BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

DANIEL NEHRING,	:	
Claimant,	:	File No. 19006754.02
vs.	:	
MARTIN MARIETTA MATERIALS, INC.,	:	ARBITRATION DECISION
Employer,	:	
and	:	
CHUBB d/b/a INDEMNITY INSURANCE COMPANY OF NORTH AMERICA,	:	Head Note Nos.: 1402.40, 1701, 1801, 1803, 1803.1, 2501, 2502, 2701, 2907, 3800, 4000.2
Insurance Carrier, Defendants.	:	

STATEMENT OF THE CASE

Daniel Nehring, claimant, filed a petition for arbitration against Martin Marietta Materials, Inc., as the employer and Chubb d/b/a Indemnity Insurance Company of North America, as the insurance carrier. This case came before the undersigned for an arbitration hearing on February 18, 2022.

Pursuant to an order from the Iowa Workers' Compensation Commissioner, this case was heard via videoconference using CourtCall. All participants appeared remotely.

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 25 and Claimant's Exhibit 1. All joint exhibits were received without objection. The record was suspended at the conclusion of the arbitration hearing pending receipt of Claimant's Exhibit 1, requested documentation from David H. Segal, M.D. This exhibit was received over the objection of defendants as a result of an evidentiary ruling at the arbitration hearing. As part of that evidentiary ruling, defendants were given an opportunity to depose Dr. Segal. However, defendants waived the opportunity to depose Dr. Segal via e-mail from defense counsel dated March 11, 2022.

Claimant testified on his own behalf. Defendants called Jeff Baldwin, the plant manager for the employer, to testify. No other witnesses testified live at the hearing. The testimonial record closed at the conclusion of the arbitration hearing and the evidentiary record closed after claimant filed Claimant's Exhibit 1 and defendants elected to waive any opportunity to depose Dr. Segal.

However, counsel for the parties requested an opportunity to file post-hearing briefs. This request was granted and both parties filed briefs simultaneously on April 1, 2022. The case was considered fully submitted to the undersigned on that date.

ISSUES

The parties submitted the following disputed issues for resolution:

1. Whether claimant's alleged right upper back (trapezius and rhomboid), cervical spine, cervicogenic headaches and right ulnar neuropathy conditions are causally related to or materially aggravated by the work injury on July 8, 2019.

2. Whether claimant is entitled to temporary total disability, or healing period, benefits from July 11, 2019 through April 19, 2021.

3. Whether the permanent disability is limited to a right shoulder scheduled member or includes unscheduled injuries that should be compensated with industrial disability.

4. The extent of claimant's entitlement to permanent partial disability benefits.

5. Whether claimant is entitled to payment or reimbursement for past medical expenses, including claims for medical mileage.

6. Whether claimant is entitled to reimbursement for an independent medical evaluation, including transportation expenses, pursuant to Iowa Code section 85.39 and, if so, in what amount.

7. Whether claimant is entitled to alternate medical care.

8. Whether claimant is entitled to interest on any late-paid weekly benefits and the date interest should begin accruing.

9. Whether defendants should be ordered to pay penalty benefits for an alleged unreasonable delay or denial of weekly benefits, and, if so, in what amount.

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

FINDINGS OF FACT

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

Daniel Nehring, claimant, sustained an admitted injury on July 8, 2019, when the wind caught a door on his end-loader, causing it to strike him in the right shoulder, right elbow, and upper back. Mr. Nehring asserts he sustained injuries to his right shoulder, right biceps tendon, upper back, trapezius, rhomboid, neck, headaches as a result of his neck injury, and a right ulnar nerve injury. Defendants concede claimant sustained a right shoulder injury on July 8, 2019, but deny that claimant's injuries extend beyond the right shoulder.

Mr. Nehring acknowledges that he sustained a prior right shoulder injury that required surgical repair of his right rotator cuff in approximately 2008 or 2009. However, there is no evidence in this record to demonstrate that claimant had ongoing symptoms, treatment, or limitations after recovering from his right shoulder surgery in 2008 or 2009. Claimant denies any significant right shoulder difficulties prior to his work injury on July 8, 2019.

Mr. Nehring began working for Martin Marietta in May 2012. He submitted to and passed a pre-employment physical before commencing this employment. In fact, the pre-employment physical documented claimant had normal range of motion in the right shoulder, no limitations and could meet all his required job demands at Martin Marietta. (Joint Ex. 3, pp. 1-7) Claimant worked as an equipment operator for the employer. In this position, claimant was required to lift a maximum of 100 pounds, lift 20-40 pounds up to 20-30 times per day, as well as squat, stoop, and crouch. The equipment operator position also required claimant to be able to walk up to 2 miles per day, stand, bend, twist, grip, and grasp.

Claimant worked as an equipment operator from May 2012 until July 8, 2019, without incident, injury, or physical limitations. Unfortunately, on July 8, 2019, claimant was injured while climbing into his end loader. On that day, the door latch failed, and a strong wind blew the door of the end-loader into claimant's right shoulder, right elbow, and upper back. The incident caused Mr. Nehring to experience immediate pain in his right shoulder, which radiated toward his right hand.

Mr. Nehring presented to the emergency room in Iowa Falls on the date of this incident. He reported that a door of a loader closed on his right shoulder and back. He indicated that the pain worsened over an hour and that he had difficulty moving his right shoulder by the time he reported to the emergency room. The emergency room provider documented back pain and diagnosed claimant with a right shoulder strain. (Joint Ex, 5, pp. 1-3)

On July 11, 2019, claimant followed-up for additional care with Thomas S. Waters, D.O., at the Iowa Falls Clinic. Dr. Waters concurred with the diagnosis of a shoulder strain and ordered physical therapy. (Joint Ex. 3, p.p. 27-28) Claimant

returned for evaluation by Dr. Waters two weeks later, reporting increased pain and numbness and tingling into his fingertips. Dr. Waters suspected a biceps tendon tear at that time and ordered an MRI of claimant's right shoulder. (Joint Ex. 3, p. 30)

On August 9, 2019, Dr. Waters documented complaints of right anterior shoulder pain that radiates to claimant's right bicep. Dr. Waters noted that a right shoulder MRI had not yet occurred but continued to recommend the MRI. (Joint Ex. 3, p. 34) In follow-up on August 23, 2019, Dr. Waters noted that the right shoulder MRI demonstrated a partial tear of claimant's right supraspinatus and a complete tear of his right infraspinatus tendon. He recommended an orthopaedic evaluation. (Joint Ex. 3, p. 36)

David K. Sneller, M.D., an orthopaedic surgeon, evaluated claimant on September 4, 2019. Dr. Sneller noted the MRI findings of a torn rotator cuff in claimant's right shoulder and recommended surgical repair. (Joint Ex. 2, p. 9) Claimant consented to surgical intervention and Dr. Sneller took claimant to the operating room on September 13, 2019. Dr. Sneller performed an open partial rotator cuff repair. His operative note indicates finding significant scar tissue within the shoulder joint and opting for an open surgical repair due to the extent of the scarring. The operative note describes significant difficulties in performing the rotator cuff repair. (Joint Ex. 2, pp. 13-14)

After several months of post-operative care, Dr. Sneller declared that claimant had plateaued in his recovery on March 30, 2020. He recommended a functional capacity evaluation (FCE) to determine claimant's functional abilities. (Joint Ex. 2, p. 26) The FCE occurred on April 22, 2020, and demonstrated limitations that include occasional lifting no more than 45 pounds, occasional lifting of 15 pounds to shoulder height, only occasional forward reaching, avoidance of overhead reaching with the right arm, and avoidance of ladder climbing. (Joint Ex. 2, p. 30) Dr. Sneller formally accepted the recommendations of the FCE and imposed permanent work restrictions on April 30, 2020. (Joint Ex. 2, p. 28)

However, at this April 30, 2020 evaluation, claimant requested a second opinion. Dr. Sneller concurred that a second opinion evaluation was appropriate and referred claimant to James V. Nepola, M.D. (Joint Ex. 2, p. 28) I find that the authorized surgeon, Dr. Sneller, made the referral for a second opinion to Dr. Nepola.

Defendants authorized a second opinion evaluation performed by Dr. Nepola at the University of Iowa Hospitals and Clinics on July 21, 2020. Dr. Nepola diagnosed claimant with pseudo paralysis of the shoulder, which he indicated was consistent with a non-functioning rotator cuff. (Joint Ex. 8, p. 4) Dr. Nepola ordered a repeat MRI, which demonstrated a partially intact supraspinatus tendon repair, severe atrophy of the infraspinatus, tearing of the subscapularis tendon, atrophy of the infraspinatus muscle, a partially torn biceps tendon, as well as a possible mild labral tear in the right shoulder. (Joint Ex. 8, pp. 9-10)

Dr. Nepola recommended and subsequently performed an arthroscopic right shoulder rotator cuff revision and tendon transfer for the rotator cuff. (Joint Ex. 8, p. 15) Post-operative care was required, and claimant remained off work from August 26, 2020 through March 23, 2021. Dr. Nepola released Mr. Nehring to return to work with restrictions on March 9, 2021. Specifically, Dr. Nepola imposed restrictions that included occasional lifting up to 50 pounds on an occasional basis and below shoulder height. Dr. Nepola also restricted claimant from any repetitive overhead work or repetitive work away from his body with the right arm. (Joint Ex. 8, p. 43) Martin Marietta returned claimant to light duty work on March 24, 2021, after Dr. Nepola's release.

On April 20, 2021, claimant returned for a final evaluation by Dr. Nepola. Dr. Nepola's office notes indicate that claimant reported increased pain levels, including symptoms in the back of his head and neck, scapula, and trapezius. Dr. Nepola's notes also record pain at the base of the neck, by the clavicle, as well as a pins and needles feeling in claimant's right biceps. (Joint Ex. 8, p. 44) Nevertheless, Dr. Nepola declared maximum medical improvement (MMI) at this evaluation and ordered a functional capacity evaluation (FCE) to determine permanent work restrictions. (Joint Ex. 8, pp. 45-48) Dr. Nepola subsequently issued a permanent impairment rating on August 23, 2021, assigning 26 percent permanent functional impairment to claimant's right upper extremity, or the equivalent of 16 percent of the whole person as a result of claimant's right shoulder injury. (Joint Ex. 8, p. 52)

Mr. Nehring submitted to the recommended FCE on April 29, 2021, at McFarland Clinic. The FCE was deemed valid, and the evaluating therapist concluded that claimant was capable of a 2-hand occasional lift up to 100 pounds from 12 inches from the floor to waist level and an occasional lift of 50 pounds from waist to shoulder level. The therapist recommended only occasional ladder use and avoidance of overhead reaching with the right arm. (Joint Ex. 6, p. 48) Dr. Nepola accepted the FCE recommendations as permanent work restrictions. (Joint Ex. 8, pp. 52-53) After receipt of the April 29, 2021 FCE, the employer returned claimant to his regular duties as an equipment operator.

By March 20, 2021, Mr. Nehring was calling Dr. Nepola's office reporting ongoing symptoms in the shoulder and that the shoulder pain was causing headaches. He reported that the frequency of headaches or the onset of the headaches had changed and increased since released from care by Dr. Nepola. (Joint Ex. 8, p. 29) Claimant again called Dr. Nepola's office on June 21, 2021, reporting ongoing right shoulder pain and headaches. (Joint Ex. 8, p. 49) According to claimant, Dr. Nepola refused to schedule a follow-up visit. Claimant, pursuant to the recommendation of Dr. Nepola's nurse, scheduled an evaluation with his primary care provider.

Sarah Scott, ARNP evaluated claimant on July 1, 2021. Mr. Nehring continued to report right shoulder, right neck, and headache pain. Claimant returned to Hanson Family Hospital and was evaluated by Kathleen Haverkamp, M.D., on July 15, 2021. Dr. Haverkamp noted that claimant's headaches were worsening, that claimant was reporting intermittent paresthesia down his right arm, and tenderness in the paracervical

muscles. Dr. Haverkamp considered the causal connection between claimant's right shoulder work injury and his complaints of neck pain and opined, "I think these are intertwined." (Joint Ex. 3, p. 48) She recommended a cervical MRI.

Defendants agreed to have claimant's neck evaluated by a neurosurgeon, Chad D. Abernathey, M.D. Dr. Abernathey evaluated claimant on August 19, 2021 and recommended a cervical MRI. The MRI of claimant's neck occurred on September 28, 2021. After reviewing the MRI, Dr. Abernathey opined, "The study demonstrates modest degenerative change consistent with age without significant neural compromise. Therefore, I do not recommend any aggressive neurosurgical management. I favor further conservative treatment in this setting." (Joint Ex. 9, p. 2) Defendants challenged causal connection of the neck and authorized no further treatment.

Several causation opinions appear in this evidentiary record pertaining to the disputed injury claims. As noted above, Dr. Haverkamp and her nurse practitioner noted several times in her office notes an opinion that the neck and headache issues were linked to or causally related to the right shoulder injury and condition. Realistically, as a treating physician, Dr. Haverkamp's opinion is important. However, there are physicians in this case that have superior credentials to offer causation opinions. I do not give significant weight to Dr. Haverkamp's opinions or those of her nurse practitioner, other than to note they support the opinions of other physicians offering causation opinions.

Mr. Nehring sought evaluation of his disputed conditions from John D. Kuhnlein, D.O., on October 29, 2021. Following his evaluation, Dr. Kuhnlein offered diagnoses to claimant including:

1) Muscle contraction cephalgia

2) Musculoskeletal neck pain

3) Right shoulder

    a) Right rotator cuff tear with September 17, 2019 surgery (operative note not available)

    b) Right supraspinatus and infraspinatus tears with retraction

        i) September 13, 2019, partial rotator cuff repair (Sneller)

        ii) Recurrent full-thickness supraspinatus and infraspinatus tendon tear, and biceps tendinopathy with August 26, 2020, arthroscopic rotator cuff repair revisions, biceps tenotomy and tenodesis (Nepola)

    c) Chronic right shoulder pain

(Joint Ex. 12, p. 21)

Dr. Kuhnlein explained:

> [I]t is more likely than not that Mr. Nehring used other muscles to accommodate for the failure of the rotator cuff muscles … In using these muscles to accommodate the non-functioning rotator cuff muscles, it is more likely than not that Mr. Nehring developed pain in the trapezius muscle related to accommodation for the severe rotator cuff injury. The infrascapular pain Mr. Nehring experiences is more likely than not due to using other accessory muscles, such as the rhomboid musculature, also in accommodation for the rotator cuff injury. Mr. Nehring has more likely than not developed muscle contraction cephalgia because of the altered use of the trapezius muscle in compensation for the rotator cuff pathology.
>
> Mr. Nehring has developed myofascial neck pain as a sequela to the July 8, 2019 injury caused by the different ways he has had to use the muscles to accommodate the significant rotator cuff tear. The muscle contraction cephalgia Mr. Nehring experiences is also related as a sequela to the July 8, 2019, injury related to changes in how he uses the muscles to accommodate for the significant rotator cuff injury.

(Joint Ex. 12, pp. 21-22)

Dr. Kuhnlein disagreed with the results of the second FCE performed. He opined that "it makes little sense that Mr. Nehring could perform the work outlined in the second functional capacity evaluation on a routine basis without safety concerns for reinjuring himself or injuring others." (Joint Ex. 12, p. 25) Instead, Dr. Kuhnlein recommended permanent restrictions that include lifting up to 50 pounds occasionally from floor to waist, 30 pounds occasionally from waist to shoulder, and no lifting over shoulder height. He also limited claimant to occasional crawling and rare work on ladders or at a height. (Joint Ex. 12, p. 26) Dr. Kuhnlein opined that claimant achieved MMI on November 18, 2021 and assigned claimant a 14 percent permanent functional impairment as a result of the July 8, 2019 injury at work, which includes impairment ratings for claimant's cervical spine, left shoulder, and distal clavicle excision. (Joint Ex. 12, p. 25)

Claimant sought a second independent medical evaluation performed by David Segal, M.D., on December 10, 2021. Dr. Segal opines:

> It is probable that Mr. Nehring's job at Martin Marietta Materials, Inc. was one substantial factor in causing injury, either directly or as a sequela, to his right shoulder including the right rotator cuff, right bicep tendon, right glenohumeral joint, right AC joint, right trapezius / rhomboid / scapula, his cervical spine conditions and diagnoses, and his right ulnar nerve.

(Joint Ex. 13, p. 16)

Ultimately, Dr. Segal offers diagnoses that include claimant's right shoulder, right ulnar neuropathy, permanent aggravation of claimant's cervical degenerative spine

disease, a disc bulge or herniation at C5-C6, right cervical radiculopathy, cervical facet arthropathy, permanent aggravation of cervical foraminal stenosis, occipital neuralgia, and cervicogenic headaches. (Joint Ex. 13, p. 20) He causally connects each of his diagnoses to the work injury either directly or as a sequela of that injury. Claimant points out that Dr. Segal is the only physician to diagnose or offer a causation opinion about claimant's ulnar neuropathy. Accordingly, claimant argues this is an unrebutted opinion and that claimant's injury, at a minimum, includes the right shoulder and right elbow.

Review of Dr. Kuhnlein's report reveals that claimant complained of "pain radiating to the elbow and into the dorsal and radial right forearm with tingling in the right middle, ring, and small fingers when driving." (Joint Ex. 12, pp. 16-17) Dr. Kuhnlein clearly also examined the right elbow. (Joint Ex. 12, p. 20) Nevertheless, in spite of specific symptomatic complaints and his evaluation of the right elbow, Dr. Kuhnlein offered no causally connected diagnosis for the right elbow, including the claimed ulnar neuropathy. Interestingly, Dr. Sneller did not record any symptoms in claimant's right elbow or hand during his treatment, nor did Dr. Nepola.

On the other hand, claimant's physical therapy notes reference right hand tingling and numbness, as well as a cold sensation, from the beginning. On July 18, 2019, the therapist notes claimant experienced "tingling and numbness in the hand as well as a cold sensation throughout the hand." (Joint Ex. 6, p. 1) He repeated that complaint to his therapist on July 24, 2019. (Joint Ex. 6, p. 4) These symptoms were not specifically noted or addressed by treating physicians but appear to have returned when claimant returned to his work as an equipment operator. Ultimately, it appears that Dr. Segal is the only physician that specifically addressed the ulnar neuropathy injury claim. I accept Dr. Segal's opinion on this issue and find that claimant proved both a right shoulder and right elbow injury as a result of the work injury in July 2019.

With respect to the asserted cervical injury, both Dr. Kuhnlein and Dr. Segal opine this is causally connected to the work injury. Clearly, claimant had some pre-existing degenerative disease in his neck. However, there is no evidence that claimant had ongoing symptoms, treatment, or limitations in his neck prior to the injury of July 8, 2019.

Dr. Abernathey seems to assume a causal connection between claimant's work injury and his neck injury. However, he was not impressed with the MRI findings and found no surgical significance. His opinion is ultimately cursory and not convincing either way on causation.

However, Dr. Haverkamp also referred claimant for evaluation by a rheumatologist, Thomas Schmidt, M.D. Dr. Schmidt evaluated claimant on November 18, 2021. Dr. Schmidt diagnosed claimant with possible occipital neuralgia but opined that no rheumatological follow-up was necessary. (Joint Ex. 11, p. 3) Dr. Segal also offered this diagnosis and causally connected it to the July 8, 2019, work injury. I accept the diagnosis of Dr. Schmidt and Dr. Segal and find that claimant has proven he sustained occipital neuralgia as a result of the work injury, causing headaches. In

making this finding, I acknowledge that claimant had a history of headaches prior to the date of injury. However, no expert has explained the significance of the pre-existing headaches or offered an opinion that the headaches are not related to the work injury. Therefore, I accept the opinions of Dr. Schmidt and Dr. Segal for the diagnosis and causal connection to claimant's work injury.

With respect to the diagnosis of permanent aggravation of underlying degenerative spine disease, I accept the opinions of Dr. Segal and Dr. Kuhnlein. Dr. Abernathey appears to assume a causal connection but offers no specific causation opinion. No other physician refutes the cervical injury claim. Therefore, I find that claimant has proven he sustained a permanent aggravation of his underlying degenerative disc disease and ongoing neck symptoms. I similarly accept the opinions of Dr. Kuhnlein that the work injury caused injury, either directly or via sequela to the rhomboids and trapezius at least where they attach to the cervical spine, again contributing to claimant's headaches.

Dr. Segal assigns permanent functional impairment for Mr. Nehring's right shoulder (22 percent of the whole person), his right ulnar neuropathy (12 percent whole person), cervical injury (7 percent whole person) and occipital neuralgia headaches (3 percent whole person). Dr. Segal combines the impairment ratings concluding that Mr. Nehring sustained a 38 percent permanent functional impairment as a result of the combined effects of all his injuries resulting from or a sequela of the July 8, 2019, work injury. (Joint Ex. 13, p. 39)

Additionally, Dr. Segal addresses permanent work restrictions. He criticizes the results of the April 29, 2021, FCE referenced above. He opines, "placing Mr. Nehring in the HEAVY work category may have been related to Mr. Nehring's decline since the FCE." (Joint Ex. 13, p. 45) Instead, Dr. Segal opines:

> [H]e does not have a realistic ability to work at the level and capacity that he did before the work injury. I understand that Mr. Nehring is currently working and getting through each day, but his symptoms and impairment cause him to struggle and risk further injury to his right shoulder, and continues to exacerbate his cervical symptomatology and occipital neuralgia as he tries his best to compensate for his functional limitations from his work injury.

(Joint Ex. 13, p. 44) Dr. Segal recommends claimant not lift overhead with his right arm, that he only occasionally carry or lift 1-10 pounds below shoulder height, that he use ladders only occasionally. He imposes separate restrictions for claimant's neck condition that preclude reaching overhead with either arm only rarely, never working overhead, rare single extension of the head, and never working overhead or with a sustained extension of the head. Dr. Segal recommends claimant only occasionally use his hands for fine motor activities, rarely use vibrating tools and that he only occasionally perform a firm grip due to his ulnar neuropathy. (Joint Ex. 13, p. 45)

I acknowledge that the defendants mounted a credibility challenge against Dr. Segal. Certainly, a settlement of charges filed by the Iowa Board of Medicine against a physician can cause concerns about a physician's competency and credibility. However, Dr. Segal continues to maintain his board certification as a neurosurgeon and a license to practice medicine in the State of Iowa. Dr. Segal offered an explanation of his personal health reason why he no longer practices surgery in Iowa. Ultimately, I find that the credibility challenge was unsuccessful in this case. Dr. Segal offered some opinions that were not rebutted by another physician. I find that claimant has proven a work injury that extends beyond just the right shoulder and extends into the neck, rhomboids, trapezius, neck, right elbow, and causes headaches.

With respect to permanent work restrictions, I find Dr. Kuhnlein's restrictions to be most reasonable with respect to the right shoulder condition. In other words, claimant is likely capable of lifting up to 50 pounds occasionally from floor to waist, 30 pounds occasionally from waist to shoulder, and no lifting over shoulder height. He also limited claimant to occasional crawling and rare work on ladders or at a height. Dr. Segal is the only physician to specifically address restrictions for the neck and/or ulnar neuropathy. Accordingly, I also accept those restrictions and find that claimant should only rarely reach overhead with either arm and never work overhead or with a sustained extension of the head. Pursuant to Dr. Segal's recommendations, claimant should only occasionally use his hands for fine motor activities, rarely use vibrating tools and only occasionally perform a firm grip due to his ulnar neuropathy.

With respect to claimant's permanent disability, the parties dispute whether the disability should be assessed as a functional impairment or with industrial disability. The legal analysis of this issue will be discussed in the conclusions of law. However, I find Dr. Kuhnlein's permanent functional impairment of 14 percent of the whole person is credible and convincing. This impairment rating includes permanent impairment for claimant's right shoulder and neck injuries. I accept Dr. Kuhnlein's impairment rating for the right shoulder and neck over those offered by Dr. Nepola and/or Dr. Segal.

Dr. Segal offers the only permanent impairment ratings for claimant's occipital neuralgia headaches and ulnar neuropathy. Specifically, Dr. Segal opines that claimant sustained a 3 percent permanent whole person functional impairment rating for the headaches and 12 percent functional impairment of the whole person as a result of his ulnar neuropathy. As an aside, the 12 percent functional impairment of the whole person seems high compared with similar cases and diagnoses observed by the undersigned in the past. However, the statutory changes in 2017 do not permit the use of agency expertise in such matters. Therefore, I accept the unrebutted impairment ratings offered by Dr. Segal for the headaches and ulnar neuropathy.

Pursuant to the AMA Guides Combined Values Chart on page 604 of the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, Dr. Kuhnlein's 14 percent permanent impairment combines with the 12 percent ulnar neuropathy rating offered by Dr. Segal for a 24 percent permanent impairment of the whole person. That impairment is then combined with the 3 percent impairment for headaches and results in a combined 26 percent functional permanent impairment under the AMA Guides, Fifth

Edition. I specifically find that claimant has proven a 26 percent permanent functional impairment of the whole person as a result of his July 8, 2019, work injuries and the sequela of that injury.

Additionally, the parties have a dispute about whether claimant has returned to work and has received the same or greater salary, wages, or earnings than he received at the time of the injury. Claimant contends that he has been off on winter lay-off longer than he traditionally was off, if he was off at all, due to his injuries. Prior to his work injury, claimant would perform maintenance on equipment during the traditional winter lay-off of the construction industry. However, since his injury, he is no longer capable of performing the winter maintenance and, at the time of the hearing, was on winter lay-off. This lay-off had persisted longer than was typical for claimant and the persistence of the lay-off is due to his work injury.

On the other hand, defendants contend that claimant earns the same or greater hourly wages. They offered testimony from Jeff Baldwin to demonstrate that claimant remains a valued member of their team and that he will be recalled (and presumably already has been) from lay-off. Given that lay-off was common and that claimant was basically guaranteed to be recalled by the employer at a same or higher wage, the employer contends that claimant remains an employee and is offered work at the same or greater wages than he received at the time of the injury. I find that claimant was to be recalled (and likely has been already). I find that he would be recalled at a wage that was the same or greater than he received at the time of the injury. However, I find that winter lay-off for claimant did extend beyond the typical time it would extend due to his inability to perform equipment maintenance due to his injury.

Mr. Nehring also asserts a claim for temporary disability, or healing period, benefits. The parties did a nice job of compiling information pertaining to dates off work, amounts owed, and payments made by defendants. The parties' compilation of this information is located at Joint Exhibit 18. Joint Exhibit 18 is accepted as accurate as to the amounts claimant was owed, the amounts he was paid as wages, the amounts he was paid as weekly benefits, and the ongoing calculation of the total benefits owed or overpaid to claimant at any given point during the claim.

Defendants' brief does not dispute entitlement to the temporary, or healing period, benefits reflected in Joint Exhibit 18. What Joint Exhibit 18 reflects is that claimant was underpaid at times throughout this claim, overpaid benefits at times, and that defendants have a principal balance due of $732.87 (inclusive of healing period and permanent partial disability benefits) as of January 25, 2022.

Mr. Nehring asserts a claim for healing period benefits, or temporary partial disability benefits from July 11, 2019 through April 19, 2021. (Hearing Report) Again, I accept the accuracy of the parties' Joint Exhibit 18 as to the dates and amounts owed for either healing period or temporary partial disability benefits. According to the parties' calculations, claimant was owed $2,229.08 in temporary partial disability benefits and an additional $41,375.36 in healing period benefits during the claimed period. I find that

to be accurate and also find accurate the documentation of benefits paid by defendants contained in Joint Exhibit 18.

Mr. Nehring asserts that penalty benefits should be awarded in this case because defendants unreasonably delayed payment of weekly benefits at various times throughout this case. Claimant specifically points to the delay in commencement of permanent partial disability (PPD) benefits. The parties stipulated that PPD benefits should commence on April 20, 2021. (Hearing Report) This is the date that Dr. Nepola assigned maximum medical improvement. That stipulation was accepted.

Nevertheless, claimant points out, no PPD benefits were paid to him until October 6, 2021. Defendants offered no written explanation to claimant for the delay in commencement of benefits from April 20, 2021 through October 5, 2021. Defendants introduced no evidence at the time of hearing to establish that they had a good faith basis to delay payment of PPD benefits, particularly after Dr. Nepola issued a permanent impairment rating on August 23, 2021. Nor did defendants offer any evidence that they contemporaneously conveyed a basis for delay to the claimant. The delay from April 20, 2021 through October 6, 2021 is 24 weeks.

Mr. Nehring also points out delays for the week ending August 30, 2020. No explanation for the delay was established by defendants, nor any justification or reasonable basis for a delay of that week of healing period benefits. Defendants offered no evidence that they contemporaneously conveyed a basis for denial to claimant for this period of time.

Claimant also points to a three-week delay in payment of benefits through November 16, 2020. Joint Exhibit 18 demonstrates this delay. Defendants offered no explanation for the delay. Nor did they establish that they contemporaneously conveyed a justification for the delay to claimant.

As of the date of MMI, April 20, 2021, claimant points out that there was an underpayment of healing period of $546.87. See Claimant's Post-Hearing Brief, p. 36; Joint Ex. 18, p. 5) Again, defendants offered no reasonable basis for this delay and did not establish that they contemporaneously conveyed any excuse to the claimant.

Mr. Nehring also points out that there was an underpayment of weekly benefits while the parties figured out claimant's weekly rate. Claimant does not assert a penalty claim for the underpayment while it occurred. However, he points out that the underpayment remained and that defendants did not retroactively pay the higher rate at a subsequent time after the rate issue was resolved.

Claimant requests that a 50 percent penalty be entered for each of these delayed benefits. Specifically, claimant requests a $9,597.18 penalty be imposed in this case. See Claimant's Post-Hearing Brief, p. 38.

Defendants assert that they had difficulties in obtaining an impairment rating from Dr. Nepola and contend that any delay necessary to obtain that impairment rating was reasonable given their efforts to obtain the rating. Defendants offer no explanation for

their delay between the date Dr. Nepola issued his rating (August 23, 2021) and the date PPD benefits were actually paid to claimant (October 6, 2021). Defendants do not address the delays in payment of healing period benefits noted above in their post-hearing brief.

I find that there was a delay in payment of 24 weeks of PPD benefits, that defendants offered no reasonable excuse for the delay in payment of these benefits, particularly after Dr. Nepola issued his impairment rating. I find that there was a delay in payment of the few weeks of healing period noted above and addressed by claimant in his post-hearing brief. Defendants offered no reasonable excuse for these delays and did not establish that they contemporaneously conveyed their basis for any of the delays to claimant.

Overall, defendants appear to have paid the vast majority of claimant's weekly benefits. Their delays in healing period benefits were not reasonable but also not egregious. The 24-week delay of PPD was somewhat egregious, particularly after Dr. Nepola issued his impairment rating. Ultimately, I find that claimant has proven a delay in payment of benefits as outlined above and that defendants failed to prove a reasonable cause or excuse for those delays and/or that the basis for the delays were contemporaneously conveyed to claimant. Considering the extent of the delays, the number of delays, as well as the factors to be considered in determining penalty benefits, I find that a penalty totaling $2,000.00 is less than 50 percent of the benefits delayed but is sufficient to penalize defendants and discourage similar conduct in the future.

Having found that claimant proved his right shoulder, neck, ulnar neuropathy, and headaches are all causally related to, or a sequela of, his July 8, 2019 work injury, I similarly find that the medical expenses outlined and contained in Joint Exhibit 20 are causally related to the work injury. I similarly find the expenses in Joint Exhibit 20 are reasonable and that they are for necessary medical care to treat claimant's injuries. Mr. Nehring also requests an award of transportation expenses contained in Joint Exhibit 20. I find those transportation expenses were for reasonable and necessary care and for care related to the July 8, 2019, work injury.

Mr. Nehring also seeks an order requiring defendants to provide alternate medical care for his neck, upper back, headaches, and right ulnar neuropathy. Claimant's personal physician, Dr. Haverkamp, recommended and referred claimant for pain management with Dr. Wells. Dr. Haverkamp did not specify whether the referral was for the right shoulder only or also for purposes of treating claimant's neck and upper back, as well as his headaches. (Joint Ex. 3, p. 61) Dr. Abernathey recommended additional conservative treatment for claimant's neck. However, he did not specify what treatment he deemed necessary or make a specific referral for such care. (Joint Ex. 9, p. 2)

Dr. Schmidt, claimant's rheumatologist, suggested that claimant "may want to discuss with pain management about injections" for his occipital neuralgia." (Joint Ex. 11, p. 3) However, Dr. Schmidt made no specific referrals. Dr. Kuhnlein also

recommended further treatment, including pain management. He specifically suggested pain management for claimant's neck pain and headaches. Dr. Kuhnlein specifically recommended Dr. Alison Weissheipl, Dr. Christian Ledet, or Dr. Shelley Wells for this pain management. (Joint Ex. 12, p. 24) Dr. Segal similarly recommended pain management for claimant's neck, recommending cervical epidural and facet injections as well as occipital nerve injections. He recommended Dr. Thomas Klein, Dr. Andrew Huff, or Dr. Rahul Rastogi as appropriate pain management physicians.

Dr. Segal also recommended claimant be provided an EMG and an evaluation for his right ulnar neuropathy. He recommended Dr. Irving Wolfe or PCI Neurology in Cedar Rapids perform the EMG. Dr. Segal recommended four different physicians at the University of Iowa Hospitals and Clinics to perform a surgical evaluation for claimant's right ulnar neuropathy. (Joint Ex. 13, p. 34)

I find that claimant requires additional medical care for the disputed injuries to his neck, rhomboids, trapezius, headaches, and right ulnar neuropathy. I find that the defendants' denial of these claims and care for these injuries is not reasonable. However, I also find that no less than six pain specialists have been recommended for treatment of claimant's condition. While it might make sense for defendants to select and authorize Dr. Wells to provide pain management for claimant's neck, rhomboids, trapezius, and headaches since they have already authorized Dr. Wells for claimant's right shoulder, I find no evidence that Dr. Wells potential treatment of the neck and headaches is superior to any of the other five mentioned pain specialists.

With respect to the right ulnar neuropathy, two different providers were mentioned for the EMG and four different surgeons were mentions for the surgical consultation. It is apparent that there is not an exclusive physician required to provide care for the ulnar neuropathy that possesses exclusive skills or abilities. Rather, it appears multiple medical providers could provide reasonable, necessary, and appropriate medical care for claimant's right ulnar neuropathy.

CONCLUSIONS OF LAW

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).

In this case, I found the opinions of Drs. Kuhnlein and Segal to be most convincing and credible. Ultimately, I found that claimant proved injuries to his right shoulder, neck, rhomboids, trapezius, right ulnar neuropathy, as well as headaches resulting from his July 8, 2019, work injury. Accordingly, I conclude that claimant has proven a compensable work injury for each of these conditions and injuries.

Mr. Nehring asserts a claim for temporary disability, or healing period, benefits. Specifically, claimant seeks an award of temporary total disability, or healing period, benefits from July 11, 2019 through April 19, 2021. (Hearing Report) Defendants point out that they have voluntarily paid most of the claimed benefits and do not appear to dispute the claimed periods of time off work or the extent of claimant's entitlement to healing period or temporary partial disability benefits outlined in Joint Exhibit 18. Regardless, I found the summary of benefits owed and paid, as contained in Joint Exhibit 18, to be accurate.

Claimant has established entitlement to $41,375.36 in healing period benefits and an additional $2,229.08 in temporary partial disability benefits. (Iowa Code section 85.34(1); Joint Ex. 18, p. 6) Of course, the parties also stipulate that defendants have paid the vast majority of these benefits and that defendants are entitled to a credit for the benefits paid to date. (Hearing Report)

Section 85.34(1) provides that healing period benefits are payable to an injured worker who has suffered permanent partial disability until (1) the worker has returned to work; (2) the worker is medically capable of returning to substantially similar employment; or (3) the worker has achieved maximum medical recovery. The healing period can be considered the period during which there is a reasonable expectation of improvement of the disabling condition. See Armstrong Tire & Rubber Co. v. Kubli, 312N.W.2d 60 (Iowa App. 1981). Healing period benefits can be interrupted or intermittent. Teel v. McCord, 394 N.W.2d 405 (Iowa 1986).

In addition to the above healing period benefits, Mr. Nehring also asserts a claim for permanent disability benefits. Claimant asserts that his claim should be awarded as an industrial disability because his injury extends beyond the right shoulder to include the neck, right elbow, headaches, and other injuries. In this respect, I found claimant was correct. Claimant's injuries include anatomic body parts beyond the right shoulder. As such, I conclude that claimant's injury should be compensated pursuant to Iowa Code section 85.34(2)(v).

In this case, I found that Mr. Nehring proved several injuries. As a result, his recovery is not limited to the right shoulder or a scheduled member disability. Instead, he qualifies for permanent partial disability benefits pursuant to Iowa Code section 85.34(2)(v). Section 85.34(2)(v) provides:

> If an employee who is eligible for compensation under this paragraph returns to work or is offered work for which the employee receives or would receive the same or greater salary, wages, or earnings than the employee received at the time of the injury, the employee shall be compensated based only upon the employee's functional impairment resulting from the injury, and not in relation to the employee's earning capacity.

This statutory limitation was added during a statutory change made in 2017. Neither party cited a case providing specific guidance on how this situation should be handed under the new language of Iowa Code section 85.34(2)(v). It appears this is a case of first impression.

The actual language of the statute does not provide significant guidance for this situation. See McCoy v. Menard, Inc., File No. 1651840.01 (Appeal April 2021). Claimant has been offered, in fact guaranteed by the employer, a return to work after the typical construction winter lay-off ends. In this sense, he has clearly been offered work. In fact, he returned to work prior to winter lay-off. He returned to work earning the same or greater wages as he received at the time of the injury and presumably will be returned to work after lay-off at the same or greater wages than he received at the time of the injury.

On the other hand, claimant makes a convincing argument that he has remained on lay-off longer than would otherwise be typical for him. Therefore, if viewed in aggregate, claimant may receive the same or greater hourly wage when he returned or returns to work but would earn less wages on an annualized basis.

In McCoy v. Menard, Inc., File No. 1651840.01 (Appeal April 2021), the Commissioner interpreted Iowa Code section 85.34(2)(v) to consider the actual hours worked and declined to consider the hourly wage offered in isolation. The Commissioner held, "a claimant's hourly wage must also be considered in tandem with the actual hours worked by that claimant or offered by the employer when comparing pre- and post-injury wages and earnings under section 85.34(2)(v)." Id. However, the Commissioner ultimately found in McCoy that the claimant was consistently offered work at the same or greater earnings and limited claimant's recovery to a functional impairment.

This case presents a scenario in which claimant is being offered work at the same or greater earnings prior to lay-off and once recalled from lay-off. The question is whether the extension of that lay-off due to claimant's injury and limitations is sufficient to remove this case from the functional impairment and award permanent disability

based on industrial disability. I conclude that it is not proper to remove this case from the functional impairment and award industrial disability.

It appears that the purpose, or intention, of the new language in Iowa Code section 85.34(2)(v) is to encourage an employer to maintain an employee after an injury and to pay that employee a wage that is the same or greater than he or she earned prior to being injured. If I interpret the statute to require an award of industrial disability in this scenario, the incentive for an employer to retain an employee and pay him or her the same or greater wages would be damaged, if not eliminated. This would seem contrary to the intention of the statute. Moreover, awarding only a functional impairment in this case does not result in claimant losing his claim for industrial disability. It only delays the award to a time when claimant no longer works for this employer. I conclude that the return to work and offer of a return to work after the construction winter lay-off at wages that are the same or greater than those earned at the time of the injury mandates an award using the functional permanent impairment. Iowa Code section 85.34(2)(v).

Pursuant to Iowa Code section 85.34(2)(v), the award of benefits is made on a 500-week schedule. Having found that claimant proved a 26 percent permanent functional impairment, I conclude that claimant has proven entitlement to 130 weeks of permanent partial disability benefits.

The parties also raised a legal issue about the application of interest to any past due benefits. Claimant contends that interest is payable on any week of benefits paid past the due date for such benefits. Joint Exhibit 18 demonstrates several points in time when benefits were underpaid to claimant. Interest is not calculated for those late paid benefits, but claimant contends it should be ordered.

Defendants assert that interest should not be payable on any past-due benefits until a date certain to be determined by the agency. Defendants contend that no interest should be payable on temporary disability, or healing period, benefits until MMI was achieved. Defendants also contend that no interest should be ordered on PPD benefits until the date Dr. Nepola issued his permanent impairment rating. Defendants appear to be using a more aggregate thinking process about what remains owed. Claimant is focused on the specific weeks that were paid late.

The issue of interest is an issue that has been clearly defined by the Iowa Supreme Court. The Court has adopted the United States rule. See Christensen v. Snap On Tools Corp, 554 N.W.2d 254, 261-262 (Iowa 1996). Weekly compensation benefits (healing period, temporary partial disability, and permanent partial disability) are due the day after the compensation week ends. Robbennolt v. Snap-On Tools Corp., 555 N.W.2d 229, 235 (Iowa 1996). If weekly benefits are not paid on or before the date due, interest is owed. Iowa Code section 85.30. In fact, any subsequently paid benefits are allocated to satisfaction of the outstanding interest before being applied to outstanding principal. Christensen, 554 N.W.2d at 261-262.

Accordingly, I conclude claimant is correct and that interest should be payable on all weekly benefits that were paid after the due date, including any underpayment of

weekly rate. All subsequent payments should be first allocated to satisfaction of interest before being applied to outstanding principal. Id.

The parties did not submit a calculation of interest using the United States rule. However, it is assumed the parties can perform this mathematical calculation. If there is further dispute about the amount of interest owed, the parties should file a request for rehearing within the applicable time for clarification of the total interest due.

The subject of late-paid weekly benefits also leads to a claim for penalty benefits by claimant. I found that claimant proved several weeks of delayed benefits, including a 24-week period of delay in payment of permanent partial disability benefits and a few intermittent delays in payment of healing period benefits. I also found that defendants failed to prove a reasonable cause or excuse for these various delays and that defendants failed to prove they contemporaneously conveyed the basis(es) for these delays to claimant.

Penalty benefits are governed by Iowa Code section 86.13(4), which 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 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).

Weekly compensation payments are due at the end of the compensation week. Robbennolt, 555 N.W.2d 229, 235.

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

When an employee's claim for benefits is fairly debatable based on a good faith dispute over the employee's factual or legal entitlement to benefits, an award of penalty benefits is not appropriate under the statute. Whether the issue was fairly debatable turns on whether there was a disputed factual dispute that, if resolved in favor of the employer, would have supported the employer's denial of compensability. Gilbert v. USF Holland, Inc., 637 N.W.2d 194 (Iowa 2001).

In this case, I found that claimant proved a delay of 24 weeks in the payment of permanent partial disability benefits and a few additional delays in the payment of healing period benefits. I also found that defendants did not offer a reasonable excuse for the delay in payment of benefits. Iowa Code section 86.13(4)(b)(2). Defendants did not contemporaneously convey their bases for delay of benefits. Iowa Code section 86.13(4)(c)(3). Defendants bore the burden to establish a reasonable basis, or excuse, and to prove the contemporaneous conveyance of those bases to the claimant. Defendants failed to carry their burden of proof on the penalty issues, and a penalty award is appropriate. Iowa Code section 86.13(4).

The purpose of Iowa Code section 86.13 is both punishment for unreasonable conduct but also deterrence for future cases. Id. at 237. In this regard, the Commission is given discretion to determine the amount of the penalty imposed with a maximum

penalty of 50 percent of the amount of the delayed, or denied, benefits. Christensen v. Snap-On Tools Corp., 554 N.W.2d 254, 261 (Iowa 1996).

In exercising its discretion, the agency must consider factors such as the length of the delays, 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. Meyers v. Holiday Express Corp., 557 N.W.2d 502, 505 (Iowa 1996). In this case, the 24-week delay of permanent disability benefits was somewhat egregious, particularly since the delay extended weeks beyond the date that Dr. Nepola issued a permanent impairment rating. On the other hand, defendants voluntarily paid most of the benefits owed in this claim and did so in a timely manner.

Having considered the relevant factors and the purposes of the penalty statute, I conclude that a section 86.13 penalty in the amount of $2,000.00 is appropriate in this case. Such an amount is appropriate to punish the employer for delays in payment of benefits under these facts and should serve as a deterrent against future conduct. However, the facts of this case are not of such an egregious nature that an additional penalty is warranted.

Claimant seeks award of past medical expenses in this case. The employer shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance, and hospital services and supplies for all conditions compensable under the workers' compensation law. The employer shall also allow reasonable and necessary transportation expenses incurred for those services. The employer has the right to choose the provider of care, except where the employer has denied liability for the injury. Section 85.27. Holbert v. Townsend Engineering Co., Thirty-second Biennial Report of the Industrial Commissioner 78 (Review-Reopening October 1975).

Claimant details the past medical expenses sought in Joint Exhibit 20. Defendants contested the compensability of the past medical expenses in Joint Exhibit 20 on the hearing report. Defendants challenged causal connection of the medical expenses to the work injury, as well as whether the medical expenses were related to one of the disputed conditions.

On page 32 of their post-hearing brief, however, defendants appear to revise their challenge. Defendants' post-hearing brief concedes, "The purposes for the medical services and transportation identified in Joint Exhibit 20 relates to the Claimant's contested conditions." No dispute is raised or urged that some of the expenses listed in Joint Exhibit 20 are not related to one of the alleged injuries (ulnar neuropathy, cervical, rhomboids, trapezius, headaches, right shoulder). Accordingly, it appears defendants now concede the expenses contained in Joint Exhibit 20 are related to the injuries or conditions upon which these claims are made.

Therefore, the remaining challenge or question to determine is whether those claimed injuries are related to the work injury of July 8, 2019. As noted above, I found that each of those conditions is causally related or a sequela of the July 8, 2019, work

injury. As such, I conclude that defendants should be ordered to pay, reimburse satisfy, and otherwise hold claimant harmless for all the medical expenses and transportation expenses contained in Joint Exhibit 20. Iowa Code section 85.27.

Mr. Nehring also seeks reimbursement of the independent medical evaluation charges from Dr. Kuhnlein. Section 85.39 permits an employee to be reimbursed for subsequent examination by a physician of the employee's choice where an employer-retained physician has previously evaluated "permanent disability" and the employee believes that the initial evaluation is too low. The section also permits reimbursement for reasonably necessary transportation expenses incurred and for any wage loss occasioned by the employee attending the subsequent examination.

Defendants are responsible only for reasonable fees associated with claimant's independent medical examination. Claimant has the burden of proving the reasonableness of the expenses incurred for the examination. See Schintgen v. Economy Fire & Casualty Co., File No. 855298 (App. April 26, 1991). Claimant need not ultimately prove the injury arose out of and in the course of employment to qualify for reimbursement under section 85.39. See Dodd v. Fleetguard, Inc., 759 N.W.2d 133, 140 (Iowa App. 2008).

Specifically, Iowa Code section 85.39(2) provides, in relevant part:

> If an evaluation of permanent disability has been made by a physician retained by the employer and the employee believes this evaluation to be too low, the employee shall … be reimbursed by the employer the reasonable fee for a subsequent examination by a physician of the employee's own choice, and reasonably necessary transportation expenses incurred for the examination.… An employer is only liable to reimburse an employee for the cost of an examination conducted pursuant to this subsection if the injury for which the employee is being examined is determined to be compensable.

In this case, Dr. Nepola provided an impairment rating. Dr. Nepola was an authorized physician. However, defendants pointed out that claimant requested a second opinion evaluation with Dr. Nepola. Therefore, defendants' initial assertion is that they did not select Dr. Nepola, and claimant should not qualify for reimbursement of an independent medical evaluation.

However, I found that Dr. Sneller, an authorized surgeon selected by defendants, concurred with claimant's request for a second opinion and made the referral for evaluation by Dr. Nepola. When a designated physician refers a patient to another physician, that physician acts as the defendant employer's agent. Permission for the referral from defendant is not necessary. Kittrell v. Allen Memorial Hospital, Thirty-fourth Biennial Report of the Industrial Commissioner, 164 (Arb. November 1, 1979) (aff'd by industrial commissioner). See also Limoges v. Meier Auto Salvage, I Iowa Industrial Commissioner Reports 207 (1981).

Accordingly, I find that Dr. Nepola was "retained by the employer" upon referral by Dr. Sneller. See Iowa Code section 85.39(2).

Defendants authorized and paid for the treatment rendered by Dr. Nepola. Therefore, I reject defendants' argument in this respect. I conclude that claimant may qualify for an independent medical evaluation if he demonstrates compliance with the remainder of the requirements of Iowa Code section 85.39(2).

The next requirement of Iowa Code section 85.39(2) is that the examination performed by the physician chosen by claimant occur subsequent to the issuance of a permanent impairment rating by the physician retained by defendants. In this instance, I found that Dr. Nepola rendered a permanent impairment rating on August 23, 2021. Dr. Kuhnlein performed his evaluation on October 26, 2021. Claimant has clearly established that Dr. Kuhnlein's evaluation occurred subsequent to the issuance of the impairment rating by Dr. Nepola.

The third requirement to qualify for reimbursement of an independent medical evaluation fee is to demonstrate that the condition(s) evaluated is compensable as a work injury. Having found and concluded that each of the conditions evaluated by Dr. Kuhnlein are compensable work injuries or sequela thereof, I conclude claimant has established entitlement to reimbursement of her independent medical evaluation with Dr. Kuhnlein. Iowa Code section 85.39 (2017); Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839, 843 (Iowa 2015).

Defendants raise one further challenge to the award of Dr. Kuhnlein's evaluation fees. Defendants contend that they already reimbursed the expenses of Dr. Segal's IME. Defendants contend that by reimbursing those charges, they have satisfied their obligation under Iowa Code section 85.39(2) since the statute only permits reimbursement for one evaluation of claimant's choosing.

Claimant credibly and convincingly counters this argument in two ways. First, claimant points out that the evaluation performed by Dr. Kuhnlein occurred before the evaluation by Dr. Segal. Indeed, Dr. Kuhnlein evaluated claimant in October 2021. Dr. Segal evaluated claimant in December 2021. Claimant contends that the statute permits reimbursement for an evaluation by a physician of the claimant's choice. Claimant elects to have Dr. Kuhnlein's evaluation qualify as his section 85.39 evaluation.

Second, claimant contends that to permit defendants' argument allows defendants to select the physician that qualifies for reimbursement under Iowa Code section 85.39, rather than claimant. In essence, by reimbursing the lesser charges submitted by Dr. Segal, defendants are attempting to retain the ability to select which physician claimant uses under Iowa Code section 85.39. However, the statute provides that the physician should be of claimant's choosing, not the defendants' choosing. Claimant asserts the more convincing argument, and I conclude that claimant is permitted to select Dr. Kuhnlein as his section 85.39 evaluator. This is particularly true given that Dr. Kuhnlein performed the earlier evaluation. I conclude that claimant has

established that the evaluation performed by Dr. Kuhnlein qualifies for reimbursement pursuant to Iowa Code section 85.39.

Dr. Kuhnlein charged $8,087.50 for his evaluation services. Claimant acknowledges that this is a "steep" fee for an independent medical evaluation. Claimant contends that the fee is reasonable given the number of pages reviewed, that multiple body parts are involved in the claim, the length of Dr. Kuhnlein's evaluation, the necessity for Covid-19 precautions extending the evaluation, and the thoroughness of Dr. Kuhnlein's report and opinions.

Defendants challenge the reasonableness of Dr. Kuhnlein's evaluation fee. They point out that Dr. Segal's fee for a similar evaluation and report was $4,750.00. (Joint Ex. 24, p. 7) Defendants further point out that Dr. Segal issued a 49-page report compared to the 27-page report authored by Dr. Kuhnlein.

Realistically, the length of an IME report is not convincing to the undersigned about the "value" or "reasonableness" of the charges. A 27-page IME report is lengthy, and a 49-page report is bordering on burdensome to read and comprehend. Nevertheless, defendants' contention is acknowledged and considered. Iowa Code section 85.39(2) provides, "A determination of the reasonableness of a fee for an examination made pursuant to this subsection, shall be based on the typical fee charged by a medical provider to perform an impairment rating in the local area where the examination is conducted." Dr. Kuhnlein and Dr. Segal are both physicians that perform a fair amount of IME's in the State of Iowa. Both reviewed significant documentation, performed an evaluation, and provided thorough reports. Yet, their charges are significantly divergent in this case.

In this instance, with competing reports and fees, both obtained by claimant, it is difficult to say that Dr. Kuhnlein's fee for this evaluation is reasonable and consistent with a "typical fee charged by a medical provider … in the local area." Iowa Code section 85.39(2). Dr. Kuhnlein is well-qualified. However, Dr. Segal is a neurosurgeon and specifically qualified to provide opinions related to the disputed head and neck issues. I accepted portions of each physician's opinions as most credible and convincing.

I cannot say that Dr. Kuhnlein's qualifications are so superior that they justify a charge of more than $3,000 greater than that charged by Dr. Segal for a similar evaluation and report. Considering the fees charged by Dr. Segal, the amount of time required for the evaluation, and related considerations, I find that a fee not exceeding $6,000.00 would be reasonable under the circumstances and consistent with a typical fee charged by a medical provider to perform an IME in the local area where Dr. Kuhnlein practices. Accordingly, I conclude claimant is entitled to an order requiring defendants to reimburse Dr. Kuhnlein's fees in the amount of $6,000.00. Iowa Code section 85.39(2) (2017); Young, 867 N.W.2d at 843. Claimant is also entitled to reimbursement of mileage to and from Dr. Kuhnlein's evaluation totaling $77.84. Iowa Code section 85.39(2).

Mr. Nehring also asserted a claim for alternate medical care and seeks an order directing care for his right upper back, neck, cervicogenic headaches, as well as an EMG for his right ulnar neuropathy. Specifically, claimant seeks an order requiring defendants to authorize Shelly Wells, M.D. as a pain specialist to treat claimant's right upper back, neck, and cervicogenic headaches. In addition, Mr. Nehring seeks an order requiring defendants to authorize an EMG with Irving Wolfe, D.O., for his right ulnar neuropathy and authorizing claimant's personal physician, Dr. Haverkamp, to treat the right ulnar neuropathy and make any necessary referrals after the EMG results are obtained.

Iowa Code section 85.27(4) provides, in relevant part:

> For purposes of this section, the employer is obliged to furnish reasonable services and supplies to treat an injured employee, and has the right to choose the care. . . . The treatment must be offered promptly and be reasonably suited to treat the injury without undue inconvenience to the employee. If the employee has reason to be dissatisfied with the care offered, the employee should communicate the basis of such dissatisfaction to the employer, in writing if requested, following which the employer and the employee may agree to alternate care reasonably suited to treat the injury. If the employer and employee cannot agree on such alternate care, the commissioner may, upon application and reasonable proofs of the necessity therefor, allow and order other care.

An application for alternate medical care is not automatically sustained because claimant is dissatisfied with the care he has been receiving. Mere dissatisfaction with the medical care is not ample grounds for granting an application for alternate medical care. Rather, the claimant must show that the care was not offered promptly, was not reasonably suited to treat the injury, or that the care was unduly inconvenient for the claimant. Long v. Roberts Dairy Co., 528 N.W.2d 122 (Iowa 1995).

An employer's right to select the provider of medical treatment to an injured worker does not include the right to determine how an injured worker should be diagnosed, evaluated, treated, or other matters of professional medical judgment. Assmann v. Blue Star Foods, File No. 866389 (Declaratory Ruling, May 19, 1988).

The employer has the right to choose the provider of care, except where the employer has denied liability for the injury. Section 85.27; Holbert v. Townsend Engineering Co., Thirty-second Biennial Report of the Industrial Commissioner, 78 (Review-Reopening 1975).

Defendants denied liability for the neck, upper back (rhomboids and trapezius), headache, and ulnar neuropathy conditions. Accordingly, defendants authorized no treatment for those conditions.

Ultimately, having found the neck, rhomboids, trapezius, headaches, and ulnar neuropathy conditions related to the alleged work injury, I find that claimant is entitled to

medical care for those conditions. Defendants' offer of no care is not reasonable. Iowa Code section 85.27. Accordingly, claimant is entitled to an order providing care for the neck, rhomboids, trapezius, headaches, and ulnar neuropathy. However, claimant has not established a need for a specific pain specialist to treat her neck, upper back, and headaches.

It might make sense for defendants to authorize Dr. Wells for the neck and headaches since she is already authorized to treat the right shoulder. However, at least six pain specialists were mentioned as reasonable selections to treat claimant's neck, upper back, and headaches. I conclude that defendants should be permitted to select the pain specialist they wish to treat claimant's neck, rhomboids, trapezius, and headaches so long as they make the selection and provide care in a reasonable time.

With respect to the recommendation for an EMG related to claimant's right ulnar neuropathy and a surgical consultation, again there were multiple medical providers mentioned as qualified for these procedures and evaluations. Claimant has not proven that a specific provider is necessary to undertake the EMG or to perform the surgical evaluation of claimant's right ulnar neuropathy. Again, defendants should be permitted to select a provider of their choosing so long as they identify, authorize, and schedule prompt treatment for claimant's right ulnar neuropathy.

The final disputed issue is whether costs should be assessed against either party. Costs are assessed at the discretion of the agency. Iowa Code section 86.40. Claimant has prevailed on the majority of the disputed issues submitted for resolution. Therefore, I conclude it is appropriate to assess claimant's costs against defendants in some amount.

Mr. Nehring submits a request for two filing fees. Filing fees are reasonable and appropriate costs pursuant to 876 IAC 4.33(7). I conclude it is reasonable to assess one filing fee in the amount of $103.00.

Claimant also seeks assessment of the charges for obtaining medical records from Hanson Family Hospital. Claimant's statement of costs asserts this is for a medical report. However, review of the statement demonstrates that it is for photocopying medical records. (Joint Ex. 24, p. 5) I conclude this is not a permissible cost under 876 IAC 4.33.

Claimant next seeks reimbursement for the cost of Dr. Segal's report, or $3,375.00. Ultimately, Dr. Segal provided some unrebutted opinions, which I accepted in this case. His opinions were offered in lieu of him testifying live. Defendants even declined the opportunity to depose Dr. Segal. I relied upon Dr. Segal's charges in analyzing those of Dr. Kuhnlein so I find Dr. Segal's charges to be reasonable. Agency rule 876 IAC 4.33(6) permits assessment of "the reasonable costs of obtaining no more than two doctors' or practitioners' reports. I conclude it is reasonable to assess the cost of Dr. Segal's report. Claimant asserts the amount to be assessed should be $3,375.00. However, review of Dr. Segal's statement of charges demonstrates that he only charged $2,250.00 for preparation of his report. (Joint Ex. 24, p. 7) I conclude it is

appropriate to assess defendants $2,250.00 for the cost of Dr. Segal's report. 876 IAC 4.33(6).

Finally, claimant seeks assessment of the cost of his deposition transcript. Agency rule 876 IAC 4.33(2) permits the assessment of transcription costs when appropriate. In this instance, claimant's deposition transcript was not particularly helpful and resulted in significant duplication of evidence. I decline to assess the cost of claimant's deposition in this case. In total, I conclude it is appropriate to assess claimant's costs in the amount of $2,353.00.

ORDER

THEREFORE, IT IS ORDERED:

Defendants shall pay claimant healing period benefits from July 11, 2019 through April 19, 2021, as outlined and detailed in Joint Exhibit 18.

Defendants shall pay claimant one hundred thirty (130) weeks of permanent partial disability benefits commencing on April 20, 2021.

All weekly benefits shall be payable at the stipulated weekly rate of six hundred forty-six and 49/100 dollars ($646.49) per week.

Defendants are entitled to the stipulated credit for weekly benefits paid to date.

Interest shall be payable using the United States rule.

Interest on any late paid weekly benefits shall be payable at an annual rate equal to the one-year treasury constant maturity published by the federal reserve in the most recent H15 report settled as of the date of injury, plus two percent. See Gamble v. AG Leader Technology File No. 5054686 (App. Apr. 24, 2018).

Defendants shall pay claimant two thousand and 00/100 dollars ($2,000.00) in penalty benefits for unreasonable delay in payment of weekly benefits.

Defendants are responsible for payment, reimbursement, and to hold claimant harmless for the medical expenses contained in Joint Exhibit 20.

Defendants shall reimburse Dr. Kuhnlein's independent medical evaluation fees totaling six thousand and 00/100 dollars ($6,000.00).

Defendants shall reimburse claimant seventy-seven and 84/100 dollars ($77.84) as a transportation cost for claimant to attend the independent medical evaluation with Dr. Kuhnlein.

Defendants shall authorize and pay for the right shoulder medical care they consented to at the time of hearing, including an evaluation at Mayo Clinic.

Defendants shall promptly identify a provider, authorize, and pay for an EMG of claimant's right arm as well as a subsequent orthopaedic surgical consultation related to claimant's right ulnar neuropathy.

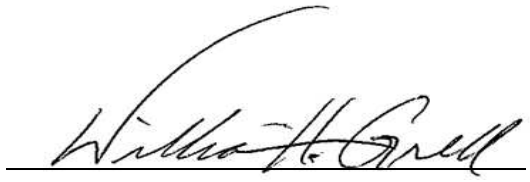
Defendants shall promptly select, authorize, and pay for a pain specialist to treat claimant's neck, rhomboids, trapezius, and headaches.

Defendants shall reimburse claimant's costs in the amount of two thousand three hundred fifty-three and 00/100 dollars ($2,353.00).

Defendants are entitled to a credit for any reimbursement they made toward Dr. Segal's fees.

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 __5th__ day of August, 2022.



WILLIAM H. GRELL
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Saffin Parrish-Sams (via WCES)

Rene Lapierre (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.