BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

MARY DENG, Claimant, vs. FARMLAND FOODS, INC., Employer, and SAFETY NATIONAL CASUALTY CORP., Insurance Carrier, Defendants.	File No. 5061883 ARBITRATION DECISION Head Note Nos.: 1803; 1803.1; 4000.2

STATEMENT OF THE CASE

This is a petition in arbitration. Claimant, Mary Deng, initiated this contested case proceeding when she filed her original notice and petition with the Iowa Division of Workers' Compensation. The petition was filed on April 13, 2018. Claimant alleged she sustained a work-related injury on August 19, 2017. Claimant alleged the work injury affected her left shoulder, left arm, and neck. (Original Notice and Petition)

Farmland Foods, Inc. is the named employer. Safety National Casualty Corporation is the named insurance carrier. Defendants filed their answer on April 30, 2018. Defendants denied liability for the alleged injuries.

The hearing administrator scheduled the case for hearing on February 26, 2019. The hearing took place at the Iowa Workforce Development offices in Sioux City, Iowa. The undersigned appointed Ms. Morgan Catania as the certified shorthand reporter. She is the official custodian of the records and notes. The original transcript was filed on March 15, 2019.

Claimant testified at hearing. No other witnesses testified. The parties offered Joint Exhibits 1 through 8. Claimant offered Exhibits 1 through 4. Defendants offered Exhibits A through C. The exhibits were admitted as evidence in the case.

The evidentiary record was suspended at the conclusion of the live hearing to permit claimant an opportunity to obtain a rebuttal report from Sunil Bansal, M.D. The rebuttal report was timely filed thereafter by claimant and is admitted as Joint Exhibit 6, pages 87A-87B. Upon receipt of Dr. Bansal's rebuttal report, the evidentiary record closed.

Post-hearing briefs were filed on March 29, 2019. The case was deemed fully submitted on that date.

STIPULATIONS

The parties completed the designated hearing report and filed it at the time of the arbitration hearing. The parties' various stipulations are:

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

2. Claimant sustained an injury, which arose out of and in the course of her employment on August 19, 2017;

3. The parties agree the stipulated injuries resulted in both temporary and/or permanent disability;

4. Temporary disability, or healing period, is no longer in dispute;

5. Claimant's gross average earnings on the date of injury, calculated pursuant to Iowa Code section 85.36, were $956.94 per week;

6. Claimant's actual average earnings prior to the injury were $1,088.05 per week.

7. Claimant's actual average earnings at the time of hearing were $1,204.74.

8. If claimant's injury is determined to be to the "whole body," no industrial loss is assessed at this time due to Claimant's increased earnings since the injury date.

9. Claimant was married on the date of injury;

10. Claimant was entitled to four exemptions on the date of injury;

11. Medical benefits are no longer in dispute;

12. Defendants consented at the commencement of hearing to pay claimant's medical mileage ($171.20 for mileage to an FCE on March 7, 2018 and an MRI on November 15, 2017).

13. Defendants will pay interest on any benefits awarded.

14. Defendants waive any affirmative defenses.

15. Defendants have paid ten weeks of compensation at the rate of $628.46 and are entitled to a credit for those payments.

16. Claimant has paid certain costs associated with this case, and defendants do not dispute those costs have been paid.

ISSUES

The issues presented are:

1. Whether claimant's injury involves the left shoulder and should be compensated as a scheduled member injury or involves an unscheduled injury?

2. If the injury is limited to the left shoulder, what is the applicable permanent impairment rating under the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition?

3. If the injury is limited to the left shoulder, should claimant be awarded permanent disability benefits above the permanent impairment rating due to permanent restrictions?

4. If the injury is limited to the left shoulder, should the injury be compensated as a scheduled member to the arm or should the impairment rating be converted to the whole person before being awarded?

5. If it is determined that the injury should be compensated as an unscheduled injury, the extent of claimant's entitlement to permanent disability benefits for the functional impairment rating.

6. What is the proper commencement date for permanent disability benefits?

7. Whether defendants should be ordered to pay penalty benefits for allegedly late-paid and allegedly unreasonably delayed payment of permanent disability benefits.

8. Whether claimant's costs should be assessed against defendants and, if so, in what amount?

FINDINGS OF FACT

This deputy, after listening to the testimony of claimant at hearing, after judging the credibility of the claimant, and after reading the evidence, the transcript, and the post-hearing briefs, makes the following findings of fact and conclusions of law:

The party who would suffer loss if an issue were not established has the burden of proving the issue by a preponderance of the evidence. Iowa Rule of Appellate Procedure 6.14(6).

Mary Deng started working for Farmland Foods on March 29, 2016. During her employment, Ms. Deng performed three different positions for Farmland Foods. The initial position she performed was “cutting cheeks.” The second position she performed was trimming fat in the belly and the third position was trimming the liver. These positions required repetitive use of claimant’s upper extremities, including some work at approximately shoulder level.

Before commencing her employment with Farmland Foods, Ms. Deng had no prior symptoms or treatment of her left shoulder or surrounding structures. Unfortunately, on August 19, 2017, Ms. Deng developed symptoms in her left shoulder area and went to the plant nurse. The company ultimately referred Ms. Deng for medical evaluation by Todd A. Woollen, M.D.

Dr. Woollen evaluated claimant on November 22, 2017. He obtained an MRI of claimant’s left shoulder and referred claimant for orthopaedic evaluation performed by Douglas F. Bolda, M.D. (Joint Ex. 1, p. 4) Dr. Bolda evaluated claimant on November 28, 2017. He indicated the left shoulder MRI suggested a potential SLAP tear but noted claimant was not an overhead throwing athlete and she did not have a history of trauma to the left shoulder. (Joint Ex. 1, p. 8)

By January 9, 2018, Dr. Bolda indicated claimant’s left shoulder etiology is uncertain. (Joint Ex. 1, p. 11) On February 27, 2018, Dr. Bolda noted comments from claimant’s physical therapist that claimant was unable to replicate home exercises and the therapist did not think claimant was performing those home exercises. Dr. Bolda also noted the therapist’s report of poor effort by claimant, rather than true shoulder weakness. In his February 27, 2018 office note, Dr. Bolda indicated he suspected malingering by claimant because she exhibited non-physiologic symptoms. Dr. Bolda recommended a functional capacity evaluation (FCE). (Joint Ex. 1, p. 13) The FCE occurred on March 7, 2018. (Joint Ex. 4)

Claimant returned for further evaluation with Dr. Bolda on April 6, 2018. Dr. Bolda noted claimant had submitted to a FCE, which was determined to be valid by the therapist. The FCE recommended claimant lift and carry no more than 40 pounds on an occasional basis. However, Dr. Bolda recommended slightly more conservative permanent restrictions. Specifically, Dr. Bolda recommended claimant not lift more than 30 pounds on an occasional basis. He recommended claimant limit lifting overhead to 20 pounds or less. (Joint Ex. 1, p. 18)

Unfortunately, claimant’s left shoulder symptoms continued. On June 16, 2018, Dr. Bolda recommended claimant be evaluated by an orthopaedic surgeon that specialized in treatment of the shoulder. (Joint Ex. 1, p. 22) Defendants honored the referral and scheduled claimant to be evaluated by Timothy R. Vinyard, M.D. (Joint Ex. 5)

Dr. Vinyard evaluated claimant on July 30, 2018. He assessed claimant with neck pain and left arm pain. Dr. Vinyard noted pain in the left trapezius. Dr. Vinyard opined, "I do not believe that her pain is related to the shoulder, especially since cortisone injections to the shoulder in the past did not improve her pain. I do not have any surgical intervention options offer her at this time." (Joint Ex. 5, p. 59) Dr. Vinyard concurred with the restrictions recommended in the FCE. (Joint Ex. 5, p. 61)

Ms. Deng returned to Dr. Bolda, who rendered a permanent impairment rating on February 23, 2019. Dr. Bolda opined claimant had symmetric ranges of motions in her right and left shoulders. Therefore, Dr. Bolda opined claimant did not qualify for a permanent impairment of the left shoulder. However, Dr. Bolda did assign a two percent permanent impairment rating as a result of claimant's ongoing pain. (Joint Exhibit 1, pp. 32G-32H)

Claimant obtained an independent medical evaluation performed by Sunil Bansal, M.D. on September 27, 2018. Dr. Bansal opined claimant sustained a superior anterior to posterior labral tear (SLAP tear) in her left shoulder. He also opined claimant had rotator cuff tendonitis. (Joint Ex. 6, p. 78) He opined claimant achieved maximum medical improvement on August 4, 2018 and assigned an eight percent permanent impairment of the left upper extremity as a result of the work injury. Dr. Bansal also recommended permanent work restrictions. The restrictions included no lifting greater than 10 pounds occasionally with the left arm, no lifting more than 30 pounds with both arms, and no over the shoulder lifting with the left arm. (Joint Ex. 6, p. 80)

Claimant's counsel inquired and requested clarification from Dr. Bansal after issuance of his IME report. On January 4, 2019, Dr. Bansal issued a supplemental report. In the report, Dr. Bansal opined:

> Ms. Deng has two anatomically distinct shoulder area injuries. One is to her labrum that is not located proximal to the glenohumeral joint space and the second is to her infraspinatus that is proximal to the glenohumeral joint space…. [t]he infraspinatus attaches to the scapula. Moreover, this anatomical attachment at least partially explains the scapular area pain as noted by her treating physician, Dr. Boda [sic].

(Joint Ex. 6, p. 87)

Defendants took the deposition of Ms. Deng's treating orthopaedic surgeon, Dr. Bolda, on February 18, 2019. Dr. Bolda provided further insight into the issue of the medical definition of the shoulder joint and the areas where claimant's injuries were located. Dr. Bolda testified, the classic definition of the shoulder involved the ball and socket joint, known as the glenohumeral joint. (Defendants' Ex. A, p. 26) He conceded one could define the shoulder to include the muscles, tendons and ligaments surrounding the glenohumeral joint. (Defendants' Ex. A, p. 26)

Dr. Bolda testified the clavicle is part of the shoulder, especially the distal end that meets the acromion. (Defendants' Ex. A, p. 28) However, he also explained all of the rotator cuff muscles originate proximal to the glenohumeral joint. He also explained the muscle belly of the infraspinatus, the affected area in claimant's case, is proximal to the glenohumeral joint for the most part.

Dr. Bolda conceded the tendons of the rotator cuff were distal to the glenohumeral joint, however. (Defendants' Ex. A, p. 27) Dr. Bolda also testified the pain claimant describes in her trapezius is proximal to the glenohumeral joint line. (Defendants' Ex. A, p. 55) However, he also testified tendinitis (claimant's diagnosis) is usually close to the insertion part of the tendon and distal to the glenohumeral joint. (Defendants' Ex. A, p. 56)

Claimant submitted a rebuttal report from Dr. Bansal dated March 1, 2019. In the report, Dr. Bansal opines:

> Interestingly, Dr. Bolda chooses to rate pain for the impairment rating. While I agree that Ms. Deng does have pain, in addition she has a functional loss of range of motion. A point of discrepancy between Dr. Bolda's shoulder ranges of motion compared to my measurements is that Dr. Bolda used passive range of motion measurements instead of active range of motion measurements as noted in his deposition. Per Section 16.4a of the AMA Guides of [sic] Evaluation for Permanent Impairment, Fifth Edition, 'measurements of active motion take precedence' (over passive).

(Joint Ex. 6, p. 87B)

In this case, the undersigned finds claimant experiences pain and symptoms due to injury to part of her anatomy that are proximal to the glenohumeral joint. For instance, she sustained injury to the infraspinatus muscle belly and has residual symptoms in the trapezius, both of which are proximal to the glenohumeral joint according to Dr. Bansal and Dr. Bolda. However, claimant sustained potential injury to the labrum located within the glenohumeral joint. This deputy finds claimant also sustained injury proximal to that joint space.

Turning to the extent of the injury, the undersigned finds the permanent impairment rating offered by Dr. Bansal to be most convincing and accurate. Dr. Bolda is the treating surgeon. He has excellent credentials and had numerous opportunities to evaluate claimant. Often, this will make a treating surgeon's opinions most convincing.

However, in this case, Dr. Bolda utilized passive range of motion measurements to render his permanent impairment rating. Dr. Bansal credibly and convincingly explained the AMA <u>Guides to the Evaluation of Permanent Impairment</u>, Fifth Edition, require the use of active range of motion measurements to calculate permanent

impairment of the shoulder and surrounding structures. (Joint Ex. 6, p. 87B) In this case, Dr. Bansal utilized active range of motion measurements and more accurately calculated the permanent impairment under the AMA Guides, Fifth Edition.

Dr. Bansal opined claimant sustained an eight percent permanent impairment of the left upper extremity. He converted the impairment rating and opined claimant sustained a five percent permanent impairment of the whole person as a result of the work injury. (Joint Ex. 6, p. 79) This deputy accepts Dr. Bansal's impairment ratings and finds claimant proved she sustained a five percent permanent functional impairment of the whole person as a result of the August 19, 2017 work injury. The undersigned further accepts Dr. Bansal's opinion; claimant achieved maximum medical improvement. (Joint Ex. 6, p. 79) However, this deputy notes Dr. Bansal indicated the last treatment with Dr. Bolda was August 4, 2018. Instead, it appears Dr. Bolda issued permanent restrictions on September 4, 2018. (Joint Ex. 1, p. 25) The undersigned finds claimant achieved maximum medical improvement on September 4, 2018 and her permanent impairment could be determined at that time.

Ms. Deng also alleged a penalty benefit claim, asserting defendants unreasonably delayed or denied her weekly benefits. Claimant contends permanent partial disability benefits were not issued by defendants after September 4, 2018.

Claimant asked, through counsel, on September 17, 2018 why permanent partial disability benefits were not being paid by defendants. (Claimant's Ex. 3, p. 10) After an exchange of communications between counsel, defendants agreed to advance ten weeks of permanent partial disability benefits, which they asserted was equivalent to two percent of the whole person. However, defendants did not issue the permanent disability estimate payment until October 22, 2018. This represents a delay in benefits. This deputy finds claimant has proven a delay or denial of weekly benefits after the September 3, 2018 maximum medical improvement date.

It is noted there is a dispute about the proper date for maximum medical improvement. Yet, by September 4, 2018, claimant had attended a FCE and the treating orthopaedic surgeon imposed permanent restrictions. On September 19, 2018, defense counsel indicated a recommendation would be made for payment of permanent partial disability benefits. Yet, no benefits were paid until over a month later. Defendants do not offer a reasonable excuse for the delay of more than a month of late benefits.

Claimant also contends penalty benefits should be paid because she went and obtained an independent medical evaluation on November 12, 2018. Dr. Bansal offered a permanent impairment that was ultimately accepted in this decision. At the time Dr. Bansal's impairment rating was issued, defendants had no competing impairment rating. Therefore, claimant asserts there was not a reasonable basis for further delay or denial. A penalty on a five percent whole person impairment rating should be awarded.

Defendants did obtain a permanent impairment rating from Dr. Bolda in February 2019. However, defendants offered no reasonable explanation for not obtaining a permanent impairment between September 2018 and February 2019.

CONCLUSIONS OF LAW AND RATIONALE

The first issue for determination is the matter of whether claimant's injury is limited to the left shoulder and should be compensated as a scheduled member injury pursuant to Iowa Codes section 85.34(2)(n) (2017) or whether the injury extends into the body as a whole and should be compensated pursuant to Iowa Code section 85.34(2)(v) (2017).

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, there is no real dispute about whether the injury occurred. Rather, the parties dispute whether the injury is limited to the left shoulder as a scheduled member injury or extends beyond the left shoulder into the body as a whole as an unscheduled injury. Claimant contends her injury involves the left shoulder, which she asserts should be defined as the glenohumeral joint. However, claimant also contends the injury extends proximal to the glenohumeral joint and, thus, includes an injury to unscheduled body parts. Claimant contends the injury should be compensated as an unscheduled injury pursuant to Iowa Code section 85.34(2)(v).

Defendants assert the injury involves structures of the body, which have traditionally been considered to be part of the shoulder. For instance, defendants urge any injury to the rotator cuff should be considered to be part of the shoulder and point

out that prior case law from this agency has referred to rotator cuff injuries as injuries to the shoulder. Indeed, this agency and the Iowa Supreme Court have previously indicated an injury to structures surrounding the glenohumeral joint constitute an injury to the shoulder and are compensable as an unscheduled injury. See Alm v. Morris Barick Cattle Co., 240 Iowa 1174, 38 N.W.2d 161 (1949); Nazarenus v. Oscar Mayer & Co., II Iowa Industrial Commissioner Report 281 (App. 1982). Defendants contend that similar injuries should still be considered injuries to the "shoulder" and compensated as a scheduled injury pursuant to the statutory change at Iowa Code section 85.34(2)(n).

Claimant responds that Iowa's workers' compensation statutes are supposed to be interpreted liberally in favor of the injured worker. Mortimer v. Fruehauf Corp., 502 N.W.2d 12, 14 (Iowa 1993); Beier Glass Co. v. Brundidge, 329 N.W.2d 280, 283 (Iowa 1983). Therefore, claimant contends any ambiguity in the law should be interpreted in favor of the claimant and result in the shoulder being defined under the statute as only the glenohumeral joint.

Pursuant to the Iowa Workers' Compensation Act, permanent partial disability is compensated for a loss or a loss of use of a scheduled member under Iowa Code section 85.34(2) (a)-(u) (2017) or for a loss of earning capacity under section 85.34(2)(v) (2017). The extent of scheduled member 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). It is the anatomical situs of the permanent injury or impairment which determines whether the schedules in section 85.34(2)(a)-(t) are applied. Lauhoff Grain v. McIntosh, 395 N.W.2d 834 (Iowa 1986); Blacksmith v. All American, Inc., 290 N.W.2d 348 (Iowa 1980).

The Iowa Legislature modified Iowa Code section 85.34 in 2017. Subsection 85.34(2) (On) [sic] was added. The subsection is now renumbered to 85.34(2)(n) (2018). It reads:

> For the loss of a shoulder, weekly compensation is paid based on four hundred weeks.

The Iowa Legislature also added Iowa Code section 85.34(2)(w). It provides the manner for determining functional disability or loss of percentage of permanent impairment. The subsection provides:

> w. In all cases of permanent partial disability described in paragraphs "a" through "t", or paragraph "u' 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 “t”, or paragraph “u” when determining functional impairment and not loss of earning capacity.

With respect to case law regarding the new shoulder statute, there has been minimal interpretations at the administrative level. In Agee v. EFCO, Corp. Inc., File Nos. 5065304, 5064099, (Arb., October 22, 2019), a deputy workers’ compensation commissioner determined a shoulder injury should be calculated according to the schedule. The rationale behind the deputy’s decision was:

> Claimant urges a finding that the February 21, 2018, injury extends beyond the right shoulder. No medical provider has rendered an opinion that the February 21, 2018 injury extends beyond the shoulder. Surgery was performed on claimant’s right shoulder. Both Dr. Galles and Dr. Bansal have analyzed the permanent impairment pursuant to the AMA Guides using impairment ratings for the shoulder. It is found that claimant has proven a permanent injury to the right shoulder but has not demonstrated by a preponderance of the evidence that the February 21, 2018 injury extends beyond the right shoulder.

Agee at page 7.

Later in the same arbitration decision, the deputy expounded:

> The Iowa legislature enacted significant amendments to the Iowa workers’ compensation laws, which took effect in July 2017. As part of those amendments, the legislature specified that injuries to the shoulder should be compensated as scheduled member injury on a 400-week schedule. Iowa Code section 85.34(2)(n) (2018). It has long been understood that an injury must be compensated as a scheduled injury if the legislature saw fit to list the injured body part in Iowa Code section 85.34(2) (a-(u). Williams v. Larson Construction Co., 255 Iowa 1149, 125 N.W. 248 (1963). Having found that claimant did not prove his February 21, 2018, injury extended beyond the right shoulder. [sic] I conclude that the injury should be compensated as a scheduled member injury pursuant to Iowa Code section 85.34(2)(n) (2018).

Agee, at page 10. (It is noted for the record, this case was not appealed. It became final agency action.)

In another arbitration decision, decided just days following Agee, a different deputy held there were no expert opinions to support a finding that a November 1, 2017 work injury extended beyond the shoulder. In Hospodarsky v. Quaker Oats Company, File No. 5061912, (Arb., October 30, 2019), the deputy concluded:

> The next question is the extent of disability. Under the statutory change, shoulder injuries are considered to be functional rather than industrial

> disabilities. A shoulder injury is based on a four-hundred-week schedule. The evidence supports a finding of a shoulder injury rather than a whole body injury. There are no expert opinions that support a finding that the November 1, 2017, injury extended beyond the shoulder. Therefore, the determination of extent must be measured by examining the claimant's functional loss.

Hospodarsky at page 7.

The same deputy continued on page 9 of her decision in Hospodarsky:

> While the Supreme Court has not examined the current statute, based on past precedent, the legislature's designation of the shoulder injury as a functional loss is within their power. Therefore, claimant's shoulder loss will be examined as a functional loss. Dr. Hart assigned a 4 percent impairment of the right upper extremity while Dr. Mathew assessed a 20 percent upper extremity impairment. Claimant testified that she works the same job and has no formal accommodations or restrictions; however, she has made personal modifications due to weakness in her shoulder. Dr. Mathew is a physical and rehabilitation expert. His restrictions were based on his opinions regarding claimant's ability to function on a day-to-day basis. Because of his expertise, his opinion regarding claimant's functional use of her shoulder is given more weight. Based on the foregoing expert opinions and claimant's own testimony, it is determined she has sustained a 20 percent functional impairment of her left shoulder arising out of the work injury.

Hospodarsky at page 9. (It is noted for the record, this case was not appealed, and became final agency action.)

In both of these decisions, the parties did not present specific evidence as to the anatomical structure or definition of the shoulder. On the other hand, the undersigned issued a decision in a factually similar case in Chavez v. MS Technology, L.L.C., File No. 5066270 (Arbitration February 5, 2020). In Chavez, the parties made specific arguments about the anatomical structures and medical definition of the shoulder. A physician in the Chavez case provide specific medical opinions delineating the structures in and around the shoulder joint. In that case, the physician explained that rotator cuff tendons attach to the scapula and, at least some of them, are proximal to the glenohumeral joint. Accordingly, the undersigned determined that the injury involved structures proximal to the glenohumeral joint, resulting in an injury to the body as a whole. Id.

The present case is more closely aligned with Chavez than with either Agee or Hospodarsky. Claimant's injuries in this case involve "two anatomically distinct shoulder area injuries. One is to her labrum that is not located proximal to the glenohumeral joint space and the second is to her infraspinatus that is proximal to the glenohumeral joint

space." (Joint Ex. 6, p. 87) Having accepted this medical explanation as fact, this deputy concludes claimant has established she sustained an injury to the left shoulder and an injury that extends beyond, or proximal, to the left shoulder. Therefore, the undersigned concludes this injury is not limited to a scheduled member injury of the left shoulder but should be compensated as an unscheduled injury pursuant to Iowa Code section 85.34(2)(v).

The salient issue to address is whether claimant is entitled to have her permanency benefits calculated by the industrial method or whether claimant is only entitled to have her permanency calculated by the functional impairment/loss method per the 2017 legislative changes to Iowa Code section 85.34 (2)(v) (2017). The relevant portion of the subsection provides:

> v. In all cases of permanent partial disability other than those hereinabove described or referred to in paragraphs "a" through "t" hereof, the compensation shall be paid during the number of weeks in relation to five hundred weeks as the reduction in the employee's earning capacity caused by the disability bears in relation to the earning capacity that the employee possessed when the injury occurred. A determination of the reduction in the employee's earning capacity caused by the disability shall take into account the permanent partial disability of the employee and the number of years in the future it was reasonably anticipated that the employee would work at the time of the injury. 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.

Iowa Code section 85.34(2)(v) (2017).

There is crucial language under the 2017 legislative changes to 85.34(2)(v) that involves industrial disability when an employee returns to work following an injury. The language is whether the injured worker receives the same or greater salary, wages or earnings than the employee received at the time of the injury. In this case, the parties stipulated, "If Claimant's injury is to the 'whole body' no industrial loss is assessed at this time due to Claimant's greater earnings." (Hearing Report Attachment) Accordingly, I conclude that claimant's recovery is limited to an award of her functional impairment rating.

However, the parties dispute whether the functional impairment rating should be awarded based upon an upper extremity impairment rating or should be converted to a "whole person" impairment rating before being awarded. It is noted the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, have been adopted by administrative rule as applicable. 876 IAC 2.4. The AMA Guides initially assign a

shoulder impairment rating to the upper extremity. However, having found the injury includes structures proximal to the shoulder, or glenohumeral joint, this deputy concludes the impairment rating should be converted to the whole person before being awarded.

Unscheduled injuries are compensated based upon a 500-week schedule. Iowa Code section 85.34(2)(v). Having accepted Dr. Bansal's impairment rating of 5 percent of the whole person, the undersigned concludes claimant is entitled to an award of 25 weeks of permanent partial disability benefits for her permanent functional impairment. Iowa Code section 85.34(2)(v).

The parties also dispute the proper commencement date for permanent partial disability benefits. Claimant contends permanent partial disability benefits should commence on July 31, 2018. Defendants contend the permanent partial disability benefits should commence on January 10, 2019. This deputy accepted Dr. Bansal's declaration of maximum medical improvement but found it occurred on September 4, 2018.

Pursuant to Iowa Code section 85.34(2):

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

Having accepted Dr. Bansal's opinion maximum medical improvement was achieved and having found, it was achieved on September 4, 2018, it would be appropriate to rate claimant impairment at that time. Therefore, the undersigned concludes permanent disability benefits should begin as of September 5, 2018. Iowa Code section 85.34(2).

Accrued benefits shall be paid in a lump sum, together with interest, as allowed by law. All interest on past due weekly compensation benefits accruing on or after July 1, 2017, 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. April 24, 2018).

Ms. Deng asserts a claim for penalty benefits. She asserts the defendants unreasonably denied weekly benefits. Defendants deny this claim, asserting they had a reasonable basis for denial of benefits.

Iowa Code section 86.13(4) provides:

> a. If a denial, a delay in payment, or a termination of benefits occurs without reasonable or probable cause or excuse known to the employer or insurance carrier at the time of the denial, delay in payment, or termination of benefits, the workers' compensation commissioner shall award benefits in addition to those benefits payable under this chapter, or chapter 85, 85A, or 85B, up to fifty percent of the amount of benefits that were denied, delayed, or terminated without reasonable or probable cause or excuse.
>
> b. The workers' compensation commissioner shall award benefits under this subsection if the commissioner finds both of the following facts:
>
> > (1) The employee has demonstrated a denial, delay in payment, or termination in benefits.
> >
> > (2) The employer has failed to prove a reasonable or probable cause or excuse for the denial, delay in payment, or termination of benefits.

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

> Based on the plain language of section 86.13, we hold an employee is entitled to penalty benefits if there has been a delay in payment unless the employer proves a reasonable cause or excuse. A reasonable cause or excuse exists if either (1) the delay was necessary for the insurer to investigate the claim or (2) the employer had a reasonable basis to contest the employee's entitlement to benefits. A "reasonable basis" for denial of the claim exists if the claim is "fairly debatable."
>
> Christensen, 554 N.W.2d at 260.

The supreme court has stated:

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

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

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

Claimant proved a delay in payment of permanent partial disability benefits after September 4, 2018. Defendants, a little over a month later, paid ten weeks of permanent disability benefits. However, they again delayed benefits after receipt of Dr. Bansal's impairment rating.

Having found defendants did not demonstrate a contemporaneous and reasonable basis for delay in permanent disability benefits, the undersigned concludes claimant met her burden of proof and defendants failed to meet their burden of proof. Therefore, this deputy concludes penalty benefits, in some amount, are appropriate.

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 delays were not significant. There is no evidence of a past record of penalties against these defendants. This case involves one of the initial applications of the new 2017 statutory changes. While the undersigned concludes a penalty is appropriate, this deputy concludes a penalty of $1,000.00 is sufficient to meet the purposes of Iowa Code section 86.13 under this set of facts.

The final issue for determination is the matter of costs. Iowa Code section 86.40 states:

> **Costs.** All costs incurred in the hearing before the commissioner shall be taxed in the discretion of the commissioner.

Iowa Administrative Code Rule 876—4.33(86) states:

> **Costs.** Costs taxed by the workers' compensation commissioner or a deputy commissioner shall be (1) attendance of a certified shorthand reporter or presence of mechanical means at hearings and evidential depositions, (2) transcription costs when appropriate, (3) costs of service of the original notice and subpoenas, (4) witness fees and expenses as provided by Iowa Code sections 622.69 and 622.72, (5) the costs of doctors' and practitioners' deposition testimony, provided that said costs do not exceed the amounts provided by Iowa Code sections 622.69 and 622.72, (6) the reasonable costs of obtaining no more than two doctors' or practitioners' reports, (7) filing fees when appropriate, (8) costs of persons reviewing health service disputes. Costs of service of notice and subpoenas shall be paid initially to the serving person or agency by the party utilizing the service. Expenses and fees of witnesses or of obtaining doctors' or practitioners' reports initially shall be paid to the witnesses, doctors or practitioners by the party on whose behalf the witness is called or by whom the report is requested. Witness fees shall be paid in accordance with Iowa Code section 622.74. Proof of payment of any cost shall be filed with the workers' compensation commissioner before it is taxed. The party initially paying the expense shall be reimbursed by the party taxed with the cost. If the expense is unpaid, it shall be paid by the party taxed with the cost. Costs are to be assessed at the discretion of the deputy commissioner or workers' compensation commissioner hearing the case unless otherwise required by the rules of civil procedure governing discovery. This rule is intended to implement Iowa Code section 86.40.

Iowa Administrative Code rule 876—4.17 includes as a practitioner, "persons engaged in physical or vocational rehabilitation or evaluation for rehabilitation." A report or evaluation from a vocational rehabilitation expert constitutes a practitioner report under our administrative rules. Bohr v. Donaldson Company, File No. 5028959 (Arb. November 23, 2010); Muller v. Crouse Transportation, File No. 5026809 (Arb. December 8, 2010). The entire reasonable costs of doctors' and practitioners' reports may be taxed as costs pursuant to 876 IAC 4.33. Caven v. John Deere Dubuque Works, File Nos. 5023051, 5023052 (App. July 21, 2009).

Claimant requests costs for her filing fee totaling $100.00 and for her service fee totaling $6.91. Both are reasonable and assessed pursuant to 876 IAC 4.33. Claimant also seeks assessment of Dr. Bansal's supplemental report. Dr. Bansal's supplemental

report charges were $356.00. (Joint Ex. 6, p. 87C) This deputy finds the report fee to be reasonable and assess that as a cost against defendants. Iowa Code section 86.40.

ORDER

THEREFORE, IT IS ORDERED:

Defendant shall pay unto claimant twenty-five weeks (25) weeks of permanent partial disability benefits commencing from September 5, 2018 and payable at the rate of six hundred twenty-eight and 46/100 dollars ($628.46).

Defendants shall pay interest on all past due weekly benefits as required by Iowa Code section 85.30.

Defendants shall be entitled to a credit for all benefits paid prior to hearing against the benefits awarded pursuant to the parties' stipulation on the hearing report.

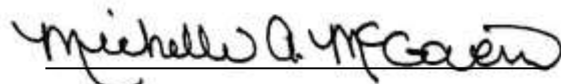
Defendants shall reimburse claimant's medical mileage in the amount of one hundred seventy-one and 20/100 dollars ($171.20).

Defendants shall pay claimant one thousand dollars ($1,000.00) in penalty benefits.

Defendants shall pay claimant's costs as detailed in the body of the decision and totaling four hundred sixty-two and 91/100 dollars ($462.91).

Defendants shall file all reports as required by law.

Signed and filed this _25th__ day of February, 2020.



MICHELLE A. MCGOVERN
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Jennifer Zupp (via WCES)

Eric Lanham (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.