BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

FILED
JAN 29 2018
WORKERS' COMPENSATION

CHRISTINA ARELLANES,	:	File No. 5054258
Claimant,	:	ARBITRATION
vs.	:	DECISION
NEWTON CORRECTIONAL FACILITY,	:	
Employer,	:	
STATE OF IOWA,	:	
Defendants.	:	Head Notes: 1803, 4000.2

STATEMENT OF THE CASE

Christina Arellanes, claimant, filed a petition in arbitration seeking workers' compensation benefits from her employer, the State of Iowa. Claimant worked at the Newton Correctional Facility. The arbitration hearing was held on September 22, 2017. The parties submitted post-hearing briefs on November 6, 2017, and the matter was considered fully submitted on that date.

The evidentiary record includes: Joint Exhibits JE1 and JE2; Claimant's Exhibits 1 through 6; and Defendant's Exhibits A through H. Claimant provided testimony at hearing.

The parties filed a hearing report at the commencement of the arbitration hearing. On the hearing report, the parties entered into various stipulations. All of those stipulations were accepted and are hereby incorporated into this arbitration decision and no factual or legal issues relative to the parties' stipulations will be raised or discussed in this decision. The parties are now bound by their stipulations.

ISSUES

The parties submitted the following disputed issues for resolution:

1. The extent of Industrial Disability, if any.

2. Whether claimant is entitled to Penalty Benefits.

FINDINGS OF FACT

After a review of the evidence presented, I find as follows:

1) General

Claimant was 33 years old at the time of the hearing. She grew up in Colorado and moved to Iowa when she was about 20 years old and then returned in April, 2016 to live in Tyron, Colorado. (Testimony)

Claimant is right-hand dominant. (Ex. JE2, p. 1) She presented herself at hearing as a rational and intelligent person and provided credible testimony.

2) Education

Claimant completed the 9th grade. She dropped out during her 10th grade year and testified that while she was in high school, she earned average grades. She stated that she does not suffer from any learning disabilities. (Testimony) Claimant obtained her G.E.D in 2006 after passing the required exam on her first attempt. She has no additional formal education, but has completed training with the defendant employer concerning such things as CPR and Pressure Point Tactics for dealing with inmates. (Testimony; Ex. E, p. 8)

3) This Injury

The stipulated injury in this matter occurred on January 22, 2011. (Hearing Report, p. 1) Claimant was working her regular shift at the Newton Correctional Facility when she went to use the restroom and pulled on the bathroom door. She felt a shocking-ripping pain in her right shoulder. She reported the incident to her shift commander. (Testimony) Claimant continued to work although she had pain. She testified that it did not keep her from working because she did not do work that was stressful to her shoulder such as lifting. Claimant testified that the most she lifted at her job was maybe a ream of paper or moving a chair. (Testimony)

4) Prior Medical History

Claimant did not have any right shoulder problems before her work injury on January 22, 2011. (Ex. JE1, p. 1; Ex. E, pp. 9-10; Testimony) She did have a previous diagnosis of Crohn's disease, but testified that the condition was generally well controlled with medication and did not ordinarily impact her work. (Ex. E, p. 10; Testimony)

5) Work History

Before working for the defendant employer, claimant was employed as a bartender, a waitress, in customer service and she worked for a computer paper printing

company. (Testimony; Ex. F. pp. 13-15) Claimant testified that she believed she could return to these jobs in her current condition. (Testimony; Ex. G, pp. 20-21)

Claimant started at the Newton Correctional Facility in June, 2010. (Ex. F, p. 13) She was hired as a Correctional Officer. Her starting wage was $16.13 per hour. When she left this employer, she was earning about $25.00 per hour. (Testimony) Her job duties included: monitoring inmate activity; doing counts; and equipment inventory, among other things. (Testimony; Ex. F, pp. 13-14) The job did not require any significant lifting or manual labor. However, she was required to be physically fit in order to physically deal with an inmate, if needed. During her training, claimant had to do physical calisthenics and testified that she was able to perform them without pain or problems. Before claimant was hired, she passed a pre-employment physical. (Testimony) There is no record of any complaints about claimant's job performance before or after the work injury.

6) Current Work Status

Claimant resigned from her position with the defendant in March, 2016. (Testimony; Ex. F, p. 16) There was no testimony presented to suggest that claimant left her job due to the work injury and she did not mention the work injury in her resignation letter. (Ex. C, p. 3)

Claimant left her job with the defendant employer and moved back to Colorado, where she grew up. On or about March 17, 2016, claimant went to work as a Correctional Officer for the Colorado Department of Corrections at Trinidad Correctional Facility in Trinidad, Colorado. (Testimony; Ex. F, p. 15; Ex. G, p. 19) She had been offered this job before she resigned her position with the defendant employer. (Testimony) Claimant testified that she took the job in Colorado because it offered better promotion opportunities. Claimant stated that she presently earns similar pay and benefits in Colorado compared to her job with the defendant employer. (Testimony)

Claimant testified that she had a pre-employment physical with Colorado Corrections before she was hired, but that she had pneumonia at the time and the doctor conducting the exam focused on her pneumonia and did not really examine her shoulder. Claimant stated that she has been able to do her job in Colorado without accommodations and she has not received any complaints about her job performance. (Testimony) She also stated that similar to her job with the defendant employer, her job in Colorado requires little to no lifting or overhead work. (Testimony; Ex. G, p. 20)

In addition to working for the Colorado Department of Corrections, claimant works as a part-time waitress/server at a café in Trinidad, Colorado, to make extra money. She works about 4 hours per shift at the café. (Testimony) She stated that she does experience some difficulties with this job due to her shoulder because it requires lifting, carrying and reaching. She avoids certain activities like lifting heavy items above shoulder height, such as bulk supplies. She also avoids using her right hand to grab a full pot of coffee. (Testimony) However, she stated on cross-

examination that she can, in fact, do this job and she works the shifts that are available to her without accommodation or restriction. (Testimony)

Claimant has no plans to look for a different job at this time. (Testimony)

I find based on claimant's continued employment, that she is motivated to maintain employment.

7) Post-Injury Medical Treatment

After the work injury on January 22, 2011, claimant went to see the nurse located at the correctional facility where she was employed. She was later seen by a physician at a clinic in Altoona, Iowa at the direction of her employer. Claimant was told at that clinic that she might have a torn labrum. (Testimony)

Claimant was referred to Iowa Ortho. On January 27, 2011, she saw Stephen Ash, M.D. (Ex. JE1, p. 1) He suspected a right rotator cuff strain. (Id.) Her symptoms persisted and an MRI was obtained which the "radiologist has called a partial tear or strain to the superior border of the subscapularis." (Ex. JE1, p. 4) However, Dr. Ash stated that "I feel the subscapularis appears normal." (Id.) On April 1, 2011, due to persisting symptoms, she received injections into her right shoulder. (Ex. JE1, p. 5; Testimony) Claimant testified that she requested a second opinion, which was granted. (Ex. JE1, p. 5; Testimony)

Claimant was sent to James Nepola, M.D. at the University of Iowa Hospitals and Clinics on May 15, 2011. (Ex. JE2, p. 1) An MR Arthrogram of the right shoulder was requested and claimant was returned to work at that time with no restrictions. (Ex. JE2, p. 5) The arthrogram was completed on June 13, 2011. (Ex. JE2, p. 6) Claimant testified that Dr. Nepola prescribed physical therapy, and injections. (Testimony) She stated that the first injection did not help. However, the second injection did seem to provide some relief. (Testimony)

On July 3, 2013, Dr. Nepola performed a right shoulder biceps tenotomy and tenodesis. (Ex. JE2, p. 20) His surgery notes indicate that there was some fraying of the anterior labrum, but "no obvious tear," and the "[r]otator cuff appeared to be intact." (Ex. JE 2, p. 25) Claimant was off work for several weeks following surgery. (Ex. D, p. 5) On September 24, 2013, it is noted that claimant "has been working without restrictions except no inmate contact." (Ex. JE2, p. 31)

Claimant testified that post-surgery, she continued to have the same pain that she had pre-surgery. (Testimony) On claimant's February 28, 2014 visit with Dr. Nepola she noted that the pain has not changed since before surgery and she was having "difficulty with overhead reaching" and "throwing a ball," and has "feelings of instability" in her shoulder. (Ex. JE2, p. 35)

On June 30, 2014, Dr. Nepola performed a second surgery, a Bankart repair involving the labrum. (Ex. JE2-47) Claimant testified that the second surgery did not provide relief. (Testimony)

On October 6, 2014, claimant noted her pain level when she used her shoulder was 6/10. (Ex. JE2, p. 52) Dr. Nepola continued claimant on restrictions, which limited her lifting to 10 pounds with the right arm, with her elbow at her side, and lifting no more than 25 pounds with both arms with her elbows at her sides. (Ex. 2, p. 51) Yet despite the work restrictions, it was noted that at her job, she "was allowed to go back in population working with prisoners" since her previous appointment in September, 2014, and she "has been doing okay." (Ex. JE2, p. 49) Claimant agreed that she returned to regular duty work in the fall of 2014. (Testimony)

On December 15, 2014, claimant reported to Dr. Nepola that "she still doesn't feel like anything has changed from her original injury and that with certain positions she feels a 'catch'." (Ex. JE2, p. 54) Claimant was continued on lifting restrictions at that time of 15 pounds with the right arm, with her elbow at her side, and 30 pounds with both arms and her elbows at her sides. (Ex. JE2, p. 56)

On December 22, 2014, claimant called the University of Iowa Hospitals and Clinics inquiring about her restrictions. Claimant said that before her previous appointment she had lifting restrictions but that she was working full duty because "she doesn't lift much in her job," and although her lifting restrictions were increased at her last appointment, her employer wanted to put her back on light duty. (Ex. JE2, p. 12) Therefore, claimant asked for a "change in work status to say that she can work fully [sic] duty." (Id.)

On December 24, 2014, Dr. Nepola, through his staff, advised claimant that she could return to full duty work. (Id.) I note that as stated above, claimant had been working her regular job since the fall of 2014.

Claimant stated that after each surgery, she had restrictions of no inmate contact for a time. (Testimony) She confirmed in her testimony that she asked to be returned to full duty work without restrictions because she knew her regular job did not require any lifting. She stated that she hoped she would just be able to figure it out and modify her physical movements to avoid pain. (Testimony)

On February 2, 2015, claimant was still reporting pain of 4-5/10 when she uses it. (Ex. JE2, p. 58) She continued to attend physical therapy at that time and reported that she was not taking any "routine medications for pain." (Id.) Claimant was continued on physical therapy. (Ex. JE2, p. 61) It was confirmed again at that time that claimant "may return to work without restrictions." (Ex. 2, p. 62)

On March 9, 2015, claimant reported that although her job primarily involved watching inmates that are locked in their cells 23 hours per day, she is concerned about losing her job because of a quarterly physical fitness test and a push-up requirement

that she does not believe she can perform. (Ex. JE2, p. 63) However, in the same note, she later stated that she "doesn't for [sic] see a problem keeping her job," but that she feared failing any pre-employment physical that may be required if she ever needed a job in the future. (Id.) Dr. Nepola recommended claimant continue with physical therapy. (Ex. JE2, p. 65)

On May 21, 2015, Dr. Nepola placed claimant at maximum medical improvement (MMI) and he assigned no permanent restrictions. (Ex. JE2, p. 70) However, claimant recalls that Dr. Nepola suggested a third surgery, which claimant described as tightening something in her shoulder, but he was unsure if the procedure would actually fix her shoulder. (Testimony) Claimant stated that she has not followed through with this third surgery because she already had two surgeries without improvement, and Dr. Nepola could offer no certainty of the outcome. (Testimony) Dr. Nepola does state in the medical records that claimant would "most likely need to return to surgical intervention at a later time." (Ex. JE2, p. 70)

8) Medical Opinions re: Permanency

On July 8, 2015, Dr. Nepola assigned a permanent impairment rating of six (6) percent to the whole person based on the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition (AMA Guides), specifically referring to findings of "occult instability" and reduced range of motion and referencing figures 16-26, 16-40, 16-43, 16-46 in the AMA Guides. (Ex. JE2, p. 72) Dr. Nepola also confirms that claimant "was released to work without restrictions." (Id.) He then states that future medical treatment may include "nonsteroidal anti-inflammatory medications, corticosteroid injections, physical therapy, and possibly revision surgery." (Id.)

On January 17, 2017, claimant underwent an independent medical evaluation with William Watson, M.D. of Maple Leaf Orthopedics. (Ex. 1, pp. 1, 3, 13) Claimant only saw Dr. Watson on one occasion. Dr. Watson reviewed claimant's current complaints, her medical history, and was asked to assess claimant's permanent impairment based on the AMA Guides. Dr. Watson noted reduced range of motion and some occult subluxation, and referred to figure 16-26 of the Guides and assigned an eight (8) percent permanent impairment to the whole person. (Ex. 1, p. 12) Dr. Watson affirmatively assigned no permanent restrictions. (Ex. 1, p. 13)

However, on February 16, 2017, Dr. Watson explained that the reason he declined to assign restrictions "even in the face of an impairment rating" was "because the examinee was very concerned that she would lose her job if restrictions were applied." (Ex. 1, p. 15) He then stated that "it is my professional opinion that no permanent restrictions need to be assigned in a mandatory fashion; however, it would not be unreasonable to assign no repetitive overhead activity and no lifting greater than 25 pounds above shoulder height as reasonable restrictions if work conditions and patient's status deemed it necessary." (Id.)

Dr. Watson, whose practice in is Colorado, stated in a deposition that he was familiar with the AMA Guides, he is board certified in orthopedics, and he does about one or two IMEs per week. (Ex. 2, pp. 5-6) He testified that he has evaluated or treated hundreds of shoulder injuries in his career. Dr. Watson obtained his M.D. in 1974 and worked until 1997 in orthopedics doing "sports medicine, total joints and trauma." (Ex. 2, p. 5) However, in 1997 he altered his practice and no longer does surgery, but continues to practice in non-operative orthopedics. (Id.) Dr. Watson was uncertain of the specific nature of claimant's second surgery, as he did not have that particular surgical note. (Ex. 2, p. 21) Nevertheless, he testified that the lack of the operative note did not change claimant's presentation during the examination and would not impact his opinions concerning permanency. (Ex. 2, pp. 12-13) Dr. Watson stated that he would normally have assigned restrictions for a person in claimant's condition of those identified in his February 16, 2017 letter to claimant's counsel, but that he chose not to because claimant was very concerned about losing her job if she had any restrictions . (Ex. 2, pp. 9-10)

I find that but for claimant's request to not have any restrictions, Dr. Watson would have in all likelihood assigned the restrictions identified in his February 16, 2017 letter of no repetitive overhead activity and no lifting greater than 25 pounds above shoulder height. I further find that these restrictions are consistent with claimant's testimony concerning the activity that aggravates her condition and her statements about her ability and that they reasonably represent her functional ability, despite the fact that they have not been formally assigned. I also find that, in keeping with claimant's desire to not have any permanent restrictions, Dr. Watson again stated in his deposition that claimant did not require "mandatory restrictions." (Ex. 2, p. 20)

Concerning claimant's permanent partial disability rating, I accept the rating assigned by Dr. Watson of 8 percent to the whole person. This is based in part on the fact that Dr. Watson's evaluation is much closer in time to the hearing and therefore more likely to be representative of claimant's current condition at the time of the hearing. Although, I note that both Dr. Nepola and Dr. Watson's opinions concerning permanent impairment are relatively similar and both are based on reduced range of motion and occult subluxation.

9) Current Condition/Symptoms

Claimant testified that reaching behind her, pulling in certain directions, reaching out and reaching across her body continue to cause her pain. She stated that she tries to avoid activities that cause her pain and she relies more on the use of her unaffected left arm than she did prior to the work injury. (Testimony)

Claimant testified that outside of work she notices that using her arm for ordinary things, such as: opening doors; throwing a ball; putting a shirt on; brushing her hair; vacuuming; cleaning windows; and, generally just using her arm, she has to do differently because her right shoulder hurts. (Testimony) Claimant is concerned about

her ability to lift and reach with her shoulder and the impact it may have if she would be forced to seek other employment outside of her current type of occupation. (Testimony)

10) Additional Findings

Defendant, after receiving Dr. Nepola's permanent impairment rating of six (6) percent of the whole person, denied payment of any permanent partial disability benefits and communicated that denial to claimant. (Ex. 4, p. 1)

Claimant's last treatment for her right shoulder injury was with Dr. Nepola in May, 2015, more than two (2) years before the hearing in this matter. (Ex. JE2, p. 70)

When claimant returned to work with no restrictions following her surgeries, she returned to the same job, on the same shift, and she continued to work overtime as she had before the work injury. (Testimony) In addition, claimant agreed that her hourly wage was not any less than it was before the work injury. (Testimony) Since being returned to full duty by Dr. Nepola, claimant was never returned to light duty and she did not receive any complaints about her job performance. (Testimony)

Claimant testified that in her new job at the Colorado Department of Corrections, she did not have a wage decrease from her prior employment with defendant employer and she continues to work overtime. In addition, she has had good evaluations, she has not requested any accommodations for her right shoulder and she does the same job as every other correctional officer. (Testimony) Further, she has taken a job as a server in a café and does this job without restrictions or accommodations. She has no intention of leaving her current job. (Testimony)

Considering claimant's young age and potential for rehabilitation, her education and work experience both before and after the work injury, the severity of her injury which required two separate surgeries, her earnings before and after the work injury, along with her functional impairment and all other appropriate considerations for the assessment of industrial disability I find that claimant sustained industrial disability of 15 percent.

CONCLUSIONS OF LAW

1) Extent of Industrial Disability

The first issue is the extent of claimant's industrial disability, if any.

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 Rule of Appellate Procedure 6.14(6).

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, 593; 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. However, consideration must also be given to the injured worker's medical condition before the injury, immediately after the injury and presently; the situs of the injury, its severity, and the length of healing period; the work experience of the injured worker prior to the injury, after the injury, and potential for rehabilitation; the injured workers' qualifications intellectually, emotionally and physically; the worker's earning before and after the injury; the willingness of the employer to re-employ the injured worker after the injury; the worker's age, education, and motivation; and, finally the inability because of the injury to engage in employment for which the worker is best fitted. Thilges v. Snap-On Tools Corp., 528 N.W.2d 614, 616 (Iowa 1995); 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).

There are no weighting guidelines that indicate how each of the factors is to be considered. Neither does a rating of functional impairment directly correlate to a degree of industrial disability to the body as a whole. In other words, there are no formulae which can be applied and then added up to determine the degree of industrial disability. It therefore becomes necessary for the deputy or commissioner to draw upon prior experience as well as general and specialized knowledge to make the finding with regard to degree of industrial disability. See Christensen v. Hagen, Inc., Vol. 1 No. 3 Industrial Commissioner Decisions, 529 (App. March 26, 1985); Peterson v. Truck Haven Cafe, Inc., Vol. 1 No. 3 Industrial Commissioner Decisions, 654 (App. February 28, 1985).

Assessments of industrial disability involve a viewing of loss of earning capacity in terms of the injured workers' present ability to earn in the competitive labor market without regard to any accommodation furnished by one's present employer. Quaker Oats Co. v. Ciha, 552 N.W.2d 143, 158 (Iowa 1996); Thilges v. Snap-On Tools Corp., 528 N.W.2d 614 (Iowa 1995).

Defendant argues that the lack of any formal work restrictions is a significant factor that should lead to the conclusion that claimant has sustained no industrial disability despite the 6 percent permanent impairment rating assigned by the authorized treating physician, Dr. Nepola and the 8 percent rating assigned by claimant's IME physician, Dr. Martin.

Claimant argues that the lack of any permanent restrictions is the product of the treating and evaluating physicians simply following the request of the patient to not assign any restrictions. Claimant testified that she asked both Dr. Nepola and Dr. Watson to not assign any restrictions because she was afraid that permanent restrictions could result in her losing her job. The evidence does indicate that claimant asked Dr. Nepola to return her to full-duty work, and Dr. Watson testified in his

deposition that claimant did not want restrictions because of her fear of losing her job. What is not clear from the evidence is whether Dr. Nepola may have returned claimant to work without restrictions without claimant's request to do so.

Defendant argues that even if the potential restrictions identified by Dr. Watson are considered, claimant would still be able to do her job, suggesting that there remains no industrial disability even if the potential restrictions are accepted.

The potential restrictions discussed by Dr. Watson are based on his years of experience of having evaluated and treated hundreds of shoulder injuries and in consideration of a person in claimant's condition. I have found above that but for claimant's request to not have restrictions that Dr. Watson, based upon his testimony, would have in all likelihood assigned the restrictions identified in his February 16, 2017 letter of no repetitive overhead activity and no lifting greater than 25 pounds above shoulder height and that these restrictions are consistent with claimant's testimony concerning her ability and reasonably represent her functional ability.

Defendant further argues, in support of their position that claimant has sustained no industrial disability, that after claimant was released to return to work, she returned to the same job on the same shift, and did not suffer any hourly wage reduction. Further, claimant sought out and obtained a new job in Colorado and continued to earn the same or more income than when she worked for the defendant employer. Defendant argues that these factors among others should lead the factfinder to conclude that claimant has no industrial disability.

It has been held in the past that an impairment rating does not set an absolute minimum industrial disability amount. Gibson v. ITT Hartford Ins. Co., 621 N.W.2d 388, 398 (Iowa 2001)

I also note that "[t]he commissioner may find there has been a diminution in earning capacity, even when there has not been a diminution in actual earnings." ABF Freight Sys., Inc. v. Veenendaal, No. 11-1862, 2012 WL 1860733, at *4 (Iowa Ct. App. May 23, 3 2012).

Claimant argues that she did sustain industrial disability, stating that: she has undergone two separate surgeries due to the injury; she had a substantial period of recovery; she was found by two separate orthopedic physicians to have permanent impairment under the AMA Guides of 6 percent and 8 percent; and, she has provided unrebutted testimony of her ongoing pain when reaching, pulling and doing overhead activities like putting on a shirt and brushing her hair. Claimant further argues that the lack of permanent restrictions is only due to the physician's accommodation of claimant's request to not assign any restrictions.

The parties seem to agree that claimant's job duties with both the defendant employer and her current employer require little to no lifting. However, claimant testified that she also works part-time as a server/waitress in addition to her full time job, and

she has modified those job duties and no longer lifts and reaches with her right arm in the way that she would have before the work injury.

I conclude that the preponderance of the evidence supports the conclusion that claimant has sustained industrial disability as a result of her work injury of January 22, 2011. I have found above that claimant has sustained a 15 percent industrial disability for the reasons there stated. In support of this conclusion, it is significant to the undersigned that claimant underwent two separate surgeries and was found to have permanent impairment by both of the expert witnesses in this case. Claimant had a significant period of treatment and recovery from the date of the injury on January 22, 2011 until her last treatment with Dr. Nepola in May, 2015 she also provided unrebutted testimony of her ongoing symptoms, including shoulder pain with basic movements of her right arm.

On the other hand, she returned to the same job, at the same pay, found a similar job in the competitive labor market and continued to work without accommodations and has received no complaints concerning her job performance.

2) Penalty

The second issue to be determined is whether claimant is entitled to penalty benefits for defendant's failure to pay any permanent partial disability benefits.

Iowa Code section 86.13(4) provides that:

> (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, of chapter 85, 84A, or 85B, up to fifty percent of the amount of benefits that were denied, delayed or terminated without reasonable or probable cause or excuse.
>
> (b) The workers' compensation commissioner shall award benefits under this subsection if the commissioner finds both of the following facts:
>
> (1) The employee has demonstrated a denial, delay in payment, or termination of benefits.
>
> (2) The employer has failed to prove a reasonable or probable cause or excuse for the denial, delay in payment, or termination of benefits.
>
> (c) In order to be considered a reasonable or probable cause or excuse under paragraph "b", an excuse shall satisfy all 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, section 86.13 requires that additional benefits be awarded unless the employer shows reasonable cause or excuse for the delay or denial. Weekly compensation payments are due at the end of the compensation week. Robbennolt v. Snap-on Tools Corp., 555 N.W.2d 229, 235 (Iowa 1996).

Delay attributable to the time required to perform a reasonable investigation is not unreasonable. Kiesecker v. Webster City Meats, Inc., 528 N.W.2d 109 (Iowa 1995).

It is 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).

The fact that defendant paid no permanency benefits is not in dispute. I have found above that claimant is entitled to 15 percent industrial disability. I therefore conclude that claimant has shown a denial of permanent partial disability benefits has occurred.

The question becomes whether defendant had a reasonable or probable cause or excuse at the time of the denial.

On May 21, 2015, the authorized treating physician, Dr. Nepola, placed claimant at MMI. Defendant reasonably sought and obtained a written opinion from Dr. Nepola dated July 8, 2015, which assigned no permanent restrictions. (Ex. JE2, pp. 72-73) About a week later, defendant communicated to claimant their denial of permanent

partial disability benefits in a letter to claimant's counsel dated July 15, 2015. The basis for defendant's denial of permanent partial disability benefits was stated as: "Ms. Arellanes has returned to work without restrictions and no loss of earning capacity demonstrated, therefore no PPD will be volunteered." (Ex. 4, p. 1) At that time, claimant had been back working her regular job since on or before December 22, 2014, working her regular shift with no restrictions or accommodations and no reduction in her wage. (Ex. 4, p. 1) Defendant relies on Keystone Nursing Care Center v. Craddock, 705 N.W.2d 299 (Iowa 2005) to support their argument that they acted reasonably in accepting the physician's release to return to work at face value and that their conclusion that claimant's entitlement to industrial disability was fairly debatable. In Craddock claimant was returned to work after low back surgery with a seven percent permanent impairment rating and no restrictions, but claimant testified that she was told by the treating surgeon to avoid bathing the nursing home residents. The Iowa Supreme Court found the employer had a reasonable basis to conclude that the claimant had not sustained industrial disability based significantly on the physician's release of claimant to return to work without restrictions.

Claimant argues that the medical record supports a conclusion that claimant continued to have physical limitations associated with her right shoulder regardless of Dr. Nepola's release to return to work without restrictions, such as her complaints about having pain when "reaching behind her, pulling up or backwards, reaching across her body." (Ex. JE2, pp. 63-64)

The concept that payment of the impairment rating in industrial cases is a floor below which penalties are due has been rejected by this agency. Parrish v. Hawkeye Wood Shavings, Inc., File Nos. 1273196, 1302565 (App. November 5, 2002). As noted above, the Iowa Supreme Court has held that an impairment rating does not set an absolute floor for minimum industrial disability. Gibson v. ITT Hartford Ins. Co., 621 N.W.2d 388, 398 (Iowa 2001).

Although claimant makes reasonable arguments for the assessment of penalty, and this is a close call, I conclude that defendants did not act unreasonably in their denial of permanency benefits, and they reasonably relied upon the opinion of Dr. Nepola when he returned claimant to work with no restrictions. This combined with the other information available to defendant at the time, including her successful return to work with no accommodations, restrictions or complaints concerning her performance supports a denial of penalty benefits in this case. I also note the significance of claimant's ability to compete in the competitive labor market and obtain similar employment with no identifiable wage loss and Dr. Watson's IME report which also does not contain any formal work restrictions as support for a denial of penalty in this case.

Assessment of costs is a discretionary function of this agency. Iowa Code section 86.40. Costs are to be assessed at the discretion of the deputy commissioner or workers' compensation commissioner hearing the case. 876 IAC 4.33. I conclude that claimant was successful in this claim and therefore exercise my discretion and

assess costs against the defendant in this matter in the sum of $100.00 representing the filing fee.

ORDER

IT IS THEREFORE ORDERED:

Defendant shall pay claimant industrial disability benefits of seventy five (75) weeks, beginning on the stipulated commencement date of May 22, 2015, until all benefits are paid in full.

Defendant shall be entitled to credit for all weekly benefits paid to date, if any.

All weekly benefits shall be paid at the stipulated rate of five hundred four and 17/100 dollars ($504.17) per week.

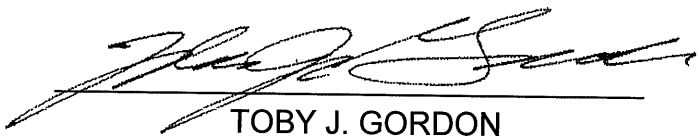
All accrued benefits shall be paid in a lump sum.

Defendant shall pay interest on any accrued weekly benefits pursuant to Iowa Code section 85.30.

Defendant shall reimburse claimant for costs of one hundred and 00/100 dollars ($100.00).

Defendant 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 29th day of January, 2018.



TOBY J. GORDON
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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TJG/sam

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.