BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

GEORGANNA DERRICKSON, Claimant, vs. SECURITAS SECURITY SERVICES USA, INC., Employer, and INDEMNITY INSURANCE CO. OF NORTH AMERICA, Insurance Carrier, Defendants.	File No. 1646401.01 ARBITRATION DECISION Head Note Nos: 1800; 1803; 1803.1; 3000; 3001; 3002;

STATEMENT OF THE CASE

The claimant, Georganna Derrickson, filed a petition for arbitration seeking workers' compensation benefits from Securitas Security Services USA ("Securitas") and Indemnity Insurance Company of North America. Joseph Powell appeared on behalf of the claimant. Caroline Westerhold appeared on behalf of the defendants.

The matter came on for hearing on May 7, 2021, before deputy workers' compensation commissioner Andrew M. Phillips. Pursuant to an order of the Iowa Workers' Compensation Commissioner related to the COVID-19 pandemic, the hearing occurred via CourtCall. The hearing proceeded without significant difficulties.

In advance of a May 7, 2021, arbitration hearing, the defendants filed an objection to claimant's proposed exhibits 1 and 7. The defendants filed their objection on May 3, 2021. On May 4, 2021, the claimant filed a response to the defendants' objection.

The claimant also filed an objection to defendants' proposed exhibit A. The claimant filed their objection on May 3, 2021. On May 4, 2021, the defendants filed a response to the claimant's objection.

Claimant's proposed exhibit 1 is an independent medical examination ("IME") report of Sunil Bansal, M.D. The IME report contains opinions regarding alleged injuries to the left shoulder, left foot, and left great toe. Proposed exhibit 7 is an invoice for the

IME and report. The claimant served the defendants with these exhibits on April 7, 2021, at about 1:18 p.m.

The defendants' objection is that the claimant alleged an injury to her left arm in her petition. The IME report in proposed exhibit 1 contains opinions regarding injuries to the left shoulder, left foot, and left great toe. The defendants argue that disclosure of a new opinion by Dr. Bansal "on the afternoon of the deadline" for production of exhibits as dictated by 876 Iowa Administrative Code 4.19(3)(d) prejudices the defendants. The defendants contend that allowing claimant's proposed exhibit 1 into evidence would unfairly prejudice the defendants and should be excluded pursuant to 876 Iowa Administrative Code 4.19(3)(e).

The claimant argues that allowing proposed exhibit 1 into evidence would not prejudice the defendants, as the claimant identified Dr. Bansal as an expert on January 7, 2021. The claimant timely served Dr. Bansal's report. The claimant also sought treatment for her foot injury, and the defendants authorized such treatment. Additionally, claimant's counsel noted that defendants' counsel questioned the claimant as to her left foot injury at her deposition.

Dr. Bansal was designated an expert in a timely manner. While the report was served on the final day allowed based upon the rules, the report was still served in a timely manner. Additionally, the claimant was treated for injuries evaluated by Dr. Bansal. Defendants' counsel also questioned the claimant as to her foot injuries at her deposition, indicating knowledge of the injury. These alleged injuries should not come as a surprise to the defendants.

Inclusion of Dr. Bansal's report is not prejudicial. The defendants have not shown that allowing the report into evidence would be unfairly prejudicial. The report was timely served, and Dr. Bansal was timely designated as an expert. The defendants' objection regarding claimant's proposed exhibit 1 is overruled. However, the claimant alleged an injury to her left arm in her original notice and petition. In later responses to discovery requests, she indicated only an injury to her left arm. Only opinions related to the left arm in Dr. Bansal's report will be considered. If the claimant wished to have other injuries considered, she should have amended her petition and/or indicated additional injuries in her discovery responses.

Regarding claimant's proposed exhibit 7, the defendants dispute whether the invoice is reasonable. The claimant notes that this is an argument to be made in posthearing briefing. I agree. The question of reasonableness of fees for an IME is an evidentiary question. The defendants should present evidence as to the reasonableness of Dr. Bansal's fees. The objection to claimant's proposed exhibit 7 is overruled.

The claimant objects to defendants' proposed exhibit A. Defendants' proposed exhibit A consists of a letter dated April 15, 2021, a letter from Timothy Vinyard, M.D. dated April 15, 2021, with an impairment rating, and an invoice regarding the same. These were provided to the claimant on April 16, 2021, and April 29, 2021. Dr. Vinyard is not a treating physician.

The defendants argue that these reports are responses to Dr. Bansal's report as provided in claimant's proposed exhibit 1. Further, the defendants argue that they could not conduct discovery because the additional injuries alleged in Dr. Bansal's report were not alleged in the original notice and petition.

On September 4, 2020, a hearing assignment order was issued. The hearing assignment order required that, at least 30 days prior to the hearing, witness and exhibit lists, along with all intended exhibits not previously required to be served, shall be served on all opposing parties. This is also required by 876 Iowa Administrative Code 4.19(3)(d). 876 Iowa Administrative Code 4.19(3)(c) also requires "[a]ll discovery responses, depositions, and reports from independent medical examinations shall be completed and served on opposing counsel . . . at least 30 days before hearing."

The reports in defendants' proposed exhibit A were not timely served according to the rules. This is prejudicial. The claimant's objection is sustained, and defendants' proposed exhibit A is excluded from the record.

The record in this case consists of Joint Exhibits 1-3, Claimant's Exhibits 1-7, and Defendants' Exhibits B-H. All of the proposed exhibits were received into evidence, minus Defendants' Exhibit A, which was excluded as noted above. Testimony under oath was also taken from the claimant, Georganna Derrickson, and Scott Peterson. Deanna Maley was appointed the official reporter and custodian of the notes of the proceeding. The evidentiary record closed at the end of the hearing, and the matter was fully submitted on May 28, 2021, after briefing by the parties.

STIPULATIONS

Through the hearing report, as reviewed at the commencement of the hearing, the parties stipulated and/or established the following:

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

2. The claimant sustained an injury arising out of, and in the course of, employment, on January 21, 2018.

3. The alleged injury is a cause of temporary disability during a period of recovery.

4. The claimant had gross earnings of seven hundred nine and 23/100 dollars ($709.23) per week, was single and entitled to one exemption, resulting in a weekly compensation rate of four hundred thirty-six and 61/100 dollars ($436.61) per week.

5. That the costs listed in Claimant's Exhibit 7 have been paid.

The defendants waived their affirmative defenses. Any entitlement to temporary disability and/or healing period benefits was no longer in dispute. Issues of medical benefits were also no longer in dispute.

The hearing report indicated that the parties disputed the weekly rate; however, during the hearing, the parties stipulated as to the claimant's gross earnings and weekly rate as noted above.

The parties are now bound by their stipulations.

ISSUES

The parties submitted the following issues for determination:

1. Whether the alleged injury is a cause of permanent disability.

2. The extent of permanent disability, if any is awarded.

3. Whether the disability is a scheduled member disability to the left arm or the left shoulder.

4. Whether the commencement date for permanent partial disability benefits is April 19, 2018, or another date.

5. Whether a penalty should be imposed on the defendants for failure to adequately investigate and pay permanent partial disability benefits.

6. Whether the claimant is entitled to a specific taxation of costs.

FINDINGS OF FACT

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

Georganna Derrickson, the claimant, was 65 years old at the time of the hearing. (Testimony). She lives in Des Moines, Iowa, where she has lived for most of her life. (Testimony). She lives alone. (Testimony). She did not graduate high school, but obtained a GED in 1983. (Testimony). She later obtained a two-year degree in business administration in 2000. (Testimony).

Most of Ms. Derrickson's career has been in the security services industry. (Testimony). In 2006, Ms. Derrickson began working at Principal Financial as an employee of another security company. (Testimony). She then transferred to Securitas in 2011. (Testimony). She worked as a patrol guard and supervisor. (Testimony). She worked the third shift. (Testimony). For several years, she rode a bicycle patrol. (Testimony). She eventually moved to a position where she took service calls and walked around performing security checks. (Testimony). She did not do much lifting as a security guard. (Testimony).

On January 21, 2018, Ms. Derrickson was on a walking patrol. (Testimony). She entered a stairway, which became dark when the door closed behind her. (Testimony). She lost her footing in the dark and fell down the stairs, injuring her left arm in the process. (Testimony). Ms. Derrickson was transported to the emergency room via EMS after her fall. (Testimony).

Upon arrival at the Iowa Methodist Medical Center, John Y. Netten, D.O. examined Ms. Derrickson. (Joint Exhibit 1:1-11). Ms. Derrickson relayed to Dr. Netten how she was injured, and indicated that she injured her left shoulder, left arm, and bilateral shins. (JE 1:1). Dr. Netten ordered a CT scan of the left upper extremity, which revealed a highly comminuted and impacted left proximal humerus fracture. (JE 1:6-7). The fracture extended through the greater and lesser tuberosities and bicipital groove with approximately 3 cm of foreshortening and impaction of the humeral metaphysis within the humeral head fragments. (JE 1:6). X-rays of the left shoulder showed an acute, highly comminuted and impacted left proximal humerus surgical neck and head fracture extending through the greater and lesser tuberosities with about 3 cm of impaction. (JE 1:7). Ms. Derrickson was placed in a sling, provided Tylenol with codeine, and told to follow up with Megan Brady, M.D. (JE 1:8). Dr. Netten's final diagnosis was that Ms. Derrickson suffered a closed three-part fracture of the surgical neck of the left humerus. (JE 1:9).

On January 25, 2018, Ms. Derrickson reported to Des Moines Orthopaedic Surgeons, P.C. ("DMOS"), where Seth Hockaday, PA-C, examined her. (JE 2:18-23). She reported the circumstances of her fall to Mr. Hockaday, and noted that Tylenol relieved her pain. (JE 2:18). Ms. Derrickson wore a sling for her left proximal humerus fracture. (JE 2:18). Mr. Hockaday reviewed the x-rays from January 21, 2018, and agreed that Ms. Derrickson suffered a moderately displaced left proximal humerus fracture. (JE 2:18). Mr. Hockaday provided Ms. Derrickson with a shoulder immobilizer for increased support and holding of the arm. (JE 2:18). Ms. Derrickson expressed a desire to return to work in some capacity. (JE 2:18). Mr. Hockaday recommended that Ms. Derrickson follow up in four weeks for repeat x-rays of the left proximal humerus. (JE 2:18). Mr. Hockaday allowed Ms. Derrickson to return to work with restrictions from January 25, 2018 to April 19, 2018. (JE 2:23). The restrictions included up to 40 hours of work per week for up to five days per week. (JE 2:23). Ms. Derrickson could walk as tolerated, but required the freedom to change positions or rest. (JE 2:23). She also could not lift more than 2 pounds with the left upper extremity. (JE 2:23). "Other restrictions" included: ". . . May do any activities that don't involve pushing, pulling, lifting with LUE, must keep left arm against body." (JE 2:23). She returned to Securitas after this release to light duty. (Defendants' Exhibit D:3).

On February 5, 2018, Ms. Derrickson returned to the emergency room at Iowa Methodist Medical Center. (JE 1:12-17). Ms. Derrickson reported that she tripped in her apartment and fell, landing on her right hip. (JE 1:12). She indicated that she tripped over her left big toe, and attempted to fall on her right side due to her previous humerus injury. (JE 1:12). X-rays taken of her right hip showed degenerative changes to the lumbar spine and both hips. (JE 1:15). An x-ray of her left toe showed a fracture to the big toe. (JE 1:15).

Megan Brady, M.D. examined Ms. Derrickson on February 8, 2018, at DMOS. (JE 2:24-25). Upon examination, Dr. Brady found that Ms. Derrickson had some bruising and swelling to her left arm. (JE 2:24). Dr. Brady indicated that Ms. Derrickson had an injury to her left proximal humerus and left proximal phalanx of the great toe. (JE 2:24). Dr. Brady opined that Ms. Derrickson was doing well. (JE 2:24). The left humeral fracture showed interval healing on an x-ray. (JE 2:24). Dr. Brady advised Ms. Derrickson to take her sling off three times per day to perform pendulum and range of motion exercises. (JE 2:24). Dr. Brady requested Ms. Derrickson return in four weeks. (JE 2:24).

On March 8, 2018, Ms. Derrickson returned to DMOS to visit Mr. Hockaday. (JE 2:26-28). Ms. Derrickson told Mr. Hockaday that her left shoulder had no pain and did not bother her. (JE 2:26). She could move her shoulder to shoulder height with no problem. (JE 2:26). She denied numbness and tingling to the left upper extremity. (JE 2:26). X-rays of the left shoulder showed a well aligned and healing fracture to the left proximal humerus. (JE 2:26). Mr. Hockaday provided additional restrictions for the next six weeks. (JE 2:28). Ms. Derrickson could work as tolerated, walk as tolerated, but could not lift more than 10 pounds with her left arm. (JE 2:28). She also needed the freedom to sit, walk, or change position as needed. (JE 2:28). Finally, Mr. Hockaday recommended that Ms. Derrickson limit repeated overhead lifting with her left arm. (JE 2:28).

Ms. Derrickson began physical therapy on March 20, 2018, with Community Health Partners. (JE 3:38-40). Ms. Derrickson expressed a desire to gain strength and range of motion in her left arm. (JE 3:38). Ms. Derrickson felt that the pain was 3 out of 10 at its worst. (JE 3:38). The therapist opined that Ms. Derrickson had good rehabilitation potential. (JE 3:39).

Mr. Hockaday examined Ms. Derrickson again on April 19, 2018. (JE 2:29-31). Ms. Derrickson indicated that she returned to work with no problems. (JE 2:29). She continued to attend physical therapy. (JE 2:29). Ms. Derrickson felt that most of her strength and range of motion returned. (JE 2:29). X-rays of Ms. Derrickson's left shoulder showed a well aligned, healed left proximal humerus fracture. (JE 2:29). Mr. Hockaday noted that Ms. Derrickson should attend two additional physical therapy visits, and then could cease attending physical therapy. (JE 2:29). Mr. Hockaday opined that Ms. Derrickson showed good healing and recovery for her injury. (JE 2:29). Dr. Brady returned Ms. Derrickson to work with no restrictions. (JE 2:31).

Ms. Derrickson returned to Community Health Partners for a final physical therapy visit on May 8, 2018. (JE 3:41-44). Ms. Derrickson reported making excellent progress. (JE 3:41). Her pain at worst was 2 out of 10. (JE 3:41). The therapist indicated that Ms. Derrickson met her goals, and discharged her from therapy. (JE 3:42).

On March 19, 2019, Ms. Derrickson returned to DMOS where Mr. Hockaday examined her. (JE 2:33-36). Ms. Derrickson slipped and fell on March 7, 2019. (JE 2:33). She had a small bruise over her right lower leg. (JE 2:33). No mention was made of her left arm injury. (JE 2:33). Due to a right proximal fibula fracture, Ms.

Derrickson was returned to work with restrictions from March 19, 2019. (JE 2:36). Mr. Hockaday recommended sit down work, walking as tolerated, and a brace for support and comfort. (JE 2:36).

On April 9, 2019, Barron R. Bremmer, D.O. allowed Ms. Derrickson to return to work in two weeks with no restrictions. (JE 2:37).

Sunil Bansal, M.D. examined Ms. Derrickson for an independent medical examination ("IME") on March 10, 2021. (Claimant's Exhibit 1:1-9). Dr. Bansal is board certified in occupational medicine. (CE 1:11). Dr. Bansal reviewed Ms. Derrickson's medical records. (CE 1:1-4). Upon examination, Dr. Bansal found tenderness to palpation of the left upper extremity. (CE 1:5). Dr. Bansal opined that Ms. Derrickson's fall while at work caused the fracture of her left humerus. (CE 1:7). Based upon observed deficiencies with range of motion to Ms. Derrickson's left shoulder, Dr. Bansal opined that Ms. Derrickson suffered a 5 percent upper extremity impairment, which equates to a 3 percent impairment of the body as a whole. (CE 1:7-8). Dr. Bansal provided restrictions of no lifting greater than 10 pounds, no overhead lifting, and no reaching with Ms. Derrickson's left arm. (CE 1:8). Dr. Bansal opined that Ms. Derrickson's fall was due to her sweeping solely with her right arm. (CE 1:8). He further noted that Ms. Derrickson had diverted attention which caused her to slip and fall. (CE 1:8). Dr. Bansal provided Ms. Derrickson with a 3 percent total foot impairment. (CE 1:8). Dr. Bansal also indicated that Ms. Derrickson had a 6 percent impairment to the right foot. (CE 1:9).

At the conclusion of her care, Ms. Derrickson was released to full duty. (Testimony). At the time of the hearing, she worked first shift at a desk position, which she started about 18 months prior to the hearing. (Testimony). She has no issues performing her job but noted some discomfort and loss of range of motion in her left shoulder. (Testimony). She had no issues performing her job duties. (Testimony). She makes sixteen and 00/100 dollars ($16.00) per hour and is eligible for overtime. (Testimony). Ms. Derrickson testified that she gave no notice of any work restrictions to Securitas. (Testimony). Also, in her answers to interrogatories, Ms. Derrickson indicated that she suffered a left arm fracture. (DE E:2). She further indicated that she suffered no subsequent injuries. (DE E:3).

Scott Peterson, a district manager for Securitas, also testified. (Testimony). As a district manager, Mr. Peterson testified that it was his duty to foster a positive client relationship and manage staffing. (Testimony). He admitted familiarity with the claimant and noted that Ms. Derrickson is an excellent employee with no issues. (Testimony). He also indicated that he was not aware of restrictions promulgated by a doctor, nor had Ms. Derrickson requested permanent accommodations due to her work incident. (Testimony).

CONCLUSIONS OF LAW

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

Permanent Disability

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 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, 569 N.W.2d at 156. 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). Unrebutted expert medical testimony cannot be summarily rejected. Poula v. Siouxland Wall & Ceiling, Inc., 516 N.W.2d 910 (Iowa App. 1994). Supportive lay testimony may be used to buttress expert testimony, and therefore is also relevant and material to the causation question.

In this case, Ms. Derrickson fell on her left arm. This caused an acute, highly comminuted fracture to the left proximal humeral surgical neck and head through the greater and lesser tuberosities. The initial diagnosis was a closed three-part fracture of the surgical neck of the left humerus. Ms. Derrickson indicated that she had reduced range of motion and continued pain in her left upper extremity. Dr. Bansal provided Ms. Derrickson with permanent restrictions including no lifting over certain amounts. Ms. Derrickson gave conflicting testimony as to her limitations between her deposition and hearing testimony. Ms. Derrickson also continued to work for Securitas, and never provided Dr. Bansal's restrictions to Securitas.

I find that the evidence in the record shows that the work incident caused a permanent disability to Ms. Derrickson's left upper extremity.

Under the Iowa Workers' Compensation Act, permanent partial disability is compensated either for a loss of use of a scheduled member under Iowa Code 85.34(2)(a)-(t) or for loss of earning capacity under Iowa Code 85.34(2)(u). The extent of scheduled member disability benefits to which an injured worker is entitled is determined by using the functional method. Functional disability is "limited to the loss of the physiological capacity of the body or body part." Mortimer v. Fruehauf Corp., 502 N.W.2d 12, 15 (Iowa 1993); Sherman v. Pella Corp., 576 N.W.2d 312 (Iowa 1998). The fact finder must consider both medical and lay evidence relating to the extent of the functional loss in determining permanent disability resulting from an injury to a

scheduled member. Terwilliger v. Snap-On Tools Corp., 529 N.W.2d 267, 272-273 (Iowa 1995); Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417, 420 (Iowa 1994).

An injury to a scheduled member may, because of after effects or compensatory change, result in permanent impairment of the body as a whole. Such impairment may in turn be the basis for a rating such impairment may in turn be the basis for a rating of industrial disability. It is the anatomical situs of the permanent injury or impairment which determines whether the schedules in Iowa Code 85.34(a) – (t) are applied. Lauhoff Grain v. MacIntosh, 395 N.W.2d 834 (Iowa 1986); Blacksmith v. All-American, Inc., 290 N.W.1d 348 (Iowa 1980); Dailey v. Pooley Lumber Co., 233 Iowa 758, 10 N.W.2d 569 (1943); Soukup v. Shores Co., 222 Iowa 272, 268 N.W. 598 (1936).

Where an injury is limited to a scheduled member, the loss is measured functionally, not industrially. Graves v. Eagle Iron Works, 331 N.W.2d 116 (Iowa 1983).

Iowa Courts have repeatedly stated that for those injuries limited to the schedules in Iowa Code 85.34(2)(a)-(t), this agency must only consider the functional loss of the particular scheduled member involved, and not the other factors which constitute an "industrial disability." Iowa Supreme Court decisions over the years have repeatedly cited favorably language in a 66-year old case, Soukup v. Shores Co., 222 Iowa 272, 277, 268 N.W. 598, 601 (1936), which states:

> The legislature has definitely fixed the amount of compensation that shall be paid for specific injuries . . . and that, regardless of the education or qualifications or nature of the particular individual, or of his inability . . . to engage in employment . . . the compensation payable . . . is limited to the amount therein fixed.

Our court has even specifically upheld the constitutionality of the scheduled member compensation scheme. Gilleland v. Armstrong Rubber Co., 524 N.W.2d 404 (Iowa 1994). Permanent partial disabilities are classified as either scheduled or unscheduled. A specific scheduled disability is evaluated by the functional method; the industrial method is used to evaluate an unscheduled disability. Graves, 331 N.W.2d 116; Simbro v. DeLong's Sportswear, 332 N.W.2d 886, 887 (Iowa 1983); Martin v. Skelly Oil Co., 252 Iowa 128, 133, 106 N.W.2d 95, 98 (1960).

When the result of an injury is loss to a scheduled member, the compensation payable is limited to that set forth in the appropriate subdivision of Iowa Code 85.34(2). Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961). "Loss of use of a member is equivalent to "loss" of the member. Moses v. National Union Coal Mining Co., 194 Iowa 819, 184 N.W. 746 (1921). Pursuant to Iowa Code 85.34(2)(u), the workers' compensation commissioner may equitably prorate compensation payable in those cases wherein the loss is something less than that provided for in the schedule. Blizek v. Eagle Signal Co., 164 N.W.2d 84 (Iowa 1969).

Consideration is not given to what effect the scheduled loss has on claimant's earning capacity. The scheduled loss system created by the legislature is presumed to include compensation for reduced capacity to labor and to earn. Schell v. Central Engineering Co., 232 Iowa 421, 4 N.W.2d 339 (1942).

The right of a worker to receive compensation for injuries sustained which arose out of and in the course of employment is statutory. The statute conferring this right can also fix the amount of compensation to be paid for different specific injuries, and the employee is not entitled to compensation except as provided by statute. Soukup, 222 Iowa 272, 268 N.W. 598.

The claimant argues that she sustained an injury to the left shoulder due to the location of the fractures in the left humerus, and Ms. Derrickson's ongoing issues with left upper extremity range of motion. The defendants allege that the injury is to the left arm. The defendants argue that the claimant should be held to the injury pled in the initial petition, which is an injury to the left arm.

In 2017, the legislature made significant changes to Iowa Code Chapter 85. Among these changes, the legislature included Iowa Code section 85.34(2)(n), making the "shoulder" a scheduled member. The main dispute regarding permanency in this case is whether the claimant's disability is to her "shoulder" under Iowa Code section 85.34(2)(n), or to the left upper extremity under Iowa Code section 85.34(2)(m).

In September of 2020, the Commissioner filed two appeal decisions addressing the 2017 addition of Iowa Code section 85.34(2)(n). The first such case was Deng v. Farmland Foods, File No. 5061883 (App. September 29, 2020). The Commissioner held in Deng that Iowa Code 85.34(2)(n) was ambiguous as to the definition of the shoulder. The Commissioner examined the intent of the legislature and determined:

> I recognize the well-established standard that workers' compensation statutes are to be liberally construed in favor of the worker, as their primary purposes is to benefit the worker. See Des Moines Area Reg'l Transit Auth. v. Young, 867 N.W.2d 839, 842 (Iowa 2015)(citations omitted); Xenia Rural Water Dist. v. Vegors, 786 N.W.2d 250, 257 (Iowa 2010)("We apply the workers' compensation statute broadly and liberally in keeping with its humanitarian objective. . . ."); Griffin Pipe Prods. Co. v. Guarino, 663 N.W.2d 862, 865 (Iowa 2003)("[T]he primary purpose of chapter 85 is to benefit the worker and so we interpret this law liberally in favor of the employee."). This liberal construction, however, cannot be performed in a vacuum. As discussed above, several of the principles of statutory construction indicate the legislature did not intend to limit the definition of "shoulder" under section 85.34(2)(n) to the glenohumeral joint. For these reasons, I conclude "shoulder" under section 85.34(2)(n) is not limited to the glenohumeral joint.
>
> Claimant's injury in this case was to the infraspinatus muscle. As discussed, the infraspinatus is part of the rotator cuff, and the rotator cuff's main function is to stabilize the ball-and-socket joint. As noted by both Dr. Bansal and Dr. Bolda, the rotator cuff is generally proximal to the joint. However, because the rotator cuff is essential to the function of the glenohumeral joint, it seems arbitrary to exclude it from the definition of "shoulder" under section 85.34(2)(n) simply because it "originates on the scapula, which is proximal to the glenohumeral joint for the most part."

> (Def. Ex. A, [Depo. Tr., 27]). In other words, being proximal to the joint should not render the muscle automatically distinct.
>
> Given the entwinement of the glenohumeral joint and the muscles that make up the rotator cuff, including the infraspinatus, and the importance of the rotator cuff to the function of the joint, I find the muscles that make up the rotator cuff are included within the definition of "shoulder" under section 85.34(2)(n). Thus, I find claimant's injury to her infraspinatus should be compensated as a shoulder under section 85.34(2)(n). The deputy commissioner's determination that claimant's infraspinatus injury is a whole body injury that should be compensated industrially under section 85.34(2)(v) is therefore respectfully reversed.

Deng at 10-11.

A second case, Chavez v. MS Technology, LLC, File No. 5066270 (App. September 30, 2020), applied the logic of Deng to another shoulder case. The Commissioner affirmed his holding in Deng, and further noted:

> . . . .[C]laimant's subacromial decompression was performed to remove scar tissue and fraying between the supraspinatus and the underside of the acromion. As discussed above, the acromion forms part of the socket and helps protect the glenoid cavity, and as such, I found it is closely interconnected with the glenohumeral joint in both location and function. And as discussed in Deng, I found the supraspinatus – a muscle that forms the rotator cuff – to be similarly entwined with the glenohumeral joint. Thus, claimant's subacromial decompression impacted two anatomical parts that are essential to the functioning of the glenohumeral joint; in fact, the procedure was actually performed to improve function of the joint. As such, I find any disability resulting from her subacromial decompression should be compensated as a shoulder under section 85.34(2)(n).
>
> I therefore find none of claimant's injuries are compensable as unscheduled, whole body injuries under section 85.34(2)(v). The deputy commissioner's finding that claimant sustained an injury to her body as a whole is therefore respectfully reversed.

Chavez at 6.

In Chavez, the claimant suffered injuries to her supraspinatus, infraspinatus, and subscapularis muscles. Id. at 3. She also suffered a tear to the biceps tendon and labrum as discovered during an arthroscopic surgery. Id. She had a surgical repair of her rotator cuff, along with "extensive debridement of the labrum, biceps tendon, and subacromial space with biceps tenotomy, subacromial decompression." Id.

As noted in other cases post Deng and Chavez, the key holdings of those cases include:

1. The definition of a "shoulder" is ambiguous in Section 85.34(2)(n). Deng at 4.

2. There is no "ordinary" meaning of the word shoulder. Deng at 5.

3. The appropriate way to interpret the statute is to examine the legislative history. Deng at 5.

4. The legislature did not intend to limit the definition of a "shoulder" to the glenohumeral joint. Rather, the legislature intended to include the entwinement of the glenohumeral joint and the muscles that make up the rotator cuff. Deng at 11.

See e.g. Retterath v. John Deere Waterloo Works, File No. 5067003 (Arb. Dec. 22, 2020).

I disagree with the assertion that the claimant's left humeral fracture is an injury to the shoulder based upon the Commissioner's rulings in Chavez and Deng. While the humerus is proximal to the glenohumeral joint, there are no indications of an injury to other portions of the joint. Standing alone, a fractured humerus is not connected to, or closely entwined with, the glenohumeral joint. Therefore, permanency should be awarded to the left upper extremity based upon Iowa Code section 85.34(2)(m). Dr. Bansal provided an impairment rating based upon some deficiencies with range of motion in the left upper extremity. While this may seem to indicate that the left upper extremity injury is a shoulder injury, I disagree, based upon previous rulings by the Commissioner. The impairment rating was 5 percent. There are no other impairment ratings in the record for the left upper extremity. Therefore, I award the claimant 12.5 weeks of permanent disability benefits (5 percent x 250 weeks = 12.5 weeks).

Date of Maximum Medical Improvement/Commencement of Benefits

Next, we turn to the commencement date of benefits. The claimant contends that permanent partial disability benefits should commence on April 19, 2018. The defendants contend that there has been no opinion as to the timing of maximum medical improvement.

Iowa Code section 85.34(2) states:

> Compensation for permanent partial disability shall begin when it is medically indicated that maximum medical improvement from the injury has been reached and that the extent of loss or percentage of permanent impairment can be determined by use of the guides to the evaluation of permanent impairment, published by the American medical association, as adopted by the workers' compensation commissioner by rule pursuant to chapter 17A.

On April 19, 2018, Ms. Derrickson was returned to work with no restrictions by the treating physician. She was told to follow up with physical therapy on an as needed basis, which she did on May 8, 2018. At that time, she was discharged from physical therapy. Considering the discharge from care on April 19, 2018, and the discharge from physical therapy on May 8, 2018, I find that the claimant achieved maximum medical improvement, and thus benefits should commence, on April 19, 2018.

Penalty

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

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

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

It is also not unreasonable to deny a claim when a good faith issue of law or fact makes the employer's liability fairly debatable. An issue of law is fairly debatable if viable arguments exist in favor of each party. Covia v. Robinson, 507 N.W.2d 411 (Iowa 1993). An issue of fact is fairly debatable if substantial evidence exists which would support a finding favorable to the employer. Gilbert v. USF Holland, Inc., 637 N.W.2d 194 (Iowa 2001). An employer's bare assertion that a claim is fairly debatable is insufficient to avoid imposition of a penalty. The employer must assert facts upon which the commissioner could reasonably find that the claim was "fairly debatable." Meyers v. Holiday Express Corp., 557 N.W.2d 502 (Iowa 1996).

If an employer fails to show reasonable cause or excuse for the delay or denial, the commissioner shall impose a penalty in an amount up to 50-percent of the amount unreasonably delayed or denied. Christensen v. Snap-On Tools Corp., 554 N.W.2d 254 (Iowa 1996). The factors to be considered in determining the amount of the penalty include: the length of the delay, the number of delays, the information available to the employer, and the employer's past record of penalties. Robbennolt, 555 N.W.2d at 238.

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

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

The claimant contends that the defendants refused to investigate whether Ms. Derrickson sustained any permanent disability from her work injury. This continued despite medical records that Ms. Derrickson had ongoing limitations. The claimant contends that this refusal to investigate and refusal to pay necessitates imposition of a penalty. The defendants contend that treatment came to an awkward conclusion in this case. They further allege that the claimant had not reached maximum medical improvement as of the conclusion of her treatment. Therefore, the defendants allege that they had no reason to request a report addressing permanent impairment.

In this case, the report of Dr. Bansal was not served on the defendants until the hearing exhibit deadline. Until that time, there was a good faith issue as to whether or not the claimant reached MMI. Furthermore, it was fairly debatable as to whether or not the claimant sustained a permanent impairment until arguably the report of Dr. Bansal. An insurer is not required to accept evidence that is most favorable to the claimant and ignore any contradictory evidence. City of Madrid v. Blasnitz, 742, N.W.2d 77, 83 (Iowa 2007).

In this case, the claimant has not established a delay in payment of benefits. I find that imposition of a penalty is not appropriate.

Costs

Claimant seeks the award of costs as outlined in Claimant's Exhibit 7. Costs are to be assessed at the discretion of the deputy commissioner hearing the case. See 876 Iowa Administrative Code 4.33; Iowa Code section 86.40. 876 Iowa Administrative Code 4.33(6) provides:

> [c]osts 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, including convenience fees incurred by using the WCES payment gateway, and (8) costs of persons reviewing health service disputes.

Pursuant to the holding in Des Moines Area Regional Transit v. Young, 867 N.W.2d 839 (Iowa 2015), only the report of an IME physician, and not the examination itself, can be taxed as a cost according to 876 IAC 4.33(6). The Iowa Supreme Court reasoned, "a physician's report becomes a cost incurred in a hearing because it is used as evidence in lieu of the doctor's testimony," while "[t]he underlying medical expenses associated with the examination do not become costs of a report needed for a hearing, just as they do not become costs of the testimony or deposition." Id. (Noting additionally that "[i]n the context of the assessment of costs, the expenses of the underlying medical treatment and examination are not part of the costs of the report or deposition"). The commissioner has found this rationale applicable to expenses incurred by vocational experts. See Kirkendall v. Cargill Meat Solutions Corp., File No. 5055494 (App. Dec., December 17, 2018); Voshell v. Compass Group, USA, Inc., File No. 5056857 (App. Dec., September 27, 2019).

In this case, the claimant requests an award of costs for the filing fee, certified mail service fees, a deposition transcript fee, and Dr. Bansal's IME.

The claimant alleges that Dr. Bansal's fee should be awarded under Iowa Code section 85.39. However, the statute requires that a previous impairment rating must be provided which the claimant believes is too low. See e.g. Iowa Code section 85.39(2). In this case, no other provider issued an impairment rating. Therefore, the claimant is not entitled to reimbursement for Dr. Bansal's IME fee based upon the statute.

In my discretion, I award the claimant one hundred three and 00/100 dollars ($103.00) for the filing fee, six and 80/100 dollars ($6.80) for certified mail service, and one hundred seven and 80/100 dollars ($107.80) for deposition

transcripts. I also award one thousand four hundred twenty-five and 00/100 dollars ($1,425.00) for Dr. Bansal's IME report pursuant to the holding in Young.

ORDER

THEREFORE, IT IS ORDERED:

That the defendants are to pay unto the claimant twelve and one-half (12.5) weeks of permanent partial disability benefits at the rate of four hundred thirty-six and 61/100 dollars ($436.61) per week from the commencement date of April 19, 2018.

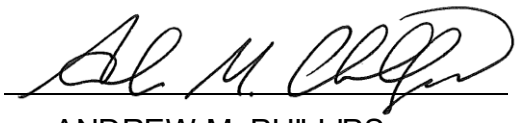
That no penalty benefits are imposed.

That the defendants shall reimburse the claimant one thousand six hundred forty-two and 60/100 dollars ($1,642.60) for costs.

Defendants 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. See Gamble v. AG Leader Technology, File No. 5054686 (App. Apr. 24, 2018).

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

Signed and filed this _____5th____ day of August, 2021.



ANDREW M. PHILLIPS
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Joseph Powell (via WCES)

Caroline Westerhold (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.