: 1. Sprains/strains; neck (847.0). 2. Sprain, Shoulder, Right (840.9). 3. Strain, Hip, Right (843.9). 4. Contusion, Multiple sites (924.8).

(Ex. 2, p. 8) Dr. Kirkle continued the restrictions he had already imposed for claimant. (Ex. 2, p. 8)

Claimant returned to Dr. Musgrave on March 3, 2014. Dr. Musgrave opined in his progress notes for the same date:

> To the best of my knowledge, this motor vehicle accident had nothing to do with her arm injury. In fact, her arm was immobilized at that time and the extent of her injuries were related to the left hip area.

> . . . . The fact remains that she was injured at work but still has significant discrepancies with this arm and should still have some serious restrictions and this should come from her occupational health physician.

(Ex. 3, p. 2)

Dr. Musgrave agreed to treat claimant for the injuries resulting from the motor vehicle accident. He would not treat claimant for her right shoulder condition. (Ex. 3, p. 2)

On March 14, 2014, Ms. Mickey Waschkat, Human Resources Specialist, sent a letter to claimant. (Ex. 5, p. 1) The letter was in reference to "Restrictions Update." (Ex. 5, p. 1) The letter provided in relevant portion:

> As you discussed with Lindy VonAhsen, United Heartland Claims, on Thursday, March 13, 2014, your worker's [*sic*] compensation claim has been suspended.
>
> Based on that, our understanding is your personal physician will address any necessary physical restrictions. Please provide a written updated medical statement with any current physical restrictions you may have and we will review them following spring break on Monday, March 24, 2014. Otherwise, we will consider your restrictions resolved.

(Ex. 5, p. 1)

Ms. Waschkat testified about the letter she issued on March 14, 2014. She testified claimant's workers' compensation claim was suspended because of claimant's intervening motor vehicle accident on February 14, 2017. Ms. Waschkat referred to the letter as a "denial letter" although nowhere in the letter is the word "denial" used.

On March 31, 2014, Dr. Musgrave restricted claimant from work due to her left sacroiliac pain for the period from April 1, 2014 through April 14, 2014. (Ex. 3, p. 2) Claimant was advised she could return to work without restrictions for her left sacroiliac pain on April 15, 2014. (Ex. 3, p. 2) Claimant's time away from work was not related to her February 6, 2014 work injury.

On April 14, 2014, claimant returned to Dr. Musgrave because of left sacroiliac pain. (Ex. 3, p. 3) Claimant reported she was doing better than she had previously. Dr. Musgrave opined claimant could return to work on the succeeding day without any work restrictions for injuries sustained in the motor vehicle accident. (Ex. 3, p. 3) The personal physician did not evaluate claimant's right shoulder. (Ex. 3, p. 3)

On April 25, 2016, Farid Manshadi, M.D., examined claimant for the purpose of conducting an independent medical examination and for providing a permanent impairment rating. (Ex. 7) The evaluating physician issued a report that was dated

June 6, 2016. (Ex. 7) Dr. Manshadi discussed claimant's work injury and any impact the injury had on claimant's condition. Dr. Manshadi wrote in relevant part:

> DISCUSSION: After review of the provided medical records and my examination and evaluation of Ms. Wendy Rector, it appears that Ms. Wendy Rector sustained work injuries involving her right shoulder as well as involving her neck and right ankle and right hip. She specifically appears to have evidence of SI joint dysfunction on the right side. I also understand that she was in a motor vehicle accident on 02/14/14. I believe from her initial work injury of 02/06/14 Ms. Rector sustained a right shoulder injury which appears to have gotten worse to some extent after the motor vehicle accident, at least by Ms. Rector's report. In regard to her neck injury, it does not appear that the motor vehicle accident really made the neck pain significantly worse. Also her right low back pain did not get significantly worse from the motor vehicle accident.
>
> The diagnosis for the right shoulder remains right shoulder pain with reduced range of motion, probably secondary to some impingement syndrome. She also has some evidence of SI joint dysfunction on the right side. Currently, she doesn't show any significant issues, at least clinically, for her neck. In regard to her right low back, as I indicated, she has clinical evidence of sacroiliac joint dysfunction. Lastly, the right ankle is currently without issues or any complaints from Ms. Rector.
>
> In regard to the relationship of her injuries to her work injury or motor vehicle accident, I believe the original work injury is the major issue and it appears that the right shoulder injury did get slightly worse after the motor vehicle accident. However, I believe that the work injury is the major causation of her right shoulder issues at this point.
>
> In regard to MMI, it is really difficult to make a determination of when she reached MMI in regard to her work injury and when she reached MMI in regard to her car accident. However, as I indicated, the work injury of 02/06/14 was the major of the two injuries. However, Ms. Rector received treatments and therapies for her injuries and I set the date of MMI as of 12/22/14 which was the last day that she received physical therapy at Cedar Valley Medical Specialists.
>
> Finally, in regard to the impairment rating, it is really difficult to differentiate how much of the impairment rating is related to the car accident and how much is related to the original work injury. However, the impairment rating at this point would be as follows:
>
> Specifically for the right shoulder I used the American Medical Association's *Guides to the Evaluation of Permanent Impairment, 5th Edition,* Chapter 16, Pages 475 through 479 , and as such I assign seven (7) percent impairment of the right upper extremity.

> In regard to her right-sided low back pain related to the sacroiliac joint dysfunction, I used the American Medical Association's *Guides to the Evaluation of Permanent Impairment, 5th Edition,* Chapter 15 Page 384, Table 15-3 and she falls under DRE Lumbar Category 2 and I assign five (5) percent impairment of the whole person.
>
> There is no impairment rating for Ms. Rector's neck or for the right ankle as she has no issues with her neck or with her right ankle at this point. The right ankle range of motion was within normal limits.
>
> In regard to any additional medical treatment other than that which has been previously offered, I believe Ms. Rector may benefit from pain medication she is currently using, which is Ibuprofen. Injection to the right shoulder periodically also may be indicated as well. Also injection into the right SI joint may be an option as well.
>
> In regard to any medical restrictions, I recommend for Ms. Rector to avoid any activity which requires repetitious reaching, shoulder height or overhead activities with her right upper extremity. Specifically for her low back and right SI joint dysfunction, she is to avoid any activity which requires repetitious twisting or bending at her waist.

(Ex. 7, pp. 5-6)

Ms. Staci Dee Tiedt testified on behalf of defendants. She is claimant's direct supervisor. Ms. Tiedt testified she never discussed claimant's workers' compensation claim with her, specifically, the right shoulder claim. Additionally, Ms. Tiedt testified the only restrictions she ever discussed with claimant were restrictions imposed by Dr. Musgrave for the motor vehicle accident and those restrictions involved sitting and standing.

During direct examination, claimant testified about her current condition. She testified her right arm goes numb at night. She indicated the range of motion of her right arm is less than it was prior to the work injury on February 6, 2014. Claimant stated she is able to lift her right arm above her head but often there is a catch in her arm. Claimant testified she uses a "grabber" to reach objects on shelves over her head. In order to dust, she places a dust cloth over a broom to clean the top of her refrigerator or her oven. She indicated it is difficult for her to operate a cash register at the school cafeteria. Claimant admitted during cross-examination she is not working under any permanent restrictions for her right shoulder.

RATIONALE AND CONCLUSIONS OF LAW

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).

When an expert's opinion is based upon an incomplete history it is not necessarily binding on the commissioner or the court. It is then to be weighed, together with other facts and circumstances, the ultimate conclusion being for the finder of the fact. Musselman v. Central Telephone Company, 154 N.W.2d 128, 133 (Iowa 1967); Bodish v. Fischer, Inc., 257 Iowa 521, 522, 133 N.W.2d 867 (1965).

The weight to be given an expert opinion may be affected by the accuracy of the facts the expert relied upon as well as other surrounding circumstances. St. Luke's Hospital v. Gray, 604 N.W.2d 646 (Iowa 2000).

Expert testimony may be buttressed by supportive lay testimony. Bradshaw v. Iowa Methodist Hospital, 251 Iowa 375, 380; 101 N.W.2d 167, 170 (1960).

The commissioner as trier of fact has the duty to determine the credibility of the witnesses and to weigh the evidence, together with the other disclosed facts and circumstances, and then to accept or reject the opinion. Dunlavey v. Economy Fire and Casualty Co., 526 N.W.2d 845 (Iowa 1995).

When disability is found in the shoulder, a body as a whole situation may exist. Alm v. Morris Barick Cattle Co., 240 Iowa 1174, 38 N.W.2d 161 (1949). In Nazarenus v. Oscar Mayer & Co., II Iowa Industrial Commissioner Report 281 (App. 1982), a torn rotator cuff was found to cause disability to the body as a whole.

Since claimant has an impairment to the body as a whole, an industrial disability has been sustained. Industrial disability was defined in Diederich v. Tri-City R. Co., 219 Iowa 587, 258 N.W. 899 (1935) as follows: "It is therefore plain that the legislature intended the term 'disability' to mean 'industrial disability' or loss of earning capacity and not a mere 'functional disability' to be computed in the terms of percentages of the total physical and mental ability of a normal man."

Functional impairment is an element to be considered in determining industrial disability which is the reduction of earning capacity, but consideration must also be given to the injured employee's age, education, qualifications, experience, motivation, loss of earnings, severity and situs of the injury, work restrictions, inability to engage in employment for which the employee is fitted and the employer's offer of work or failure to so offer. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963); Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961).

Compensation for permanent partial disability shall begin at the termination of the healing period. Compensation shall be paid in relation to 500 weeks as the disability bears to the body as a whole. Section 85.34.

Claimant has established she has a permanent partial disability. The evidence which supports claimant's claim are the opinions of Dr. Musgrave and Dr. Manshadi. The undersigned finds the only permanent condition is to the right shoulder. Dr. Manshadi rated claimant as having a permanent impairment to the right upper extremity in the amount of 7 percent. An impairment of 7 percent to the right upper extremity equates to an impairment of 4 percent to the body as a whole. This is a very low impairment rating. Dr. Musgrave opined claimant had significant discrepancies with her right shoulder. Dr. Manshadi imposed permanent restrictions for the right shoulder, but claimant admitted she was not working with any permanent restrictions. It stands to reason, claimant should not engage in repetitious reaching above her shoulder.

Claimant indicated she has difficulties working above her shoulders. She has a hard time operating a cash register at the school cafeteria with her right hand. She is motivated to work. She wants to remain employed at the school district. It is the highest paid job she has ever held. She has no plans to leave her position.

After reviewing all of the factors involving industrial disability; it is the determination of the undersigned; claimant has a permanent partial disability in the amount of 5 percent. Defendants shall pay unto claimant 25 weeks of permanent partial disability benefits at the stipulated weekly benefit rate of $279.56 per week and commencing from December 22, 2014, the date Dr. Manshadi determined claimant had reached maximum medical improvement.

In arbitration proceedings, interest accrues on unpaid permanent disability benefits from the onset of permanent disability. Farmers Elevator Co., Kingsley v. Manning, 286 N.W.2d 174 (Iowa 1979); Benson v. Good Samaritan Ctr., File No. 765734 (Ruling on Rehearing, October 18, 1989).

The next issue for resolution is the matter of medical benefits. The employer shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance, and hospital services and supplies for all conditions compensable under the workers' compensation law. The employer shall also allow reasonable and necessary transportation expenses incurred for those services. The employer has the right to choose the provider of care, except where the employer

has denied liability for the injury. Section 85.27. Holbert v. Townsend Engineering Co., Thirty-second Biennial Report of the Industrial Commissioner 78 (Review-Reopening October 16, 1975).

Defendants are liable for any causally related medical charges. They are not responsible for any medical treatment for the left sacroiliac pain, including Dr. Musgrave and the physical therapy he ordered as a treatment modality. Defendants are liable for treatment of the right shoulder.

The next issue is the matter of the cost of the independent medical examination and report from Dr. Manshadi. Section 85.39 permits an employee to be reimbursed for subsequent examination by a physician of the employee's choice where an employer-retained physician has previously evaluated "permanent disability" and the employee believes that the initial evaluation is too low. The section also permits reimbursement for reasonably necessary transportation expenses incurred and for any wage loss occasioned by the employee attending the subsequent examination.

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

With respect to the cost of the independent medical examination, claimant has failed to meet her burden to show the cost of the IME report. Following the Supreme Court's ruling in Des Moines Regional Transit Authority v. Young, 867 N.W.2d 839 (Iowa 2015), claimant must establish the costs associated with the physician's report. Claimant did not supply the cost to prepare the report. She did not meet her burden of proof. Defendants are not liable to reimburse claimant for any portion of Dr. Manshadi's independent medical examination or report.

The next issue is the matter of penalty benefits pursuant to Iowa Code section 86.13(4)(c)(3). In Christensen v. Snap-on Tools Corp., 554 N.W.2d 254 (Iowa 1996), and Robbennolt v. Snap-on Tools Corp., 555 N.W.2d 229 (Iowa 1996), the supreme court said:

> Based on the plain language of section 86.13, we hold an employee is entitled to penalty benefits if there has been a delay in payment unless the employer proves a reasonable cause or excuse. A reasonable cause or excuse exists if either (1) the delay was necessary for the insurer to investigate the claim or (2) the employer had a reasonable basis to contest the employee's entitlement to benefits. A "reasonable basis" for denial of the claim exists if the claim is "fairly debatable."
>
> Christensen, 554 N.W.2d at 260.

The supreme court has stated:

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

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

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

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

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

Id.

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

(6) In determining the amount of penalty, the commissioner is to consider factors such as the length of the delay, the number of delays, the information available to the employer regarding the employee's injury and wages, and the employer's past record of penalties. Robbennolt, 555 N.W.2d at 238.

(7) An employer's bare assertion that a claim is "fairly debatable" does not make it so. A fair reading of Christensen and Robbennolt, makes it clear that the employer must assert facts upon which the commissioner could reasonably find that the claim was "fairly debatable." See Christensen, 554 N.W.2d at 260.

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

Weekly compensation payments are due at the end of the compensation week. Robbennolt, 555 N.W.2d 229, 235.

Penalty is not imposed for delayed interest payments. Davidson v. Bruce, 593 N.W.2d 833, 840 (Iowa App. 1999). Schadendorf v. Snap-On Tools Corp., 757 N.W.2d 330, 338 (Iowa 2008).

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

There is no question here. Defendants did not convey a true denial letter to claimant. When Ms. Waschkat issued her letter of March 14, 2014 to claimant, the subject of the letter was "Restrictions Update." (Ex. 5, p. 1) Nowhere is the word "denial" mentioned in the body of the letter. Moreover, there is no basis for any denial listed in the correspondence. As a consequence, defendants did not comply with Iowa Code section 86.13(4)(c)(3). A penalty is in order. It is the determination of the undersigned; defendants shall pay unto claimant $1,500.00 in penalty benefits.

The final issue is costs to litigate. Iowa Code section 86.40 states:

Costs. All costs incurred in the hearing before the commissioner shall be taxed in the discretion of the commissioner.

Iowa Administrative Code Rule 876—4.33(86) states:

Costs. Costs taxed by the workers' compensation commissioner or a deputy commissioner shall be (1) attendance of a certified shorthand reporter or presence of mechanical means at hearings and evidential depositions, (2) transcription costs when appropriate, (3) costs of service of the original notice

> and subpoenas, (4) witness fees and expenses as provided by Iowa Code sections 622.69 and 622.72, (5) the costs of doctors' and practitioners' deposition testimony, provided that said costs do not exceed the amounts provided by Iowa Code sections 622.69 and 622.72, (6) the reasonable costs of obtaining no more than two doctors' or practitioners' reports, (7) filing fees when appropriate, (8) costs of persons reviewing health service disputes. Costs of service of notice and subpoenas shall be paid initially to the serving person or agency by the party utilizing the service. Expenses and fees of witnesses or of obtaining doctors' or practitioners' reports initially shall be paid to the witnesses, doctors or practitioners by the party on whose behalf the witness is called or by whom the report is requested. Witness fees shall be paid in accordance with Iowa Code section 622.74. Proof of payment of any cost shall be filed with the workers' compensation commissioner before it is taxed. The party initially paying the expense shall be reimbursed by the party taxed with the cost. If the expense is unpaid, it shall be paid by the party taxed with the cost. Costs are to be assessed at the discretion of the deputy commissioner or workers' compensation commissioner hearing the case unless otherwise required by the rules of civil procedure governing discovery. This rule is intended to implement Iowa Code section 86.40.

Iowa Administrative Code rule 876—4.17 includes as a practitioner, "persons engaged in physical or vocational rehabilitation or evaluation for rehabilitation." A report or evaluation from a vocational rehabilitation expert constitutes a practitioner report under our administrative rules. Bohr v. Donaldson Company, File No. 5028959 (Arb. November 23, 2010); Muller v. Crouse Transportation, File No. 5026809 (Arb. December 8, 2010). The entire reasonable costs of doctors' and practitioners' reports may be taxed as costs pursuant to 876 IAC 4.33. Caven v. John Deere Dubuque Works, File Nos. 5023051, 5023052 (App. July 21, 2009).

The following costs are assessed to defendants:

Filing fee	$100.00
Transcript	$169.61

ORDER

THEREFORE, IT IS ORDERED:

Defendants shall pay unto claimant twenty-five (25) weeks of permanent partial disability benefits at the stipulated weekly benefit rate of two hundred seventy-nine and 56/100 dollars ($279.56) and payable from December 22, 2014.

Accrued benefits shall be paid in a lump sum, together with interest, as provided by law.

Defendants shall pay unto claimant, one thousand five hundred and 00/100 dollars ($1,500.00) in penalty benefits to claimant pursuant to Iowa Code section 86.13(4)(c)(3).

Defendants shall pay all causally related medical expenses as detailed in the body of the decision.

Costs are assessed to defendants as detailed in the body of this decision.

Defendants shall file all reports as required by law.

Signed and filed this 8th day of March, 2017.

Michelle A. McGovern

MICHELLE A. MCGOVERN
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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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 in writing and received by the commissioner's office 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 a legal holiday. The notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 1000 E. Grand Avenue, Des Moines, Iowa 50319-0209.