BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

TIMOTHY AMLING, Claimant, vs. A.Y. MCDONALD INDUSTRIES, INC., Employer, and TWIN CITY FIRE INSURANCE CO., Insurance Carrier, Defendants.	File No. 1640446.01 ARBITRATION DECISION Head Notes: 1108.50, 1402.40, 1803.01, 2907, 4000

STATEMENT OF THE CASE

Timothy Amling, claimant, filed a petition in arbitration seeking workers' compensation benefits from A.Y. McDonald Industries, Inc., employer, and Twin City Fire Insurance Company, insurance carrier, as defendants. Hearing was held on April 20, 2022. This case was scheduled to be an in-person hearing occurring in Waterloo. However, due to the declaration 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 CourtCall with all parties and the court reporter appearing remotely.

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.

Timothy Amling and Ryan Lekin were the only witnesses to testify live at trial. The evidentiary record also includes Joint Exhibits 1- 3, Claimant's Exhibits 1-10, and Defendants' Exhibits A-C. All exhibits were received without objection. The evidentiary record closed at the conclusion of the arbitration hearing.

The parties submitted post-hearing briefs on May 27, 2022, at which time the case was fully submitted to the undersigned.

ISSUES

The parties submitted the following issues for resolution:

1. The nature and extent of permanent partial disability claimant is entitled to receive.

2. Claimant's gross weekly earnings at the time of the injury.

3. Defendants' credit for any overpayment of benefits.

4. Whether penalty benefits are appropriate; and if so, the amount.

5. Assessment of costs.

FINDINGS OF FACT

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

Claimant, Timothy Amling, was 62 years old at the time of the hearing. He began working at A.Y. McDonald Industries, Inc. in 1997. Mr. Amling contends he sustained a cumulative injury to his right arm and shoulder as the result of grinding and moving parts and overhead reaching. He has alleged an injury date of November 28, 2017.

In November 2017, Mr. Amling was working as a full-time grinder. This job involved grinding cast iron parts. The grinder was at his waist level. He described the work as repetitious and very strenuous due to the fast pace. He had to reach overhead to open lids on totes that the parts came in. Due to his height, Mr. Amling would have to stand on his tippy toes and reach high. On November 28, 2017, Mr. Amling was performing his work as a grinder when he felt pain in his shoulder, arm, biceps, triceps, and then his pain went into his chest. He reported the injury to his employer who advised him to go to Tri-State Occupational Health. (Hearing Transcript. pp. 21-29)

On that same day, Mr. Amling saw Emily Armstrong, PA-C at Tri-State. She recorded he was there for an initial visit for a right shoulder injury. He reported pain in his right shoulder and collarbone. The assessment was acute pain of right shoulder, pain of right sternoclavicular joint. She felt the patient's shoulder pain was likely due to rotator cuff strain versus biceps tendon strain. P.A. Armstrong recommended some exercises to prevent shoulder stiffness. She released him to work with restrictions. He was to return in one week. (Joint Exhibit 1, pp. 1-5)

Mr. Amling saw P.A. Armstrong again on December 5, 2017. He reported mild improvement. She recommended physical therapy and continued work restrictions. (JE1, pp. 6-8) Mr. Amling attended several sessions of physical therapy at Medical Associates from December 6, 2017 through January 16, 2018. At his last visit he continued to have impingement signs. (JE2)

P.A. Armstrong referred Mr. Amling to Scott P. Schemmel, M.D., an orthopedic physician. Mr. Amling saw Dr. Schemmel on February 13, 2018. He noted that Mr. Amling was seen in November and started physical therapy. The therapy failed to completely resolve his issues. At one point Mr. Amling was having some pain in the area of the sternoclavicular joint but this had resolved and he did not have any pain in that area. His pain was isolated to the lateral acromion region. The MRI showed some degenerative labral pathology and AC joint degenerative changes. The MRI was negative for a full thickness rotator cuff tear. Dr. Schemmel felt the changes on the MRI were degenerative in nature and age-appropriate. He recommended subacromial injection and to continue his current work restrictions. (JE3, pp. 70-71)

Mr. Amling saw Dr. Schemmel again on March 6, 2018. He reported minor residual discomfort. He demonstrated excellent shoulder range of motion without any restriction. Dr. Schemmel allowed Mr. Amling to return to work without restrictions. He did not recommend any surgical intervention. Dr. Schemmel said he would see Mr. Amling again if requested by occupational medicine. (JE3, pp. 72-73)

On April 2, 2018, Mr. Amling returned to P.A. Armstrong for recheck of right shoulder pain. He had mild improvement in his pain following a right shoulder subacromial steroid injection by Dr. Schemmel. P.A. Armstrong thought his pain could be coming from his labrum and/or the short head of the biceps tendon. She recommended a right shoulder intra-articular steroid injection for therapeutic and diagnostic purposes. He was to return in two weeks. (JE1, pp. 16-17)

Mr. Amling had his second right shoulder injection on April 11, 2018. (JE1, p. 20) On April 27, 2018, he returned to P.A. Armstrong and reported he was doing better since the injection. He was able to perform his normal job without any issues. Based on his response to the injection, P.A. Armstrong felt his supraspinatus was initiating and partially contributing to his pain, and glenohumeral joint pathology was also contributing to his pain. Mr. Amling reported he was doing functionally quite well at work and agreed to continue full duty. According to P.A. Armstrong, his anticipated MMI date was set for May 11, 2018. She advised that he did not need to return to the clinic unless he developed worsening of symptoms. If she did not hear from Mr. Amling before May 11, she would assume he was doing very well, and his case would be closed. If he developed recurrence of right shoulder pain before May 11, 2018, then the next evaluation would determine permanent restrictions. Mr. Amling was released to full duty. (JE1, pp. 21-22)

Mr. Amling did not seek any further medical treatment. By April 27, 2018, he returned to his grinding job on a full-time basis. (Tr. pp. 69-73)

At the request of the defendants, Erin Kennedy, M.D. performed a records review on June 14, 2018. She also examined Mr. Amling on June 28, 2018 and issued a report with her assessment of permanent impairment. Despite Mr. Amling receiving conservative treatment, he continued to report symptoms of aching, clicking, and weakness affecting his right shoulder. Dr. Kennedy cited The AMA Guides to the Evaluation of Permanent Partial Impairment, 5th Edition, figures16-40, 16-43, and 16-46, for upper extremity impairment from loss of motion. Dr. Kennedy noted forward flexion

120 degrees equates to 4 percent impairment, extension 40 degrees equates to 1 percent impairment, abduction at 112 degrees equates to 3 percent impairment, adduction 21 degrees equates to 1 percent impairment, external rotation 61 degrees does not impair the shoulder, and internal rotation 13 degrees equates to 5 percent for impairment. She assigned a total of 14 percent upper extremity impairment as the result of his work injury. (JE1, pp. 23-30)

Pursuant to a request from the defendants, Matthew Bollier, M.D. conducted a chart review evaluation and authored a missive on July 10, 2018. He felt "strongly that an in-person examination would not provide any further information to answer the questions requested in this particular case." (Defendants' Exhibit A, p. 1) Dr. Bollier did not agree with Dr. Kennedy's permanent partial impairment rating. He felt her range of motion deficits were in direct contradiction to Dr. Schemmel's February 13, 2018, clinic note which indicated Mr. Amling had full active and passive right shoulder range of motion. Dr. Bollier noted that The Guides state in Chapter 1, page 5, that "a 0% whole person impairment is assigned to an individual with an impairment if the impairment has no significant organ or body system functional consequences and does not limit the performance of the common activities of daily living." (Def. Ex. A, p. 2) Dr. Bollier placed Mr. Amling at MMI in May 2018 with no restrictions. He felt Mr. Amling had an exacerbation of an underlying degenerative condition and he responded well to non-operative treatment. He noted there was no indications that he had significant functional limitations. He assigned 0 percent impairment to the right upper extremity. (Def. Ex. A)

On July 10, 2018, the workers' compensation claims representative sent a letter to Dr. Kennedy requesting her to review her prior impairment rating in light of the rating from Dr. Bollier. Dr. Kennedy authored a responsive missive on July 26, 2018. She noted that she used objective measurements in her rating. Dr. Kennedy stated,

> I arrived at a 14% upper extremity impairment rating. This is the level of impairment that was demonstrated by this individual on that date and reflects his overall impairment, the sum of both the degenerative condition and the work injury. Of note, having reviewed all pertinent medical records pertaining to this claim prior to performing the permanent partial impairment rating on 06/28/18, I am aware that Dr. Schemmel reported 'full active and passive right shoulder range of motion' at the time of his February 13, 2018 office visit. I spoke with Dr. Schemmel earlier today and confirmed that this was a gross assessment that was not intended for the purpose of a permanent partial impairment rating.

(JE1, p. 32)

Pursuant to the claims representative's request, Dr. Kennedy apportioned the impairment rating. Dr. Kennedy felt approximately 20 percent of the motion deficit was the result of the work injury. Thus, she ultimately opined that 3 percent upper extremity impairment was the result of the work injury. (JE1, p. 32)

Dr. Kennedy also attempted to resolve the difference between the impairment ratings issued by Dr. Bollier at the time of his July 10, 2018 IME and the opinion she

offered on June 26, 2018. She noted Dr. Bollier was presented with two seemingly variable presentations of Mr. Amling's range of motions; one from Dr. Schemmel and one from her. Dr. Kennedy stated that an examiner faced with such a dilemma has a responsibility to resolve the difference which she felt could have easily been dealt with if Dr. Bollier had performed his own examination. Instead, Dr. Bollier stated that an in-person examination would not provide any further information. Dr. Kennedy then set forth the multiple errors she noted he made in arriving at his impairment rating. (JE1, pp. 32-33)

Mr. Amling returned to his grinding job on a full-time basis at the end of April 2018. He performed this work for approximately 10 weeks and then he bid into an inspection position in late 2018. He performed this job all of 2019, 2020, and the first half of 2021 until he announced his retirement. He never missed any time from work due to his right shoulder. On June 25, 2021, Mr. Amling signed a retirement/resignation notification. He advised that his last day of work would be July 12, 2021 and his official retirement date would be July 30, 2021. He stated the reason for resignation was "retirement and due to my right shoulder pain." (Tr. pp. 69-73; 86-88; Claimant's Exhibit 3, p. 23)

Mr. Amling testified he never had any permanent work restrictions as the result of his shoulder problems. Ryan Lekin was Mr. Amling's direct supervisor from 2019 through 2021. He saw him on a daily basis. If Mr. Amling was experiencing any shoulder problems, Mr. Lekin would be the person he should have reported them to. Mr. Lekin testified that Mr. Amling did not report any shoulder problems to him. (Tr. pp. 69-73; 86-88)

On December 29, 2021, claimant's attorney sent a letter to Robin Sassman, M.D. requesting an IME for Mr. Amling's injury to "the right shoulder and arm". (Cl. Ex. 2, p. 3) The letter sought a variety of information including Dr. Sassman's diagnoses of the injury or injuries and any ratable impairment. (Cl. Ex. 2, pp. 3-4)

Dr. Sassman issued her report on March 11, 2022. Dr. Sassman noted Mr. Amling's current symptoms included pain in his shoulder, some pain in his elbow at times and some pain in the bicep area. After reviewing the medical records and examining Mr. Amling, Dr. Sassman's only diagnosis was right shoulder impingement syndrome and MRI evidence of a labral tear. Dr. Sassman opined that Mr. Amling's right shoulder impingement syndrome was directly and casually related to the work he performed at A.Y. McDonald. She noted that Mr. Amling was not interested in any further care so she placed him at maximum medical improvement as of May 11, 2018. Dr. Sassman utilized Figures 16-40, 16-43 and 16-46 on pages 476-479 of The Guides to assess his impairment. She assigned upper extremity impairment as follows: 4 percent for loss of flexion, 1 percent for loss of extension, 3 percent for loss of abduction, 0 percent for loss of adduction, 4 percent for loss of internal rotation and 1 percent for loss of external rotation. She combined these together for a total of 13 percent upper extremity impairment. She respectfully disagreed with Dr. Bollier's rating of 0 percent impairment and pointed out that Dr. Bollier did not personally examine Mr. Amling. Dr. Sassman recommended restrictions as follows: limit lifting, pushing, pulling, and carrying to 20 pounds at waist height with his elbows close to his body on

an occasional basis. Mr. Amling was also not to lift, push, pull or carry above waist or shoulder height, or with his arms extended away from his body. Dr. Sassman also stated Mr. Amling should not use vibratory or power tools. (Cl. Ex. 2, pp. 5-15)

On March 16, 2022, claimant's counsel sent a missive to Dr. Sassman requesting that she review her notes and send a supplemental report if there was any ratable impairment pertaining to Mr. Amling's right arm. (Cl. Ex. 2, p. 16) The next day Dr. Sassman authored a letter to claimant's counsel. She stated,

> Although he did not exhibit any ratable range of motion deficits in the right elbow, because he notes continued pain in the right elbow and bicep area, it would be appropriate to assign him an additional 1% whole person impairment for the pain (as based on Chapter 18 of *The Guides*).

(Cl. Ex. 2, p. 17)

The first issue to be determined is the nature and extent of permanent disability sustained by Mr. Amling as the result of the work injury. There are several physicians who have offered their opinions regarding impairment in this case.

At the request of the defendants, Dr. Kennedy performed a records review and personally examined Mr. Amling. She cited to specific portions of The Guides and initially assigned 14 percent upper extremity impairment based on loss of motion of the right shoulder. (JE1, pp. 23-30) I find that the 14 percent upper extremity impairment rating assigned by Dr. Kennedy in her June 28, 2018, report is based on The Guides. Subsequently she attempted to assign a percentage of that impairment to preexisting conditions. Dr. Kennedy does not indicate what portion or section of The Guides she relies on to apportion the rating to indicate the level of impairment sustained by the work injury only. (JE1, pp. 31-33) Thus, I cannot find that her apportionment of the impairment rating is based solely on The Guides. I do not find her apportioned rating to be persuasive.

Also, at the request of the defendants Dr. Bollier performed a records review but did not personally examine Mr. Amling. For many of the reasons set forth in Dr. Kennedy's July 26, 2018 missive, I find the opinions of Dr. Bollier do not carry great weight. Dr. Kennedy is a Certified Independent Medical Examiner for the American Board of Independent Medical Examiners. She pointed out the impairment ratings are only as accurate as the measurements they are based on. She was puzzled that despite being faced with two seemingly variable presentations, one from Dr. Schemmel and the other from her, Dr. Bollier made no attempt to resolve the differences or even to examine Mr. Amling himself. I do not find Dr. Bollier's opinion regarding permanent impairment to be persuasive.

At the request of claimant's counsel, Dr. Sassman conducted an IME of Mr. Amling. Dr. Sassman utilized the same portions of The Guides as Dr. Kennedy for upper extremity impairment due to the right shoulder injury. Dr. Sassman assigned a total of 13 percent upper extremity impairment. (Cl. Ex. 2, pp. 5-15) At the request of claimant's attorney she later assigned an additional 1 percent impairment of the whole person for right elbow pain. (Cl. Ex. 2, p. 17) Dr. Sassman cites generally to Chapter

18 of The Guides. She does not provide any detail on how she reached her conclusion. Dr. Sassman did not give any indication that she followed the steps set forth in Chapter 18 on how to rate pain-related impairment. I cannot find that the 1 percent whole person assigned by Dr. Sassman for pain is based solely on The Guides.

I find the 14 percent upper extremity rating from Dr. Kennedy is based on The Guides and carries the greatest weight in this case. Thus, I find Mr. Amling has demonstrated that he sustained 14 percent functional impairment to his right upper extremity as the result of his right shoulder injury. I further find Mr. Amling failed to demonstrate that he sustained any functional impairment as the result of his elbow pain. I find that Mr. Amling's work injury is contained to his right shoulder.

The next issue in dispute is rate. The rate dispute in this case centers on whether to include the pay period ending August 27, 2017. The pay period in question has 41 hours, including 28 hours of vacation. (Cl. Ex. 8, p. 36) Claimant contends this pay period should be excluded because during this timeframe Mr. Amling was working overtime which brought his weekly total hours to around 45-50. However, during the week in question Mr. Amling contends he missed out on overtime hours because he took 28 hours of vacation during that pay period. Thus, claimant argues that when this pay period is compared to surrounding weeks, it is not representative of his earnings. Defendants contend this pay period should be included because 41 hours is considered full time employment and should be included for purposes of calculating his rate as it is usual and customary. I find during the pay period in question Mr. Amling did work but also took 28 hours of vacation. I find the week in question is representative of his earnings.

Claimant is seeking penalty benefits in this case because defendants did not voluntarily pay the initial impairment rating of Dr. Kennedy. On June 28, 2018, Dr. Kennedy issued her original impairment rating. Defendants sought another opinion regarding impairment. On July 10, 2018, Dr. Bollier opined that Mr. Amling had not sustained any permanent impairment as the result of the work injury. (Cl. Ex. 7; Def. Ex. A) Dr. Kennedy later issued a supplemental report apportioning the impairment rating and only assigned 3 percent of the impairment to the work injury. Although ultimately I did not find the opinion of Dr. Bollier or the apportioned impairment rating of Dr. Kennedy to be persuasive, I find the issue of whether claimant is entitled to payment of 14 percent upper extremity impairment is at least fairly debatable. I find that an award of penalty benefits is not appropriate in this case.

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 injury is a proximate cause of the disability on which the claim is based. A cause is proximate if it is a substantial factor in bringing about the result; it need not be the only cause. A preponderance of the evidence exists when the causal connection is probable rather than merely possible. George A. Hormel & Co. v. Jordan, 569 N.W.2d 148 (Iowa

1997); Frye v. Smith-Doyle Contractors, 569 N.W.2d 154 (Iowa App. 1997); Sanchez v. Blue Bird Midwest, 554 N.W.2d 283 (Iowa App. 1996).

The question of causal connection is essentially within the domain of expert testimony. The expert medical evidence must be considered with all other evidence introduced bearing on the causal connection between the injury and the disability. Supportive lay testimony may be used to buttress the expert testimony and, therefore, is also relevant and material to the causation question. The weight to be given to an expert opinion is determined by the finder of fact and may be affected by the accuracy of the facts the expert relied upon as well as other surrounding circumstances. The expert opinion may be accepted or rejected, in whole or in part. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); IBP, Inc. v. Harpole, 621 N.W.2d 410 (Iowa 2001); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995). Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417 (Iowa 1994). Unrebutted expert medical testimony cannot be summarily rejected. Poula v. Siouxland Wall & Ceiling, Inc., 516 N.W.2d 910 (Iowa App. 1994).

Under the Iowa Workers' Compensation Act, permanent partial disability is compensated either for a loss or loss of use of a scheduled member under Iowa Code section 85.34(2)(a)-(u) or as an unscheduled injury pursuant to the provisions of section 85.34(2)(v). The extent of scheduled member disability benefits to which an injured worker is entitled is determined by using the functional method. Functional disability is "limited to the loss of the physiological capacity of the body or body part." Mortimer v. Fruehauf Corp., 502 N.W.2d 12, 15 (Iowa 1993); Sherman v. Pella Corp., 576 N.W.2d 312 (Iowa 1998).

Based on the above findings of fact, I conclude Mr. Amling sustained an injury that was contained to his right shoulder. Thus, he is to be compensated on the basis of four hundred weeks pursuant to Iowa Code section 85.34(2)(n).

Iowa Code section 85.34(x) permanent disabilities states:

> x. In all cases of permanent partial disability described in paragraphs "a" through "u", or paragraph "v" when determining functional disability and not loss of earning capacity, the extent of loss or percentage of permanent impairment *shall be determined solely by utilizing the guides to the evaluation of permanent impairment, published by the American medical association*, as adopted by the workers' compensation commissioner by rule pursuant to chapter 17A. Lay testimony or *agency expertise shall not be utilized in determining loss or percentage of permanent impairment* pursuant to paragraphs "a" through "u", or paragraph "v" when determining functional disability and not loss of earning capacity.

Iowa Code section 85.34 (x) (emphasis added).

This agency has adopted The Guides to the Evaluation of Permanent Impairment, Fifth Edition, published by the American Medical Association for

determining the extent of loss or percentage of impairment for permanent partial disabilities. See 876 IAC 2.4.

Based on the above findings of fact, I conclude that Mr. Amling demonstrated by a preponderance of the evidence that he sustained a 14 percent impairment of the upper extremity. This is based on Dr. Kennedy's rating dated June 28, 2018. I reject Dr. Kennedy's supplemental apportioned impairment rating of 3 percent upper extremity. Dr. Kennedy fails to cite to any portion of The Guides that would permit such an apportionment. I conclude that Dr. Kennedy's apportioned rating is not based solely on The Guides and therefore cannot be relied upon. Thus, Mr. Amling is entitled to 56 weeks of permanent partial disability benefits commencing on the stipulated date of April 16, 2018.

We now turn to the issue of his weekly workers' compensation rate. Section 85.36 states the basis of compensation is the weekly earnings of the employee at the time of the injury. The section defines weekly earnings as the gross salary, wages, or earnings to which an employee would have been entitled had the employee worked the customary hours for the full pay period in which the employee was injured as the employer regularly required for the work or employment. The various subsections of section 85.36 set forth methods of computing weekly earnings depending upon the type of earnings and employment.

If the employee is paid on a daily or hourly basis or by output, weekly earnings are computed by dividing by 13 the earnings over the 13-week period immediately preceding the injury. However, any week that does not fairly reflect the employee's customary earnings is excluded. Section 85.36(6). The parties agree that this is the appropriate Code section to determine Mr. Amling's rate.

The rate dispute in this case centers on whether to include the pay period ending August 27, 2017. The pay period in question has 41 hours, including 28 hours of vacation. Claimant contends this pay period should be excluded because during this timeframe Mr. Amling was working overtime which brought his weekly total hours to around 45-50. However, during the week in question Mr. Amling took 28 hours of vacation and contends he missed out on overtime hours. Thus, claimant argues that when this pay period is compared to surrounding weeks, this pay period is not representative of his earnings.

Defendants contend this pay period should be included because 41 hours is considered full time employment and should be included for purposes of calculating his rate as it is usual and customary. This agency has held that any week of 40 hours or more is representative regardless of how little or much overtime is worked during that week and regardless of how many hours of overtime are worked during other weeks. See Ratliff v. Quaker Oats Co., File No. 5046704 (January 5, 2017, App. Dec.). It should be noted that in Ratliff, the Commissioner affirmed the deputy's decision to exclude vacation weeks wherein claimant worked zero hours. In the present case, unlike in Ratliff, Mr. Amling did in fact work some hours during the pay period in question. Furthermore, the Commissioner has previously held that weeks in which an injured worker is paid vacation are "excluded only in circumstances where the inclusion

of such weeks would not be a true representation of earnings." Gall v. Maytag Corp., File No. 5013691 (App. 5/26/06) Those weeks are otherwise included, as well as the vacation pay itself. Id. I conclude it is appropriate to include the pay period ending August 27, 2017. Thus, I conclude the defendants' rate calculation is correct in this case. I conclude Mr. Amling's average weekly rate is $1256.70. The parties agree that for rate purposes, Mr. Amling is single and entitled to one exemption. Thus, he is entitled to a weekly workers' compensation rate of $717.42.

Defendants are seeking a credit for overpayment of the weekly workers' compensation rate. Prior to the hearing defendants paid weekly benefits at the rate of $784.94. (Cl. Ex. 6; Hearing Report) The Code provides:

> 4. Credits for excess payments. If an employee is paid weekly compensation benefits for temporary total disability under section 85.33, subsection 1, for a healing period under section 85.34, subsection 1, or for temporary partial disability under section 85.33, subsection 2, in excess of that required by this chapter and chapters 85A, 85B, and 86, the excess shall be credited against the liability of the employer for permanent partial disability under section 85.34, subsection 2, provided that the employer or the employer's representative has acted in good faith in determining and notifying an employee when the temporary total disability, healing period, or temporary partial disability benefits are terminated.
>
> 5. Recovery of employee overpayment. If an employee is paid any weekly benefits in excess of that required by this chapter and chapters 85A, 85B, and 86, the excess paid by the employer shall be credited against the liability of the employer for any future weekly benefits due pursuant to subsection 2, for a subsequent injury to the same employee. An overpayment can be established only when the overpayment is recognized in a settlement agreement approved under section 86.13, pursuant to final agency action in a contested case which was commenced within three years from the date that weekly benefits were last paid for the claim for which the benefits were overpaid, or pursuant to final agency action in a contested case for a prior injury to the same employee. The credit shall remain available for eight years after the date the overpayment was established. If an overpayment is established pursuant to this subsection, the employee and employer may enter into a written settlement agreement providing for the repayment by the employee of the overpayment. The agreement is subject to the approval of the workers' compensation commissioner. The employer shall not take any adverse action against the employee for failing to agree to such a written settlement agreement.

The statute provides the employer a credit for any excess payments or overpayments against any future weekly benefits. Thus, I conclude defendants are entitled to a credit for any overpayment of the weekly rate.

Next, claimant is seeking penalty benefits for defendants failing to pay Dr. Kennedy's original impairment rating of 14 percent of the upper extremity. Claimant argues that it is not fairly debatable whether claimant was, at a minimum, entitled to payment of Dr. Kennedy's rating.

Regarding penalty benefits the Iowa Code provides, "[i]f 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 . . . ." Iowa Code section 86.13(4)(a).

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).

I conclude claimant's argument is not persuasive. Dr. Kennedy issued her original impairment rating on June 28, 2018. Defendants sought another opinion regarding impairment. On July 10, 2018, Dr. Bollier opined that Mr. Amling had not sustained any permanent impairment as the result of the work injury. (Cl. Ex. 7; Def. Ex. A) Dr. Kennedy later issued a supplemental report wherein she apportioned the impairment rating and only assigned 3 percent to the work injury. Although ultimately I did not find the opinion of Dr. Bollier or the apportioned impairment rating of Dr. Kennedy to be persuasive, I conclude the issue of whether claimant was entitled to payment of 14 percent upper extremity impairment was at least fairly debatable. I conclude that an award of penalty benefits is not appropriate in this case.

Finally, claimant is seeking an assessment of costs as set forth in Claimant's Exhibit 5. Costs are to be assessed at the discretion of the Iowa Workers' Compensation Commissioner or the deputy hearing the case. I find that claimant was generally successful in his claim and exercise my discretion to conclude that an assessment of costs against the defendants is appropriate in this case. First, claimant is seeking costs in the amount of $100.00 for the filing fee. I conclude this is an appropriate cost under 4.33(7). Next, claimant is seeking costs in the amount of $87.40 for copy of the deposition transcript of the claimant. Rule 4.33(1) allows for an assessment of costs of a certified shorthand reporter for evidentiary depositions. Claimant's deposition was not used as an evidentiary deposition in this case. I find this is not an appropriate cost in this case. Finally, claimant seeks an assessment of costs in the amount of $165.00 for the supplemental report of Dr. Sassman dated March 17, 2022. I find this is an appropriate cost under 4.33(6); defendants are assessed this cost. Thus, defendants are assessed costs totaling two hundred sixty-five and 00/100 dollars ($265.00).

ORDER

THEREFORE, IT IS ORDERED:

All weekly benefits shall be paid at the rate of seven hundred seventeen and 42/100 dollars ($717.42).

Defendants shall pay fifty-six (56) weeks of permanent partial disability benefits commencing on the stipulated commencement date of April 16, 2018.

Defendants shall be entitled to credit for all weekly benefits paid to date.

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 reimburse claimant's costs totaling two hundred sixty-five and 00/100 dollars ($265.00).

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 22nd day of September, 2022.

ERIN Q. PALS
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Mark Sullivan (via WCES)

Jane Lorentzen (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.