BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

YESENIA QUINTEROS, Claimant, vs. JBS USA, L.L.C. Employer, and AMERICAN ZURICH INSURANCE CO., Insurance Carrier, Defendants.	:	File No. 5068666 ARBITRATION DECISION Head Note Nos.: 1402.40, 1803, 2502, 2907, 4000.2

STATEMENT OF THE CASE

Yesenia Quinteros, claimant, filed a petition for arbitration against JBS USA, L.L.C., (hereinafter referred to as "JBS") and its workers' compensation insurance carrier, American Zurich Insurance Company. This case came before the undersigned for an arbitration hearing on June 4, 2021. Due to the ongoing pandemic in the state of Iowa and pursuant to an order of the Iowa Workers' Compensation Commissioner, this case was tried using the CourtCall videoconference platform.

The parties filed a hearing report before the scheduled hearing. On the hearing reports, the parties entered into numerous stipulations. Those stipulations were accepted and no factual or legal issues relative to the parties' stipulations will be made or discussed. The parties are now bound by their stipulations.

The evidentiary record includes Joint Exhibits 1 through 9, Claimant's Exhibits 1 through 16, and Defendants' Exhibits A through E. Claimant testified on her own behalf. Defendants called Toni Deters, the Occupational Health and Workers' Compensation Manager for the employer's Ottumwa plant, to testify. No other witnesses testified at trial.

Counsel for the parties requested an opportunity to file post-hearing briefs. This request was granted and both parties filed briefs simultaneously on July 16, 2021. The case was considered fully submitted to the undersigned on that date.

STATEMENT OF THE ISSUES

The parties submitted the following disputed issues for resolution:

1. The extent of claimant's entitlement to permanent disability benefits for the stipulated July 29, 2016 left shoulder injury.

2. The extent of claimant's entitlement to permanent disability benefits for the stipulated left arm injury occurring on May 30, 2017.

3. Whether defendants should be ordered to pay penalty benefits and, if so, in what amount for an alleged unreasonable underpayment of permanent disability benefits.

4. Whether claimant is entitled to reimbursement for an independent medical evaluation pursuant to Iowa Code section 85.39.

5. Whether costs should be assessed against either party and, if so, in what amount.

FINDINGS OF FACT

The undersigned, having considered all of the evidence and testimony in the record, finds:

Claimant, Yesenia Quinteros, is a 28-year-old woman, who resides in Ottumwa, Iowa. Ms. Quinteros was born in Fresno, California and moved to Iowa when she was 8 years old. She is bilingual and is able to read and speak both English and Spanish. However, claimant only completed the 11th grade and dropped out of school during her senior year. She testified that she was not a great student and found both science and math to be difficult. Nevertheless, she was able to obtain her GED in December 2020. She has no further schooling or formal training. (Claimant's testimony)

Ms. Quinteros has some basic computer skills she developed during high school. However, she does not own a computer. She is able to order items on-line and send e-mails through her smartphone. (Claimant's testimony)

After dropping out of high school, claimant sought employment. She began working for Cargill, which is the predecessor to the current owner of the Ottumwa meat packing plant where claimant works, in May 2011. Her starting pay in 2011 was $14.35 per hour. She submitted to and passed a pre-employment physical without any limitations before commencing employment with Cargill. (Claimant's testimony)

Ms. Quinteros continued working at this plant through ownership changes and continues working for the current owner and employer, JBS, at the time of hearing. During the first five years of employment, claimant worked a "Loin Defatter" position. In that position, she used a Whizard knife with her right hand on a continuous basis and

worked with pork loins that weighed approximately 10 pounds each. (Claimant's testimony)

Claimant testified that the Loin Defatter position was hard on her right arm and hand with constant gripping. Therefore, in early 2016, she transferred to a "Pump Operator" position with JBS. She worked this job for a few months before her initial work injury on July 29, 2016. (Claimant's testimony)

Ms. Quinteros explained the Pump Operator position required her to use a small rake in her right hand (though she testified she had to use both hands when pulling the meat) to pull meat forward toward herself and then used a hook in her left hand to move the meat to a separate area to be injected with brine. Claimant was performing the raking motion and task on July 29, 2016 when she felt and heard a pop in her left shoulder. She reported the injury to her supervisor and was sent to the company nurse station to be seen on the same date. (Claimant's testimony) Defendants admit that claimant sustained a left shoulder injury on this date and that the injury caused permanent disability. (Hearing Report)

Unfortunately, claimant's left shoulder symptoms did not resolve. The employer referred her to an orthopaedic surgeon, Christopher B. Vincent, M.D. for evaluation and treatment. Dr. Vincent attempted conservative measures, including work restrictions and an injection into claimant's left shoulder. Claimant continued working and ultimately missed no time from work as a result of the left shoulder injury or treatment.

Conservative treatment did not resolve claimant's left shoulder symptoms. Ultimately, Dr. Vincent recommended surgical intervention. Claimant submitted to surgery on her left shoulder on February 24, 2017. Dr. Vincent performed a left shoulder arthroscopic rotator cuff repair, biceps tenodesis, distal clavicle excision and subacromial decompression, acromioplasty, and CA ligament release. (Joint Ex. 2, p. 123)

Ms. Quinteros returned to work the Monday after her surgery, missing no time from work. She continued working for JBS until May 30, 2017 when she developed symptoms in her left hand and wrist. (Claimant's testimony) She was referred for treatment of the left hand by an orthopaedic surgeon, Michael A. Gainer, M.D. He diagnosed claimant with carpal tunnel syndrome and trigger finger of the left long finger. Dr. Gainer performed a carpal tunnel release and released claimant's left trigger finger on September 29, 2017. (Joint Ex. 5, p. 136) Once again, claimant returned to work without missing time. (Claimant's testimony)

Unfortunately, claimant developed an infection in her left long finger after this surgical intervention. She required a second surgery to clean and debride the infected area. (Joint Ex. 5, p. 137) Defendants concede that claimant sustained permanent disability as a result of the left carpal tunnel syndrome and left trigger finger. (Hearing Report)

In the summer of 2018, claimant complained of ongoing left shoulder symptoms. She was returned for further evaluation by Dr. Vincent. He ordered an MRI arthrogram and claimant complained of significantly worse symptoms after the arthrogram. (Claimant's testimony; Joint Ex. 2, pp. 126-127) Ultimately, claimant developed an infection in the left shoulder and required surgical intervention to irrigate and debride this infected area. (Joint Ex. 2, pp. 128-130; Joint Ex. 6) Once again, claimant returned to work without lost time, even though she was working with an antibiotic pump after this infection and surgical intervention. (Claimant's testimony)

Claimant ultimately decided to bid to a new job and was awarded the "Rework job." She now inspects rejected product to ensure it is ready to be shipped and that it is safe for the customer. This sometimes requires claimant to re-box and re-label meat products. However, she testified that she is capable of performing this job. She now earns $21.58 per hour in the Rework position. Claimant continues working for the employer in the Rework position at the time of hearing. (Claimant's testimony)

Ms. Quinteros testified that her left shoulder and left arm are not fully recovered. She testified that there are many things she cannot do now because of the injuries. She testified that she has pain at a level of 2 out of 10 on a pain scale at all times and that it can increase to an 8 out of 10 with activity. Ms. Quinteros uses ibuprofen on a daily basis for her symptoms and sometimes uses heat or ice before bed due to her symptoms.

Claimant testified that she does not believe she could physically perform the loin cutting job now. She testified it is a repetitive job and that she does not believe she could continuously flip the loin. Ms. Quinteros also testified that she does not believe she could perform the pump operator job now. She testified that she could not do the repetitive raking of meat that is required for that job, even though she continued performing that job after her left shoulder surgery occurred. Ms. Quinteros also testified that she does not believe she could perform repetitive work of any kind within the JBS plant with her left hand after these injuries.

The physicians have differing opinions about claimant's physical capabilities. Claimant's treating surgeon, Dr. Vincent, initially opined that claimant did not require any permanent work restrictions as a result of her left shoulder injury. (Joint Ex. 1, pp. 101, 103, 105, 107, 111) However, after claimant submitted to a valid functional capacity evaluation (FCE) with John Kruzich, Dr. Vincent changed his opinion and accepted the recommendations of Therapist Kruzich. (Defendants Ex. D; Defendants' Ex. E, p. 31) Specifically, Dr. Vincent opined, "I would recommend the patient be placed under permanent work restrictions to avoid lifting greater than 25 pounds from the level of the waist to the shoulder and avoid lifting greater than 15 pounds from the level of the waist to above shoulder." (Defendants' Ex. E, p. 31) He additionally recommended "a 50 pounds, pushing and pulling restriction on the affected left shoulder. While the patient can perform above the level of the shoulder, she should avoid continuous work above the level of the shoulder." (Defendants' Ex. E, p. 31)

Dr. Vincent also opined that claimant sustained five percent permanent impairment of the left upper extremity as a result of her left shoulder injury. He converted that to three percent of the whole person pursuant to the AMA Guides, Fifth Edition. (Joint Ex. 1, p. 106)

Claimant's hand surgeon, Dr. Gainer, opined that claimant obtained maximum medical improvement on December 4, 2017 and required no work restrictions. He also opined that claimant sustained a five percent permanent impairment of the left hand as a result of the left carpal tunnel syndrome and left long trigger finger. (Joint Ex. 1, p. 107)

Claimant obtained an independent medical evaluation performed by Sunil Bansal, M.D. on March 6, 2020. (Joint Ex. 9) Using the AMA Guides, Fifth Edition, Dr. Bansal opined that claimant sustained a five percent permanent impairment related to her left carpal tunnel and left trigger finger injuries. He assigned a 15 percent permanent impairment of the left upper extremity relative to claimant's left shoulder injury. He converted the shoulder impairment to a 9 percent permanent impairment of the whole person. (Joint Ex. 9, p. 174)

Dr. Bansal also addressed the issue of permanent work restrictions. He opined that claimant should perform "No lifting greater than 10 pounds with the left arm. No over shoulder work with the left arm. No frequent reaching with the left arm." (Joint Ex. 9, p. 175) Subsequently, claimant obtained a functional capacity evaluation (FCE) performed by Daryl Short, DPT, on January 29, 2021. (Claimant's Ex. 8) Daryl Short opined that claimant was cooperative and gave consistent effort. He concluded the FCE was valid.

Pursuant to the Short FCE, it was determined that claimant has some limitations with elevated work, forward bent standing, and reaching. Mr. Short recommended limiting lifting to no more than occasionally lifting 25 pounds from floor to waist. The Short FCE also recommended no lifting greater than 5 pounds occasionally from waist to the crown and no front carrying above 25 pounds for no more than 50 feet. (Claimant's Ex. 8, p. 21) Dr. Bansal reviewed the Short FCE and issued a supplemental report dated March 3, 2021, in which he opines that the FCE results were consistent with his own assignment of restrictions and adopted the recommendations of the Short FCE. (Claimant's Ex. 6, p.18)

Defendants offered unrebutted testimony of Toni Deters. Ms. Deters explained that she is the occupational health and workers' compensation manager at the Ottumwa plant. She explained that claimant has not turned in any of the work restrictions given to her by either Dr. Vincent or Dr. Bansal.

If an employee has permanent medical restrictions, those are documented by the plant on a "yellow card" and the claimant is not permitted to bid to any job that is not consistent with the restrictions documented. Claimant has not submitted restrictions or requested a yellow card. The employer was not aware of claimant's restrictions from either Dr. Vincent or Dr. Bansal. Nevertheless, Ms. Deters testified that the claimant's

current position with JBS is within and consistent with the restrictions offered by Dr. Vincent and the Kruzich FCE.

Dr. Vincent reviewed the IME performed by Dr. Bansal and authored a supplemental report dated December 7, 2020. In his supplemental report, Dr. Vincent opined that the impairment rating provided by Dr. Bansal was erroneous because Dr. Vincent believes the distal clavicle excision he performed actually improved claimant's functional shoulder abilities. He further opined that, even if applied literally, the AMA Guides, Fifth Edition would result in an impairment rating of 2.5 percent of the left upper extremity as a result of the distal clavicle excision. (Joint Ex. 1, pp. 110-111)

Considering the competing medical opinions, I find the five percent permanent impairment rating offered by Dr. Bansal relative to the left upper extremity resulting from the left carpal tunnel release and left trigger finger to be accurate. Dr. Gainer also offered a five percent permanent impairment rating of the left hand. Pursuant to the AMA Guides, Fifth Edition, this converts to a five percent permanent impairment of the left upper extremity. (AMA Guides, Fifth Edition, Table 16-2, page 439) Accordingly, Dr. Gainer and Dr. Bansal concur that claimant has a five percent permanent impairment as a result of the May 30, 2017 injury resulting in the left carpal tunnel release and left trigger finger release. I accept that impairment rating and find that claimant sustained a five percent permanent functional impairment and loss of the left arm as a result of the May 30, 2017 injury.

With respect to the left shoulder injury occurring on July 29, 2016, there are essentially three impairment ratings offered. Dr. Vincent offers an impairment rating of 5 percent of the upper extremity, or 3 percent of the whole person, for claimant's shoulder injury. This impairment rating contains no permanent impairment for the distal clavicle resection Dr. Vincent performed.

While I acknowledge Dr. Vincent's expertise and opinions that the distal clavicle resection actually improved claimant's functional abilities, I think his opinion that this should result in a zero percent impairment is contrary to the specific provisions of the AMA Guides, Fifth Edition. Dr. Bansal references a specific portion of the AMA Guides, Fifth Edition (Table 16-27) to assign permanent impairment for the distal clavicle resection. Indeed, this section of the AMA Guides indicates that the resection is equivalent to 10 percent of the upper extremity. This would be convincing but for the further explanation offered by Dr. Vincent.

Dr. Vincent explains that the 10 percent impairment from Table 16-27 must be multiplied by the relative value of the acromioclavicular joint to the upper extremity. Dr. Vincent quotes from Section 16.7 of the AMA Guides, Fifth Edition, in support of this opinion. I find that Dr. Vincent's analysis and application of the AMA Guides in this respect is more detailed and accurate. I accept his opinion that, if applied literally, the AMA Guides, Fifth Edition would assign a permanent impairment of 2.5 percent of the upper extremity for the distal clavicle resection. This rounds to 3 percent of the upper extremity and converts to 2 percent of the whole person pursuant to Table 16-3 of the AMA Guides, Fifth Edition.

The 3 percent permanent impairment previously assigned by Dr. Vincent is combined with the 2 percent whole person impairment for the distal clavicle resection using the Combined Values Chart at page 604 of the AMA Guides, Fifth Edition. This results in a 5 percent permanent impairment of the whole person as a result of the shoulder injury. I find claimant sustained a 5 percent permanent impairment of the whole person as a result of the shoulder injury on July 29, 2016.

With respect to restrictions, I find the initial opinion offered by Dr. Vincent of no restrictions is not accurate. Dr. Bansal's restrictions seem to be unnecessarily restrictive and limiting, particularly since claimant returned to work after both injuries and continued to work. I find the restrictions outlined by Dr. Vincent, as documented by the Kruzich FCE, to be reasonable and accurate.

Considering claimant's age, her employment history, her continued employment with the employer, her educational qualifications, permanent restrictions, the lack of a healing period, her permanent functional impairment, her motivation to return to employment, as well as all other factors of industrial disability identified by the Iowa Supreme Court, I find that Ms. Quinteros proved she sustained a 25 percent loss of future earning capacity as a result of the July 29, 2016 shoulder injury.

CONCLUSIONS OF LAW

The initial disputed issue is the extent of claimant's entitlement to permanent disability benefits for the July 29, 2016 shoulder injury. Prior to a statutory change in 2017, shoulder injuries were compensable as unscheduled injuries. Iowa Code section 85.34(2)(u) (2016).

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 Comm'r. 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 Ry. Co. of Iowa, 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 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.

Having considered claimant's age, education, employment history, ability to return to work, increased wages, motivation, impairment ratings, permanent restrictions, and all other factors of industrial disability, I found that claimant proved she sustained a 25 percent loss of future earning capacity as a result of the July 29, 2016 shoulder injury. This is equivalent to a 25 percent industrial disability. Iowa Code section 85.34(2)(u) (2016).

Pursuant to Iowa Code section 85.34(2)(u) (2016), industrial disability is awarded based on a percentage of 500 weeks. Accordingly, claimant is entitled to 25 percent of 500 weeks, or 125 weeks of permanent partial disability benefits for the July 29, 2016 shoulder injury. Iowa Code section 85.34(2)(u) (2016).

The parties also submitted claimant's entitlement to permanent disability for the carpal tunnel and trigger finger injuries occurring on May 30, 2017. However, in their post-hearing briefs, both parties assert claimant is entitled to an award equivalent to 5 percent of the arm for these injuries. Arm injuries are compensated on a 250-week scheduled. Iowa Code section 85.34(2)(m) (2017). Five percent of 250 weeks is 12.5 weeks. Accordingly, I conclude claimant is entitled to an award of 12.5 weeks of permanent disability for the May 30, 2017 carpal tunnel and trigger finger injuries.

Claimant also asserts a claim for penalty benefits pursuant to Iowa Code section 86.13. Ms. Quinteros asserts that the employer failed to re-evaluate the claim and pay more in permanent disability benefits. She concedes that defendants paid permanent disability benefits consistent with the permanent impairment rating offered by Dr. Vincent for the shoulder injury. However, she asserts that defendants should have re-evaluated the claim and paid additional permanent disability benefits after claimant's FCE with Mr. Short. She asserts that it was unreasonable to delay or deny additional permanent disability benefits once an FCE demonstrated limitations in the face of Dr. Vincent's full-duty release to return to work.

Claimant further urges that defendants did later re-evaluate by obtaining an FCE of their own. She urges that defendants needed to re-evaluate their position after the valid FCE was rendered by Mr. Kruzich and endorsed by Dr. Vincent. Claimant contends that the defendants' failure to pay additional permanent disability benefits after obtaining these FCE's and permanent restrictions from Dr. Vincent was unreasonable and should result in imposition of a maximum penalty of 50 percent of the amounts delayed or denied.

Defendants point out that they did re-evaluate the claim. They initially paid a one percent permanent impairment rating offered by Dr. Vincent and subsequently paid additional permanent disability when Dr. Vincent increased his permanent impairment rating. Defendants contend that their voluntary payment was reasonable and that it was fairly debatable whether additional permanent disability was owed given the full release

by Dr. Vincent and claimant's actual return to work and increased earnings after her shoulder injury.

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."
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> 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.
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> (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.
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> (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 Custom 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).
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> (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, 594 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).

A determination of whether the employer's denial is reasonable does not turn on whether the employer's factual basis for denial is ultimately accepted or correct. Rather, the question is "whether the employer was reasonable." Keystone Nursing Care Center v. Craddock, 705 N.W.2d 299, 308 (Iowa 2005). A return to work by the claimant was deemed a reasonable basis for disputing entitlement to permanent disability benefits in Craddock.

In this case, defendants clearly had a reasonable basis to dispute entitlement to additional permanent disability benefits when Dr. Vincent released claimant to return to work without restriction. The question is whether defendants maintained a reasonable basis for disputing additional permanent disability once Dr. Vincent adopted Mr. Kruzich's FCE.

In this instance, defendants paid the permanent impairment rating offered by Dr. Vincent. Although Dr. Vincent ultimately imposed some permanent restrictions, he continued to maintain his permanent impairment rating was accurate. Claimant also returned to work for the employer and earned more at the time of hearing than at the time of the shoulder injury. Claimant has not turned in any restrictions to the employer or requested that she be issued a "yellow card" that documents permanent restrictions. Nevertheless, I found that claimant's current restrictions permit her to continue working the full range of her current position with the employer. Arguably, claimant's failure or refusal to turn in restrictions to be documented on a yellow card by the employer also suggests she may not agree or may not want those restrictions to be applied. At least arguably, no restrictions are currently documented or applicable for claimant, leaving it debatable whether claimant has any restrictions or industrial disability.

Among the industrial disability factors to be considered are claimant's age, ability to return to work, the length of healing period, and impairment rating, among other factors. Each of the factors listed above suggests that claimant sustained little or no actual loss of earnings or loss of future earning capacity. Considering the factors at play and the facts of this case, I conclude it was fairly debatable whether claimant sustained any significant loss of earning capacity as a result of the 2016 shoulder injury. Defendants acknowledged some minor loss of functional ability and paid permanent disability equivalent to the impairment rating offered by Dr. Vincent. Ultimately, I conclude that defendants' challenge of additional permanent disability was reasonable and fairly debatable in this case. Therefore, I conclude that no penalty should be imposed in this situation. Iowa Code section 85.13; Craddock, 705 N.W.2d 299, 308 (Iowa 2005).

The next disputed issue submitted by the parties is whether claimant is entitled to reimbursement of her independent medical evaluation fees.

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).

In this case, defendants obtained a permanent impairment rating from their authorized surgeon, Dr. Vincent, on November 26, 2016. Claimant's independent medical evaluation with Dr. Bansal occurred on March 6, 2020. Dr. Bansal charged $3,342.00 for his IME. There does not appear to be a dispute about the reasonableness of those fees. Accordingly, I conclude that claimant established the prerequisites of Iowa Code section 85.39 and qualifies to have her independent medical evaluation fees reimbursed pursuant to Iowa Code section 85.39.

Finally, claimant requests that her costs be taxed against defendants. Costs are taxed at the discretion of the agency. Iowa Code section 86.40. However, costs statutes are construed strictly. Coker v. Abell-Howe Co., 491 N.W.2d 143, 151 (Iowa 1992).

Ms. Quinteros seeks assessment of her filing fee ($100.00). This is a reasonable and appropriate cost pursuant to 876 IAC 4.33(7). Defendants are taxed with the cost of the filing fee.

Claimant seeks the cost of claimant's deposition transcript. This is a reasonable and permissible cost pursuant to 876 IAC 4.33(2). Defendants elected to introduce this deposition transcript. Therefore, I assess the cost ($102.50) of the deposition transcript against defendants.

Claimant seeks costs related to obtaining medical records. Claimant does not cite or rely upon a statute or administrative rule for this requested cost. I conclude this is not a permissible cost to be taxed.

Finally, claimant seeks the cost of Daryl Short's physical therapy (FCE) report. Ultimately, I did not rely upon Mr. Short's FCE findings. I conclude this cost should not be taxed.

ORDER

THEREFORE, IT IS ORDERED:

For the July 29, 2016 shoulder injury, defendants shall pay claimant one hundred twenty-five (125.00) weeks of permanent partial disability benefits commencing on July 29, 2016.

For the May 30, 2017 carpal tunnel and trigger finger injuries, defendants shall pay claimant twelve point five (12.5) weeks of permanent partial disability benefits commencing on May 30, 2017.

All weekly benefits shall be payable at the weekly rate of four hundred ninety-five and 13/100 dollars ($495.13) per week.

Defendants are entitled to a credit for all weekly benefits paid to date.

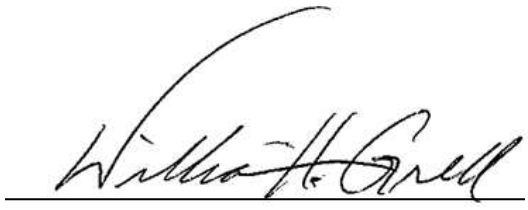
Defendants shall pay accrued weekly benefits in a lump sum together with interest at the rate of ten percent for all weekly benefits payable and not paid when due which accrued before July 1, 2017, and all interest on past due weekly compensation benefits accruing on or after July 1, 2017, shall be payable at an annual rate equal to the one-year treasury constant maturity published by the federal reserve in the most recent H15 report settled as of the date of injury, plus two percent. See Gamble v. AG Leader Technology File No. 5054686 (App. Apr. 24, 2018).

Defendants shall reimburse claimant for Dr. Bansal's independent medical evaluation in the amount of three thousand three hundred forty-two and 00/100 dollars ($3,342.00).

Defendants shall reimburse claimant's costs in the amount of two hundred two and 50/100 dollars ($202.50).

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

Signed and filed this 3rd day of December, 2021.



WILLIAM H. GRELL
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Dennis McElwain (via WCES)

Patrick Waldron (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.