BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

KENNETH SMITH, Claimant, vs. H.D. SUPPLY MANAGEMENT, INC., Employer, and NEW HAMPSHIRE INSURANCE COMPANY, Insurance Carrier, Defendants.	:	File No. 20006595.02 ARBITRATION DECISION Head Note Nos.: 1108, 1402.30, 1402.40, 1802, 1803, 1803.1, 1804, 1808, 2206, 2601.10, 2902, 3002, 4000.2

STATEMENT OF THE CASE

Claimant Kenneth Smith filed a petition in arbitration seeking worker's compensation benefits against H.D. Supply Management, Inc., employer, and New Hampshire Insurance Company, insurer, for an alleged work injury date of June 4, 2020. The case came before the undersigned for an arbitration hearing on June 14, 2022. This case was scheduled to be an in-person hearing occurring in Des Moines. However, due to the outbreak of a pandemic in Iowa, the Iowa Workers' Compensation Commissioner ordered all hearings to occur via internet-based video. Accordingly, this case proceeded to a live video hearing via Zoom, with all parties and the court reporter appearing remotely. The hearing proceeded without significant difficulties.

The parties filed a hearing report prior to the commencement of the hearing. On the hearing report, 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 6, Claimant's Exhibits 1 through 8, and Defendants' Exhibits B through E.[1]

[1] Defendants withdrew Exhibit A prior to hearing due to it being inadmissible in this case. (Hearing Transcript, p. 12)

Claimant testified on his own behalf. The evidentiary record closed at the conclusion of the evidentiary hearing on June 14, 2022. The parties submitted post-hearing briefs on July 25, 2022, and the case was considered fully submitted on that date.

ISSUES

1. Whether claimant sustained an injury arising out of and in the course of his employment on June 4, 2020;
2. If so, whether the injury caused any temporary disability and/or healing period;
3. Whether the alleged injury resulted in any permanent disability;
4. If so, the nature and extent of permanent disability, including permanent total disability;
5. The proper rate of compensation;
6. Whether claimant is entitled to payment of medical expenses;
7. Whether claimant is entitled to payment of his independent medical examination under Iowa Code section 85.39;
8. Whether claimant is entitled to alternate medical care under Iowa Code section 85.27;
9. Whether claimant is entitled to penalty benefits pursuant to Iowa Code section 86.13; and
10. Taxation of costs.

FINDINGS OF FACT

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

Claimant's testimony was consistent as compared to the evidentiary record, and his demeanor at the time of hearing gave the undersigned no reason to doubt his veracity. His answers were concise and he was a good historian. Claimant is found credible.

At the time of hearing, claimant was a 66-year-old person. (Hearing Transcript, p. 21) He is a high school graduate. (Tr., p. 22) While he did not pursue any formal education beyond high school, he has at times been certified or trained to operate a forklift, overhead crane, and other types of trucks he has driven for work. He does not have a commercial drivers' license but does possess a class D chauffer's license.

From 1981 until 1993, claimant worked at Marion Iron Company. (Tr., p. 24) He ran the steel department, which involved unloading steel trucks, gathering steel and cutting it to size for orders, and loading the steel into customers' vehicles. The job required a lot of heavy lifting. After leaving Marion Iron, claimant worked at Cedar Rapids, Inc. until approximately 2000. (Tr., pp. 24-25) His job was material handler, and it involved lifting steel products to a pallet to take to an assembly area. (Tr., p. 25) This

job also involved a lot of heavy lifting. Claimant next worked at P & D Welding, from approximately 2000 until 2015. (Tr., pp. 25-26) His job there consisted of cleaning and painting product, and he also worked as a delivery driver. (Tr., p. 26) Again, the job involved heavy lifting, up to 80 or 90 pounds. That job ended when claimant was laid off.

On February 1, 2016, claimant began working for H.D. Supply, the defendant employer. (Tr., p. 27) When he first started, he worked as a driver/warehouse associate. (Tr., p. 29) His job duties involved getting orders ready for delivery, loading the truck, and then making the deliveries. (Tr., pp. 29-30) Claimant did that job for about a year and then moved inside as a warehouse associate. (Tr., p. 30) In that position his responsibilities included unloading product from trucks and stocking shelves in the store, as well as preparing orders to be shipped out of the store. After doing that job for about a year and a half, the lead position came open, and he was promoted to lead. His job duties stayed the same, with the added responsibilities of entering the inventory into the computer system, as well as training new and temporary employees. (Tr., pp. 30-31)

At H.D. Supply, claimant was a full-time, hourly employee. (Tr., p. 27) He was paid biweekly, and received quarterly bonuses based on sales. He testified that it was routine to receive a quarterly bonus, although the amount varied over the year as business was generally better during the summer months. (Tr., pp. 27-28) On the date of injury, claimant was making $19.80 per hour. (Tr., p. 31)

Prior to the date of injury, claimant did not have any pain or other problems effecting his right arm or shoulder. (Tr., p. 31) He did not have any work restrictions, and was able to perform all of his job duties with no difficulties. On June 4, 2020, claimant had just finished unloading a truck, and had a pallet of rebar chairs on a fork truck. (Tr., pp. 31-32) The pallet was seven to seven-and-a-half feet high, and claimant had to cut the wrapping off to unload the chairs. (Tr., p. 32) Claimant testified that he was reaching up as high as he could and reaching out toward the middle of the pallet with a box cutter, when he experienced a sudden severe pain in his right shoulder, “like somebody had stuck a needle in there.” (Tr., p. 32) The pain was so severe he dropped to his knees. He also said he heard a pop when the pain occurred.

Claimant immediately reported the injury to his manager, who called human resources for direction. Claimant was told to go to an urgent care clinic in North Liberty, but was not able to get an appointment until later in the day. (Tr., pp. 32-33) Claimant told his manager he could not wait that long as his pain was too excruciating, so he was told to go to the emergency room. (Tr., p. 33)

At the emergency room, claimant reported sudden acute pain in his right shoulder when he reached up to cut the plastic off a pallet. (Joint Exhibit 2, p. 1) He had limited range of motion since that time. He denied any previous pain or problems with his right shoulder. X-ray showed advanced osteoarthritis, and claimant was given medication and a referral to orthopedics due to concern for a rotator cuff or other ligamentous injury. (Jt. Ex. 2, p. 4) He was also given an arm sling and sent for physical therapy.

Claimant was referred to Daniel Fabiano, M.D., who he saw on June 11, 2020. (Jt. Ex. 3, p. 1) Dr. Fabiano noted claimant complained of right shoulder pain after a work injury one week prior, with "no pain prior to either shoulder." Claimant complained of pain with all activities. On physical examination, claimant's range of motion was limited by pain. (Jt. Ex. 3, p. 2) Dr. Fabiano noted severe degenerative joint disease (DJD) on the emergency room X-ray, and his impression was primary osteoarthritis. He discussed total shoulder arthroscopy (TSA). He ordered an MRI and CT, and took claimant off work and restricted claimant to no use of his right arm until after his next appointment. (Jt. Ex. 3, pp. 3-4)

Claimant returned to Dr. Fabiano on June 25, 2020. (Jt. Ex. 3, p. 5) His condition had not changed. (Jt. Ex. 3, pp. 5-6) Dr. Fabiano again ordered an MRI and CT "with blueprint", and discussed TSA versus reverse TSA if claimant's condition did not improve. (Jt. Ex. 3, pp. 6, 8) He kept claimant off work. (Jt. Ex. 3, p. 7)

Claimant had the right shoulder MRI on July 2, 2020. (Jt. Ex. 1, p. 2) The radiologist's impression was severe osteoarthritis of the glenohumeral joint with marked chondral loss; mild distal supraspinatus tendinosis; partial-thickness tear of the cranial fibers of the subscapularis tendon; tenosynovitis of the long head of the biceps tendon; small glenohumeral joint effusion with mild synovitis; and a nonspecific cystic-appearing mass within the soft tissues posterior to the deltoid muscle. (Jt. Ex. 1, p. 3) Claimant also had the CT of the right shoulder that day with preoperative blueprint, which showed severe right glenohumeral osteoarthritis. (Jt. Ex. 1, pp. 4-5)

Claimant returned to Dr. Fabiano on July 24, 2020. (Jt. Ex. 3, p. 10) Dr. Fabiano reviewed the MRI and CT blueprint, and determined claimant was a candidate for a total shoulder replacement. (Jt. Ex. 3, p. 11) His note indicates he explained to claimant that the purpose of shoulder replacement is for pain relief and not to improve motion. He also explained the difference between hemiarthroplasties and total shoulder arthroplasties, and that an intraoperative decision would be made as to which he would have.

Claimant agreed to surgery, which was quickly authorized and scheduled for the end of August. (Jt. Ex. 3, p. 13; Tr., p. 34) However, at his preoperative screening, he was found to have Hepatitis C, which would need to be treated prior to surgery. (Jt. Ex. 3, pp. 14-19) As such, his surgery was cancelled until his treatment could be completed. (Jt. Ex. 3, p. 20) Claimant testified that he was first told he had Hepatitis C in 2016, but at that time his doctor did not recommend any medication or treatment. (Tr., p. 35) However, in order to be cleared for surgery, the Hepatitis C had to be treated, so claimant had to take medication for three months. (Tr., p. 35; Claimant's Exhibit 1, p. 16)

Claimant called Dr. Fabiano's office on March 22, 2021, indicating that his blood test the prior week was clear of Hepatitis, and he was ready for surgery. (Tr., p. 36; Jt. Ex. 3, p. 24) Dr. Fabiano's office sent the authorization form for the surgery to the workers' compensation insurer on March 24, 2021. (Jt. Ex. 3, p. 25) On March 30, 2021, prior counsel for defendants wrote a letter to Dr. Fabiano with a series of questions,

which he answered on April 6, 2021. (Jt. Ex. 3, pp. 26-27) Dr. Fabiano had not seen claimant since his last visit on July 24, 2020, and did not see him again prior to addressing the questions. (Tr., p. 35)

The letter provided a short description of the work incident that occurred on June 4, 2020. (Jt. Ex. 3, p. 26) It states that claimant was "reaching up on a pallet cutting the plastic when he alleges he felt a pop in his right shoulder." The letter then asked Dr. Fabiano to state the diagnoses he would assign to claimant's current complaints to his right shoulder. Dr. Fabiano responded "osteoarthritis [right] shoulder." The second question asks whether any of claimant's current medical conditions are "causally related to any preexisting injury or condition, including any idiopathic or personal health conditions." Dr. Fabiano wrote "yes DJD."

The third question is actually two questions. It states:

> Of the diagnoses stated above, which of these, if any, are causally related to his (claimant's) work accident of June 4, 2020? Did the June 4, 2020 accident cause a temporary or permanent injury?

Dr. Fabiano's handwritten response was as follows: "IDK aggravated preexisting DJD." [2]

The fourth question asked whether claimant required any further reasonable and necessary medical treatment "for injuries sustained in his work accident of June 4, 2020." It further asked the doctor to explain, and "specifically address whether the surgery recommended is necessary as a result of his work accident or due to a preexisting condition." (Jt. Ex. 3, pp. 26-27) Dr. Fabiano wrote on the first page of the letter, "Needs TSA due to DJD." (Jt. Ex. 3, p. 26) On page 2 of the letter, which contains the second part of the question, he wrote "IDK." (Jt. Ex. 3, p. 27)

Questions five and six ask whether claimant had reached maximum medical improvement (MMI), and whether there was any permanent impairment for any condition identified as being "permanently aggravated by and/or causally related to" the work accident. Dr. Fabiano replied "N/A" to both questions. Question seven asked about permanent restrictions, and Dr. Fabiano wrote "limited use as dictated by pain." Finally, the last quest asked Dr. Fabiano to provide, if he did not find claimant at MMI, the anticipated timeframe for MMI and claimant's temporary restrictions, if any. To this, Dr. Fabiano replied "IDK." (Jt. Ex. 3, p. 27)

After receiving Dr. Fabiano's responses to the letter from defense counsel, defendants denied any additional treatment for claimant's shoulder injury. (Tr., p. 36; Jt.

[2] "IDK" appears to be an abbreviation for "I don't know." This seems to be confirmed by a nurses' note dated April 8, 2021, documenting a telephone encounter with defense counsel's office asking about the abbreviation. (Jt. Ex. 3, p. 28) The note indicates a correction was made and sent but the corrected version is not in evidence.

Ex. 3, p. 29) Defendants also discontinued temporary total disability benefits, which claimant had been receiving since the date of injury. (Tr., p. 39) [3]

Dr. Fabiano's responses to the questions posed in the March 30, 2021 letter are unclear, and did not provide a reasonable basis on which defendants could terminate benefits. First, the fact that he answered several questions by indicating he did not know the answer, means that defendants at the very least had a duty to investigate further prior to denying the claim. A doctor's uncertainty regarding causation is not sufficient grounds to deny the claim. Second, Dr. Fabiano did write "aggravated preexisting DJD" as his answer to whether the work accident caused a temporary or permanent injury. While that does not directly answer the question, it does show that Dr. Fabiano thought the work injury at least aggravated the preexisting condition to some extent. A reasonable investigation would have included defendants following up with Dr. Fabiano and seeking clarification prior to denying claimant's claim. Instead, defendants relied on this admittedly unclear letter and denied the claim within days of receiving the response. (Jt. Ex. 3, p. 29) At hearing, when responding to an objection to Defendants' Exhibit E, page 1, defense counsel admitted that Dr. Fabiano's initial opinion regarding causation was not clear. (Tr., p. 14) Again in their brief, defendants admit that Dr. Fabiano's initial opinion was "confusing," and "the clarifying opinion was absolutely necessary to understand Dr. Fabiano's opinion on causation." (Def. Brief, p. 6) However, defendants did not seek that "clarifying opinion" until over a year later, as discussed further below. (Def. Ex. E, p. 1) Instead, defendants relied on the initial unclear opinion to deny claimant's claim, and terminate benefits. I find that defendants did not have a reasonable basis on which to terminate benefits.

Following the denial, claimant asked to see another provider at the same clinic, David Hart, M.D., using his personal insurance. (Tr., pp. 36-37; Jt. Ex. 3, p. 30) His first appointment with Dr. Hart was June 11, 2021. (Jt. Ex. 3, p. 31) Dr. Hart noted claimant's history, including claimant's complete lack of shoulder pain until the work injury on June 4, 2020. He also noted that following the denial of claimant's surgery, he tried over-the-counter pain medications, which provided no relief. At the time of Dr. Hart's appointment, claimant reported his shoulder pain was worse, and he could not lift his arm at all. He could not play golf, and any exercise seemed to make it worse. He was having increased difficulty with range of motion, and difficulty sleeping. He wanted to proceed with surgery using his private insurance.

Dr. Hart reviewed images of the shoulder taken that day, and noted bone-on-bone glenohumeral joint space narrowing with subchondral sclerosis and inferior humeral head osteophyte. (Jt. Ex. 3, p. 32) The acromiohumeral distance was preserved, but at least mild to moderate glenoid retroversion was present. Dr. Hart's impression was end stage osteoarthritis. He recommended proceeding with the right total shoulder arthroplasty. His plan was to evaluate the rotator cuff intraoperatively and

[3] Per the parties' stipulation, defendants paid 46 weeks of temporary benefits, totaling $24,051.24. (See hearing report; Defendants' Exhibit C, p. 1)

then make the decision whether to proceed with an anatomic versus reverse shoulder replacement.

Claimant had an anatomic total shoulder arthroplasty on July 8, 2021. (Jt. Ex. 3, p. 34) [4] As part of the procedure, a biceps tenodesis was also performed. (Jt. Ex. 3, p. 35) Claimant's first follow-up after surgery took place on July 23, 2021, at which time he reported doing well with good pain relief. (Jt. Ex. 3, p. 36) Claimant attended physical therapy and had regular follow-up appointments with Dr. Hart, and noted excellent pain relief following the surgery. (Jt. Ex. 3, pp. 37- 39) On September 10, 2021, claimant was provided a return to work sheet indicating he was released to return to work on September 20, 2021, with restrictions of keeping his arm at his side; unilateral lifting up to 10 pounds; bilateral floor to waist lift up to 30 pounds, and no overhead work. (Jt. Ex. 3, pp. 40-41) The return to work sheet notes the restrictions apply 24 hours a day. (Jt. Ex. 3, p. 41)

Claimant testified that shortly after receiving these restrictions, he was fired from his employment as there was no work available within his restrictions. (Tr., pp. 28-29) Claimant testified he even offered to move to a different store in a different city if there was work available within his restrictions, but nothing was found. (Tr., pp. 40-41) Claimant testified at his deposition that he had no immediate plans to retire. (Cl. Ex. 3, p. 13; Deposition Transcript, p. 43) This is consistent with the physical therapy records, in which he expresses a desire to return to work and continue working for at least four more years. (See Jt. Ex. 6)

Claimant testified that he has also applied for other jobs since he was released from Dr. Hart's care, at places such as FedEx, UPS, and the US Postal Service. (Tr., p. 41) He has not been offered a job because he does not meet the lifting requirements. He was also tentatively offered a job from his former employer at Marion Iron, doing part-time office work. However, the offer was rescinded after the company owners discussed his restrictions with their insurance company. (Tr., pp. 41-42) Claimant has also searched for jobs driving a delivery van, as he has a chauffer's license, but has not found any that do not require loading and unloading. (Tr., p. 42) I find claimant was motivated to return to work.

After his termination from employment, claimant was approved for Social Security Disability benefits, dating back to December 2020. (Cl. Ex. 4) He returned to Dr. Hart on November 3, 2021, who noted he was improving and had been discharged from physical therapy. (Jt. Ex. 3, p. 42) Dr. Hart advised claimant to continue with his home exercise program on a semi-regular basis. He noted that he did not specifically address return to work issues, as claimant had been granted Social Security disability. Claimant testified, however, that Dr. Hart did not change his restrictions at that visit, and claimant considers them to be permanent restrictions. (Tr., p. 38)

[4] The operative report references a reverse total shoulder arthroplasty, but later records note an anatomical TSA, and Dr. Taylor's report also notes the procedure was not a reverse TSA. (See Jt. Ex. 3, p. 36, 38, 42; Cl. Ex. 1, p. 22)

Claimant attended an independent medical evaluation (IME) with Mark Taylor, M.D., on March 1, 2022. (Cl. Ex. 1, p. 14) Dr. Taylor's report is dated March 28, 2022. Dr. Taylor reviewed the medical records and went over the details of the work incident with claimant. (Cl. Ex. 1, pp. 14-17) At the time of the IME, claimant reported that he continued to have low-level, constant pain, which increases with activity. (Cl. Ex. 1, p. 18) Claimant told Dr. Taylor he tries to limit his activities and protect the shoulder so his pain does not reach the higher levels. The pain increases if he tries to lift, push, or pull objects that are heavier. Any lifting over chest level causes problems. At times he hears and feels a clicking sound in his right shoulder. He has some trouble sleeping, as he is used to sleeping on his right side and now that causes him to wake up with numbness in the right arm and hand. He completed a pain diagram, which asked him to shade the areas of the body where he felt different types of pain. (Cl. Ex. 1, p. 26) On the diagram, he marked aching and stabbing pain, pins and needles, and burning sensations in the right shoulder, and numbness all the way down the right arm from the shoulder to his fingers. The complaints claimant expressed to Dr. Taylor are consistent with his testimony regarding his status at the time of hearing. (Tr., pp. 45-52)

Dr. Taylor further noted that prior to the work injury, claimant had no history of right shoulder pain or problems, and his right shoulder was asymptomatic and he required no restrictions or limitations on his activities. (Cl. Ex. 1, p. 19) He noted claimant enjoyed golfing and throwing a baseball or football, but at the time of his IME he had not tried those activities. He enjoys fishing but has to cast underhanded. He is able to ride a bicycle, but has to stop and rest due to pain in his right shoulder. He can still complete some tasks around the house, but there are other activities he cannot complete. Again, this is consistent with claimant's testimony at hearing. (Tr., pp. 43-47)

On physical examination, Dr. Taylor found asymmetry of the right bicep compared to the left, which he stated was likely related to the tenodesis procedure that was required on the long head of the biceps tendon. (Cl. Ex. 1, p. 19) He noted evidence of atrophy of the supraspinatus on the right compared to the left. On palpation, claimant had tenderness over the right AC joint and anterior glenohumeral area. (Cl. Ex. 1, p. 20) He had mild tenderness inferior to the lateral tip of the acromion, and tenderness over the posterior glenohumeral area and upper lateral portion of the pectoralis region.

Dr. Taylor noted that claimant had good strength throughout his left shoulder and arm, but on the right side, he demonstrated slight to mild glenohumeral weakness. He noted it was difficult to fully assess due to claimant's pain. Claimant also demonstrated mild weakness of supination on the right compared to the left, which was "checked on several occasions," and complained of paresthesias extending into the hand with Tinel's testing over the right median nerve. (Cl. Ex. 1, p. 20)

Dr. Taylor diagnosed "right shoulder injury with partial-thickness subscapularis tear, supraspinatus tendinosis, bicep tenosynovitis, glenohumeral effusion, mild synovitis, and severe glenohumeral osteoarthrosis with marked chondral loss." With respect to causation, Dr. Taylor noted that claimant denied prior right shoulder pain or

problems, which was supported by the medical records. He reported a "very acute onset" of pain when the injury occurred. He presented to the emergency room and Dr. Fabiano, and imaging revealed severe arthritic changes. Surgery was recommended. In light of the severity of the arthritis on the x-ray on the day of injury, it was evident that the arthritic changes pre-existed the work injury. (Cl. Ex. 1, pp. 20-21) However, claimant was not previously symptomatic. After the injury, claimant developed severe symptoms and was unable to return to his asymptomatic baseline. (Cl. Ex. 1, p. 21) Additionally, Dr. Taylor noted that Dr. Fabiano appears to have also opined there was an aggravation of claimant's preexisting arthritis. Based on all of those factors, Dr. Taylor opined that claimant's injury "lit-up" a previously asymptomatic condition. (Cl. Ex. 1, pp. 20-21)

Dr. Taylor further opined that all of the treatment claimant received for his right shoulder was reasonable, necessary, and causally connected to the work injury. (Cl. Ex. 1, p. 21) With respect to his treatment for Hepatitis C prior to surgery, Dr. Taylor indicated he would defer to the treating surgeon and the doctor who treated the Hepatitis as to whether the treatment was reasonable and necessary prior to surgery. However, he did note some medical literature that indicates some increased risk of various complications in patients with Hepatitis C following shoulder replacement surgery.

With respect to the surgery, Dr. Taylor noted that claimant underwent a total shoulder arthroplasty, not a reverse total shoulder arthroplasty. (Cl. Ex. 1, p. 22) He explained that a versa-dial humeral head was used on the humerus and the polyethylene glenoid component was affixed on the glenoid side of the joint. Dr. Hart used a deltopectoral approach, and a bicep tenodesis was performed, which included excising the intra-articular portion of the long head bicep tendon, along with the labrum. The glenoid was excised and a guide pin was inserted into the center of the glenoid vault. Reaming was performed, and three peripheral holes were drilled, and the glenoid component was affixed into place. On the humeral side of the glenohumeral joint, humeral retractors were used and final hardware was placed, after which the rotator cuff interval was reapproximated and bone sutures were used to repair the subscapularis and anterior capsule.

Dr. Taylor opined that claimant reached MMI at the time of his last appointment with Dr. Hart on November 3, 2021. With respect to permanent impairment, using the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, he assigned 5 percent upper extremity impairment related to decrements in range of motion. (Cl. Ex. 1, p. 22) For the total shoulder arthroplasty, he assigned 24 percent upper extremity impairment. He noted a mild decrease in supination strength on the right arm compared to the left, which was checked on several occasions. (Cl. Ex. 1, p. 23) Dr. Taylor opined this was presumably related to the tenodesis portion of the surgery. He also noted claimant demonstrated visual asymmetry of the right bicep compared to the left, and mild weakness of supination compared to the left. As such, he further assigned 2 percent of the right upper extremity related to the decrease in supination strength, pursuant to Table 16-35. Combining the values, Dr. Taylor provided a total rating of 29

percent of the right upper extremity, which is equal to 17 percent of the whole person. (Cl. Ex. 1, p. 23)

Dr. Taylor noted that the surgery required placement of hardware on both sides of the glenohumeral joint, and the rating related to the tenodesis would likely be considered distal to the glenohumeral joint. He did not find any tenderness over claimant's trapezius or periscapular area, and the injury did not affect his cervical spine or back. He demonstrated mild tenderness associated with the upper and outer portion of his pectoralis, but no additional rating applied.

With respect to restrictions, Dr. Taylor opined that claimant should continue with the ten-pound lifting limit with the right arm, no more than thirty pounds with both arms, up to waist level, and avoiding overhead tasks with the right side. He also recommended lifting activities be performed with his right arm as close to his body as possible, and avoiding movements outside his available range of motion. He recommended claimant avoid forceful pushing and pulling with the right arm. (Cl. Ex. 1, p. 23) Finally, he recommended claimant avoid crawling and recommended rare use of stepladders, related to his diminished motion and difficulties extending the arm away from his body. (Cl. Ex. 1, p. 24)

Dr. Taylor also included anatomical consideration in his report. (Cl. Ex. 1, p. 24) He noted that a deltopectoral approach was used for claimant's total shoulder arthroplasty, and in his case a tenodesis of the long head of the bicep tendon was also performed. Given the nature of the surgery, "anatomical structures were impacted on both sides of the glenohumeral joint." Dr. Taylor included a comment from the Iowa District Court as well: "It should be remembered that medical terminology used to describe an area of the body is not always compatible with statutory terminology used to describe the same area of the body."

On April 27, 2022, more than a year after denying the claim, defense counsel wrote another letter to Dr. Fabiano. (Def. Ex. E, p. 1) The letter states: "During an appointment with you on March 30, 2021, you stated that Mr. Smith's right shoulder osteoarthritis was related to preexisting DJD, and then you wrote, 'Causally related to work incident – I don't know – aggravated preexisting condition DJD.'" The letter then notes that a copy of Dr. Taylor's IME was included, and that Dr. Taylor causally related claimant's shoulder symptoms and subsequent treatment, including the shoulder replacement, to the work injury. The letter then asks: "What is your diagnosis of Mr. Smith's right shoulder?" Dr. Fabiano's handwritten response states "osteoarthritis." The next question states: "Is Mr. Smith's right shoulder condition related to his June 4, 2020 alleged work injury." Dr. Fabiano's handwritten response states "No." The letter is then signed by what appears to be Dr. Fabiano's signature, and dated May 17, 2022.

The second letter to Dr. Fabiano is nearly as problematic as the first. The letter states that claimant had an appointment with Dr. Fabiano on March 30, 2021, which is incorrect. Dr. Fabiano had not seen claimant since his last visit on July 24, 2020. (Tr., p. 35; Jt. Ex. 3, p. 10). Second, the letter is incomplete. The exact questions asked are

what Dr. Fabiano's diagnosis is, and whether that diagnosis is related to the work injury. (Def. Ex. E, p. 1) The letter does not ask Dr. Fabiano whether the work injury aggravated that condition. Considering Dr. Fabiano previously stated that it did aggravate his preexisting condition, the lack of explanation regarding his change in opinion is concerning. Again, the brief letter and absence of additional questions regarding aggravation of claimant's condition shows a lack of reasonable investigation on defendants' behalf.

The overwhelming evidence in this case proves that claimant sustained an injury arising out of and in the course of his employment on June 4, 2020. Every medical provider who saw claimant documented his previous lack of right shoulder pain prior to the work injury. (See Jt. Ex. 2, p. 1; Jt. Ex. 3, pp. 1, 30; Cl. Ex. 1) Dr. Fabiano's opinion, while unclear on most issues, specifically states "aggravated preexisting DJD." (Jt. Ex. 3, p. 26) Additionally, Dr. Taylor provided a detailed, well-reasoned opinion that is supported by the other medical records and testimony in evidence. I find that claimant's injury is compensable.

Additionally, I find that defendants' termination of benefits in April 2021 and ongoing denial of the claim thereafter was unreasonable. There does not appear to have been a question regarding liability until late March, 2021, after claimant completed his treatment for Hepatitis C and tried to reschedule the surgery. It was not until after receiving Dr. Fabiano's response to defense counsel's March 30, 2021 letter that defendants decided to deny the claim. (See Jt. Ex. 3, pp. 26-29) However, Dr. Fabiano's letter was not clear regarding causation. Defendants' lack of follow up and clarification prior to denial was not reasonable. Defendants did not conduct a reasonable investigation into whether benefits were owed prior to terminating benefits and denying the claim. Claimant is entitled to penalty benefits.

With respect to the nature and extent of disability, claimant has alleged that he sustained an injury to both his shoulder and his arm arising out of the same incident, such that Iowa Code section 85.34(2)(v) applies. Defendants contend the injury, if compensable, is to the shoulder alone, and should be compensated as a scheduled shoulder injury under Iowa Code section 85.34(2)(n). Dr. Taylor provided an impairment rating that includes specific impairment related to the shoulder, as well as for loss of right arm supination strength. (Cl. Ex. 1, p. 23) The table that Dr. Taylor referenced in assigning that portion of the rating specifically notes that arm supination relates to the elbow joint, not the shoulder. (AMA Guides, Table 16-35, p. 510) Dr. Taylor's rating is the only rating in evidence, and I have found it credible. Claimant has proven that he sustained an injury to both his shoulder and his arm, meaning section 85.34(2)(v) applies.

Additionally, claimant testified regarding the issues he has with both his shoulder and his arm. Prior to the work injury, claimant enjoyed bowling. However, he cannot bowl any longer because his ball weighs 15 pounds, and he is restricted to 10 pounds

with his right arm, and he does not believe he can swing his arm with the ball. [5] (Tr., p. 43) He also enjoys fishing, but since the injury he must cast his line underhanded. He enjoys playing with his grandchildren, but must modify how he does certain things like throwing a ball, in order to keep his arm close to his body. (Tr., pp. 43-44) Other activities that involve lifting or carrying, such as carrying groceries or pouring from a full gallon of milk, cause pain in his shoulder and tightness in his arm down to his bicep area. (Tr., pp. 45-46) He also gets weakness in his arm through his bicep down to his forearm. (Tr. p. 47) Claimant's disability is not limited to his shoulder, but extends into his arm as well.

With respect to permanent disability, claimant has alleged he is permanently and totally disabled. While he mentions odd-lot in his brief, claimant did not plead odd-lot or allege it on the hearing report. That being said, the odd-lot theory of permanent disability is not necessary in this case, as I find claimant is permanently and totally disabled based on traditional standards.

Claimant was 66-years old at the time of hearing, and has a high school education. All of his prior employment has involved heavy lifting. His permanent restrictions prevent him from lifting more than 10-pounds with his right arm, or 30-pounds with both arms, and he is to avoid overhead work. His employer could not accommodate his restrictions, even when he offered to move to a different store in a different city. Claimant has been unable to find work elsewhere, despite his efforts and motivation. He has been found permanently disabled by the Social Security Administration. He had not planned to retire for at least four more years. Based on all of the factors, I find claimant is entitled to permanent totally disability benefits as a result of the injuries to his shoulder and arm on June 4, 2020.

CONCLUSIONS OF LAW

The party who would suffer loss if an issue were not established ordinarily has the burden of proving that issue by a preponderance of the evidence. Iowa R. App. P. 6.904(3)(e). The claimant has the burden of proving by a preponderance of the evidence that the alleged injury actually occurred and that it both arose out of and in the course of the employment. Quaker Oats Co. v. Ciha, 552 N.W.2d 143, 150 (Iowa 1996); Miedema v. Dial Corp., 551 N.W.2d 309, 311 (Iowa 1996). The words "arising out of" refer to the cause or source of the injury. The words "in the course of" refer to the time, place, and circumstances of the injury. 2800 Corp. v. Fernandez, 528 N.W.2d 124, 128 (Iowa 1995). An injury arises out of the employment when a causal relationship exists between the injury and the employment. Miedema, 551 N.W.2d at 311. The injury must be a rational consequence of a hazard connected with the employment and not merely incidental to the employment. Koehler Elec. v. Wills, 608 N.W.2d 1, 3 (Iowa 2000); Miedema, 551 N.W.2d at 311. An injury occurs "in the course of" employment when it happens within a period of employment at a place where the employee reasonably may

[5] Claimant is right-hand dominant. (Tr., p. 21)

be when performing employment duties and while the employee is fulfilling those duties or doing an activity incidental to them. Ciha, 552 N.W.2d at 150.

The claimant has the burden of proving by a preponderance of the evidence that the injury is a proximate cause of the disability on which the claim is based. A cause is proximate if it is a substantial factor in bringing about the result; it need not be the only cause. A preponderance of the evidence exists when the causal connection is probable rather than merely possible. George A. Hormel & Co. v. Jordan, 569 N.W.2d 148 (Iowa 1997); Frye v. Smith-Doyle Contractors, 569 N.W.2d 154 (Iowa App. 1997); Sanchez v. Blue Bird Midwest, 554 N.W.2d 283 (Iowa App. 1996).

The question of causal connection is essentially within the domain of expert testimony. The expert medical evidence must be considered with all other evidence introduced bearing on the causal connection between the injury and the disability. Supportive lay testimony may be used to buttress the expert testimony and, therefore, is also relevant and material to the causation question. The weight to be given to an expert opinion is determined by the finder of fact and may be affected by the accuracy of the facts the expert relied upon as well as other surrounding circumstances. The expert opinion may be accepted or rejected, in whole or in part. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); IBP, Inc. v. Harpole, 621 N.W.2d 410 (Iowa 2001); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995). Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417 (Iowa 1994).

A personal injury contemplated by the workers' compensation law means an injury, the impairment of health or a disease resulting from an injury which comes about, not through the natural building up and tearing down of the human body, but because of trauma. The injury must be something that acts extraneously to the natural processes of nature and thereby impairs the health, interrupts or otherwise destroys or damages a part or all of the body. Although many injuries have a traumatic onset, there is no requirement for a special incident or an unusual occurrence. Injuries which result from cumulative trauma are compensable. Increased disability from a prior injury, even if brought about by further work, does not constitute a new injury, however. Id.; see also Ellingson v. Fleetguard, Inc., 599 N.W.2d 440 (Iowa 1999); McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985).

While a claimant is not entitled to compensation for the results of a preexisting injury or disease, its mere existence at the time of a subsequent injury is not a defense. Rose v. John Deere Ottumwa Works, 247 Iowa 900, 76 N.W.2d 756 (1956). If the claimant had a preexisting condition or disability that is materially aggravated, accelerated, worsened or lighted up so that it results in disability, claimant is entitled to recover. Nicks v. Davenport Produce Co., 254 Iowa 130, 115 N.W.2d 812 (1962); Yeager v. Firestone Tire & Rubber Co., 253 Iowa 369, 112 N.W.2d 299 (1961).

The first issue for consideration is whether claimant has sustained an injury arising out of and in the course of his employment. I found that claimant has met his burden on this issue. The overwhelming evidence in this case proves that claimant

sustained an injury arising out of and in the course of his employment on June 4, 2020. Every medical provider who saw claimant documented his complete lack of right shoulder pain prior to the work injury. While claimant clearly had preexisting osteoarthritis, it was asymptomatic until the work injury. He was able to perform all of his job duties with no difficulties or restrictions. Even Dr. Fabiano's opinion, while unclear on most issues, states that the work injury aggravated claimant's preexisting DJD. Additionally, Dr. Taylor provided a detailed, well-reasoned opinion that is supported by the other medical records and testimony in evidence. I find that claimant's injury is compensable.

The next issue to determine is the nature and extent of claimant's permanent disability, if any. Defendants allege that the injury, if found compensable, is limited to the shoulder, and compensable under Iowa Code section 85.34(2)(n). Claimant argues the injury involves both his shoulder and arm, and should be compensated pursuant to Iowa Code section 85.34(2)(v).

In this case, I found that claimant sustained permanent disability to his right arm and permanent disability to his right shoulder, caused by a single accident. This is based on Dr. Taylor's impairment rating, as well as the supporting medical records and testimony. An arm is compensated under section 85.34(2)(m), while a shoulder falls under section 85.34(2)(n). Additionally, section 85.34(2)(t) does not apply, as shoulder injuries are not included in the specific list of injuries provided. (See Anderson v. Bridgestone Americas, Inc., File No. 5067475 (Arb., Sept. 2, 2021), (aff'd Jan. 25, 2022). Therefore, Iowa Code section 85.34(2)(v) is the only section that can apply.

Defendants argue that the Supreme Court's decision in Chavez is dispositive of this issue, as the court held that the shoulder is not limited to the glenohumeral joint, but extends to all of the muscles, tendons, and ligaments that are essential for the shoulder to function. Chavez v. MS Technology, 972 N.W.2d 662, 668 (Iowa 2022). However, the Chavez court did briefly examine whether section 85.34(2)(t) applied in that case. Chavez, 972 N.W.2d at 670-671. Specifically, in Chavez, the court did not address the argument because it found that the claimant had not met her burden to prove impairment to her arm apart from the shoulder injury. Chavez, 972 N.W.2d at 671. However, in this case, the claimant did prove impairment to his arm apart from the shoulder. Dr. Taylor's rating specifically includes 2 percent permanent impairment due to a decrease in supination strength, based on Table 16-35 of the AMA Guides. Table 16-35 relates supination strength to the elbow joint, not the shoulder. (See AMA Guides, Table 16-35, p. 510) Therefore, I found that claimant has proven he sustained permanent disability to both his shoulder and arm. As such, he is to be compensated for an unscheduled injury under Iowa Code section 85.34(2)(v).

As claimant has sustained an unscheduled injury, 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 [person]."

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). The commissioner may also consider claimant's medical condition prior to the injury, immediately after the injury, and presently in rendering an evaluation of industrial disability. IPB, Inc. v. Al-Gharib, 604 N.W.2d 621, 632-633 (Iowa 2000) (citing McSpadden, 288 N.W.2d at 192).

Total disability does not mean a state of absolute helplessness. Permanent total disability occurs where the injury wholly disables the employee from performing work that the employee's experience, training, education, intelligence, and physical capacities would otherwise permit the employee to perform. See McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Diederich, 219 Iowa 587, 258 N.W. 899 (1935).

The focus for evaluating total disability is on the person's ability to earn a living. Diederich, 258 N.W. at 902. The question is whether the person is capable of performing a sufficient quantity and quality of work that an employer in a well-established branch of the labor market would employ the person on a continuing basis and pay the person sufficient wages to permit the person to be self-supporting. Tobin-Nichols v. Stacyville Community Nursing Home, File No. 1222209 (Appeal December 2003). A finding that claimant could perform some work despite claimant's physical and educational limitations does not foreclose a finding of permanent total disability, however. See Chamberlin v. Ralston Purina, File No. 661698 (App. October 1987); Eastman v. Westway Trading Corp., II Iowa Industrial Commissioner Report 134 (App. May 1982). Industrial disability is determined by the effect the injury has on the employee's earning capacity. Bearce v. FMC Corp., 465 N.W.2d 531, 535 (Iowa 1991); Trade Professionals, Inc. v. Shriver, 661 N.W.2d 119, 123 (Iowa App. 2003).

Another important factor in the consideration of permanent and total disability cases is the employer's ability to retain the injured worker with an offer of suitable work. The refusal or inability of the employer to return a claimant to work in any capacity is, by itself, significant evidence of a lack of employability. Clinton v. All-American Homes, File No. 5032603 (App. April 17, 2013); Western v. Putco Inc., File Nos. 5005190,5005191 (App. July 29, 2005); Pierson v. O'Bryan Brothers, File No. 951206 (App. January 20, 1995); Meeks v. Firestone Tire & Rubber Co., File No. 876894 (App. January 22, 1993); see also Larson, Workers' Compensation Law, Section 57.61, pp. 10-164.90-95; Sunbeam Corp. v. Bates, 271 Ark 385, 609 S.W.2d 102 (1980); Army & Air Force Exchange Service v. Neuman, 278 F.Supp. 865 (W.D. La 1967); Leonardo v. Uncas Manufacturing Co., 77 R.I. 245, 75 A.2d 188 (1950). An employer knows the demands

that are placed on its workforce. Its determination that the worker is too disabled for it to employ is entitled to considerable weight. If the employer in whose employ the disability occurred is unwilling or unable to accommodate the disability, there is no reason to expect some other employer to have more incentive to do so.

I have considered claimant's age, education, employment history, inability to return to the prior jobs he has held, his ability to retrain, his motivation, the situs and severity of his injuries, his impairment and restrictions, and all other industrial disability factors identified by the Iowa Supreme Court. Having considered all of the evidence in the record, the greater weight of evidence in this case supports a finding that claimant is permanently and totally disabled as a result of his June 4, 2020 injury. Realistically, there are not jobs within the community that claimant can perform and for which he can realistically compete in his current condition. Second Injury Fund of Iowa v. Shank, 516 N.W.2d 808, 815 (Iowa 1994). Accordingly, I conclude that claimant proved he is permanently and totally disabled. Iowa Code section 85.34(3). Having reached this conclusion under the traditional industrial disability analysis, I do not consider or rely upon the burden-shifting framework of the odd-lot doctrine.

The next question is when permanent total disability benefits should commence. Permanent total disability benefits are payable during the period of the employee's disability. Iowa Code section 85.34(3)(a). As a result, permanent total disability benefits generally commence on the date of injury. See Sandhu v. Nordstrom, Inc., File No. 5046628 (App. January 24, 2019). Given that claimant has not returned to work since the date of injury, I find permanent total disability benefits commence on June 4, 2020.

The next issue to determine is the correct weekly benefit rate. Pursuant to the hearing report, claimant believes the correct rate is $487.87, based on gross earnings of $754.00 per week, while defendants believe it is $482.48, based on gross earnings of $745.08 per week. Claimant contends the difference in the rate calculation is due to defendants excluding week ending June 5, 2020, and excluding claimant's bonuses. Defendants provided no argument regarding rate in their brief.

Bonuses are included in the gross earnings of an employee for the purposes of calculating the workers' compensation rate if the bonus is regular. An annual bonus is considered regular if it is regularly paid over a number of years. Ratliff v. Quaker Oats Co., File No. 5046704, p. 11 (App. Dec. January 5, 2017). A bonus is regular even if it is discretionary or varies in amount. Id. ("It matters not whether an annual or quarterly bonus payment is discretionary or varies in amount ....") "The division of workers' compensation has determined that when a bonus is clearly an annual expectation and there is in fact a plan governing the bonus, the best policy consistent with the Supreme Court's guidance is to include the annual bonus and include a pro rata weekly amount to claimant's gross earning calculation." Mayfield v. Pella Corp., File No. 5019317 (Remand Dec. June 30, 2009).

The only bonus claimant included in his rate calculation was his annual bonus, which was included at a pro rata weekly amount. The annual bonus is a regular bonus

that was proper to include. Additionally, the weeks that claimant used in calculating the rate are appropriate. I conclude claimant's rate calculation of $487.87 is the appropriate weekly benefit rate in this case. Defendants are responsible for any underpayment in benefits previously paid.

The next issue to determine involves medical benefits. Claimant is seeking reimbursement for medical costs as set forth in Exhibit 6, as well as mileage found in Exhibit 7. Claimant is not entitled to reimbursement for medical bills unless claimant shows that they were paid from his own funds. See Caylor v. Employers Mutual Casualty Co., 337 N.W.2d 890 (Iowa Ct. App. 1983). Otherwise, claimant is entitled only to an order directing the responsible defendants to make such payments directly to the provider. See Krohn v. State, 420 N.W.2d 463 (Iowa 1988). Where medical payments are made from a plan to which the employer did not contribute, the claimant is entitled to a direct payment. Midwest Ambulance Service v. Ruud, 754 N.W.2d 860, 867-68 (Iowa 2008) ("We therefore hold that the commissioner did not err in ordering direct payment to the claimant for past medical expenses paid through insurance coverage obtained by the claimant independent of any employer contribution.") See also: Carl A. Nelson & Co. v. Sloan, 873 N.W.2d 552 (Iowa App. 2015) (Table) 2015 WL 7574232 15-0323. Claimant has the burden of proving that the fees charged for such services are reasonable. Anderson v. High Rise Construction Specialists, Inc., File No. 850096 (App. July 31, 1990).

Because I found claimant's injury to arise out of and in the course of his employment, defendants are liable for all reasonable and causally related medical costs. Defendants did not provide any evidence or argument to suggest the medical expenses in claimant's exhibit 6 are unreasonable or were not causally related to the medical condition upon which claimant's claim is based. Defendants shall reimburse claimant for the portions of the medical bills he paid from his own funds and are responsible to reimburse any providers or lienholders with outstanding claims. Defendants will also reimburse claimant for medical mileage as set forth in claimant's exhibit 7.

The parties included the issue of alternate medical care on the hearing report, but neither party provided any argument regarding this issue in their post-hearing briefs. To the extent it remains an issue, the claimant is entitled to reasonable and causally related ongoing medical care related to his right shoulder and arm injury, pursuant to Iowa Code section 85.27.

The next issue to determine is whether claimant is entitled to penalty benefits pursuant to Iowa Code section 86.13. Claimant alleges he is entitled to penalty benefits because defendant's termination of weekly benefits occurred without reasonable or probable cause or excuse. Defendants did not include any argument regarding penalty benefits in their brief. Failing to brief the issue essentially waives any argument against it. However, assuming defendants would argue Dr. Fabiano's April 6, 2021 opinion provided a reasonable basis for the termination of benefits, the issue is considered.

Iowa Code section 86.13(4) provides:

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 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 in 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.

In Christensen v. Snap-on Tools Corp., 554 N.W.2d 254 (Iowa 1996), and Robbennolt v. Snap-on Tools Corp., 555 N.W.2d 229 (Iowa 1996), the supreme court said:

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

Christensen, 554 N.W.2d at 260.

The supreme court has stated:

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

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

(3) Reasonable causes or excuses include (a) a delay for the employer to investigate the claim, Christensen, 554 N.W.2d at 260; Kiesecker v. Webster City 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).

(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).

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).

Pursuant to Iowa Code section 86.13(4)(c), the employer bears the burden to establish that the reasonable cause or excuse for the delay in benefits was preceded by a reasonable investigation, that the results of that investigation are the actual basis for denial, and that the employer contemporaneously conveyed the basis to the claimant at the time of the delay or denial.

Pursuant to subsection (c), in order to be considered a reasonable or probable cause or excuse, the excuse must 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.

Iowa Code section 86.13(4)(c).

In this case, I found that defendants did not conduct a reasonable investigation prior to the termination of benefits. An employer has a continuing duty to reevaluate its position regarding a denial of benefits. Squealer Feeds v. Pickering, 530 N.W.2d 678, 683 (Iowa 1995). Defendants admitted that Dr. Fabiano's initial opinion was confusing and that a clarifying opinion was necessary, but did not seek that clarifying opinion until over a year later. A reasonable investigation would have included defendants following up with Dr. Fabiano and seeking clarification prior to denying claimant's claim. Instead, defendants relied on the initial unclear opinion to deny the claim, and terminate benefits. Defendants' lack of follow up and clarification prior to denial was not reasonable. Furthermore, when defendants finally did seek "clarification" in April 2022, the questions posed were incomplete. Defendants did not ask Dr. Fabiano whether the work injury

aggravated claimant's preexisting condition. Considering Dr. Fabiano previously stated that it did aggravate his preexisting condition, the lack of explanation regarding his change in opinion is concerning. Again, the brief letter and lack of additional questions regarding causation of claimant's condition shows a lack of reasonable investigation on defendants' behalf.

Defendants did not conduct a reasonable investigation into whether benefits were owed prior to terminating benefits and denying the claim. Claimant is entitled to penalty benefits. Benefits were terminated as of May 10, 2021. (Def. Ex. C, p. 1) Given the circumstances, a penalty of approximately 50 percent is appropriate. Defendants have unreasonably denied approximately 79 weeks of benefits. At claimant's rate of $487.87, that comes to $38,541.73. Therefore, claimant is entitled to penalty benefits in the amount of $19,000.00.

Finally, claimant seeks payment of Dr. Taylor's IME under Iowa Code section 85.39, and an assessment of costs. (Cl. Ex. 8) 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 Iowa Workers' Compensation Commissioner has noted that the Iowa Supreme Court adopted a strict and literal interpretation of Iowa Code section 85.39 in Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839 (Iowa 2015) (hereinafter "DART"). See Cortez v. Tyson Fresh Meats. Inc., File No. 5044716 (App. December 2015). If an injured worker wants to be reimbursed for the expenses associated with a disability evaluation by a physician selected by the worker, the process set forth by the legislature in Iowa Code section 85.39 must be followed. This process permits the employer, who must pay the benefits, to make the initial arrangements for the evaluation and only allows the employee to obtain an independent evaluation at the employer's expense if dissatisfied with the evaluation arranged by the employer. DART, 867 N.W.2d at 847 (citing Iowa Code § 85.39).

In this case, defendants asked Dr. Fabiano to address causation. Although his opinion was unclear, defendants used it as a basis to terminate benefits and deny the claim. Because they denied causation, defendants did not seek and Dr. Fabiano did not provide an impairment rating.

In September 2021, the Iowa Court of Appeals provided additional guidance with respect to these types of situations. See Kern v. Fenchel, Doster & Buck, P.L.C., 966 N.W. 2d. 326 (Iowa Ct. App., 2021) (unpublished). The court reiterated that the "primary purpose of the workers' compensation statute is to benefit the worker and his or her dependents, insofar as statutory requirements permit." See Kern, at 4 (citations omitted). Thus, the statutes are to be interpreted liberally. Id. In Kern, the physician selected by the employer found there was no causation and the doctor was silent on the issue of impairment. Kern disagreed with that opinion and sought an IME under section 85.39 at the defendants' expense. In Kern, the court concluded an employer-chosen

physician's opinion that there was no causation was tantamount to a zero percent impairment rating. (Id.) The Court of Appeals found there was no conflict in applying the Supreme Court's interpretation of section 85.39 in DART to a finding that a lack of causation opinion is tantamount to a zero impairment rating. Id.

Based on this additional guidance from the Court of Appeals, I conclude that Dr. Fabiano's opinion, while unclear, was the basis for defendants' denial, and was thus tantamount to a zero percent impairment rating. Dr. Fabiano was a physician retained by the employer. Therefore, Dr. Taylor's evaluation of permanency occurred after an evaluation of permanent disability had been made by a physician retained by the employer. Defendants provided no argument or evidence to the contrary. As such, the prerequisites of section 85.39 were met, and defendants shall reimburse claimant for the costs of the IME in the amount of $3,637.50.

With respect to costs, assessment of costs is a discretionary function of this agency. Iowa Code § 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. Claimant seeks the following costs: $100.00 for the filing fee; $13.92 for service; $147.37 for medical records; and $123.99 for claimant's deposition. (Cl. Ex. 8) Fees for obtaining medical records are not a taxable cost under Iowa Administrative Rule 876-4.33 (86). However, the remainder of the requested costs are allowed. As such, defendants shall reimburse claimant for costs in the amount of $237.91, representing the filing fee, service, and claimant's deposition.

ORDER

THEREFORE, IT IS ORDERED:

All benefits shall be paid at the rate of four hundred eighty-seven and 87/100 dollars ($487.87).

Defendants shall pay claimant permanent total disability benefits, beginning June 4, 2020, and continuing during the period of permanent total disability.

Defendants shall be entitled to a credit for all benefits previously paid, as stipulated on the hearing report.

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.

Defendants shall pay claimant penalty benefits in the amount of nineteen thousand and 00/100 dollars ($19,000.00)

Defendants shall reimburse claimant for the portions of the medical bills he paid from his own funds and are responsible to reimburse any providers or lienholders with outstanding claims. Defendants will also reimburse claimant for medical mileage as set forth in claimant's exhibit 7.

Defendants shall reimburse claimant for Dr. Taylor's IME in the amount of three thousand six hundred thirty-seven and 50/100 dollars ($3,637.50).

Defendants shall reimburse claimant's costs in the amount of two hundred thirty-seven and 91/100 dollars ($237.91), representing the filing fee, service, and claimant's deposition.

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 14th day of November, 2022.

JESSICA L. CLEEREMAN
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Nate Willems (via WCES)

Kathryn Hartnett (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.