BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

MARY DENG, Claimant, vs. FARMLAND FOODS, INC., Employer, and SAFETY NATIONAL CASUALTY CORPORATION, Insurance Carrier, Defendants.	File No. 5061883 APPEAL DECISION Head Notes: 1402.40; 1803; 1803.1; 4000.2

Defendants Farmland Foods, Inc., employer, and its insurer, Safety National Casualty Corporation, appeal from an arbitration decision filed on February 25, 2020. Claimant Mary Deng cross-appeals. The case was heard on February 26, 2019, and it was considered fully submitted in front of the deputy workers' compensation commissioner on March 29, 2019.

This case involves the 2017 legislative changes to Iowa Code Chapter 85 - specifically the addition of the shoulder to the list of scheduled members in Iowa Code section 85.34(2). As such, all references to section 85.34 herein are to the post-July 1, 2017, version of the section unless otherwise stated.

In the arbitration decision, the deputy commissioner found claimant sustained injuries to her infraspinatus muscle and labrum. Because the infraspinatus is proximal to the glenohumeral joint, the deputy commissioner determined claimant sustained an injury that extended beyond the left shoulder. As a result, the deputy commissioner concluded claimant's injury was not limited to a scheduled member and should be compensated as an unscheduled, whole body injury.

Though the deputy commissioner determined claimant sustained a whole body injury, the parties stipulated claimant's recovery should be limited to her functional impairment because she was receiving greater earnings than at the time of her injuries pursuant to section 85.34(2)(v). The deputy commissioner determined claimant's functional impairment rating should be converted to the whole person and then applied

to the 500-week schedule. Because the deputy commissioner accepted the five percent whole body impairment rating of Sunil Bansal, M.D., the deputy commissioner found claimant was entitled to an award of 25 weeks of permanent partial disability (PPD) benefits. The deputy commissioner determined claimant reached maximum medical improvement (MMI) on September 4, 2018, and that claimant's PPD benefits should commence on September 5, 2018.

The deputy commissioner also found claimant was entitled to receive $1,000.00 in penalty benefits and entitled to receive costs in the amount of $462.91.

On appeal, defendants assert claimant's injury is limited to her left shoulder and must be compensated as a scheduled member. Defendants additionally assert claimant sustained no permanent impairment based on the impairment rating offered by Douglas Bolda, M.D. In the alternative, defendants assert the proper commencement date for permanent disability benefits is January 10, 2019. Relying on that commencement date, defendants argue penalty benefits should not be awarded. Lastly, defendants assert claimant should not be entitled to receive reimbursement for the costs of Dr. Bansal's supplemental report.

On cross-appeal, claimant asserts she reached MMI on July 30, 2018. Claimant additionally asserts she is entitled to receive more than $1,000.00 in penalty benefits. Claimant also seeks an order directing defendants to pay for the mileage they agreed to pay at hearing.

Amicus briefs were filed by the Workers' Compensation Core Group of the Iowa Association for Justice (IAJ) and also by the Iowa Association of Business and Industry (ABI).

Those portions of the proposed agency decision pertaining to issues not raised on appeal are adopted as a part of this appeal decision.

I performed a de novo review of the evidentiary record and the detailed arguments of the parties. Pursuant to Iowa Code sections 86.24 and 17A.15, the arbitration decision filed on February 25, 2020, is affirmed in part, modified in part, and respectfully reversed in part.

I. Whether claimant's injury should be compensated as a "shoulder" under Iowa Code section 85.34(2)(n) or as an unscheduled injury under section 85.34(2)(v).

At the outset, I affirm the deputy commissioner's finding that claimant sustained an injury to both her infraspinatus and her labrum. Neither party disputes this finding on appeal. The question then becomes whether the labrum and the infraspinatus should be compensated as a shoulder under Iowa Code section 85.34(2)(n) or as an unscheduled whole body injury under section 85.34(2)(v).

In her brief, claimant concedes her labrum injury should be compensated as a shoulder under section 85.34(2)(n). (Claimant Appeal Brief, pp. 20-21) Both parties agree that the glenohumeral joint - or the "ball and socket itself"—falls within parameters of the "shoulder" under section 85.34(2)(n). (See Defendants' Ex. A [Deposition Transcript, p. 26]) Relying on Dr. Bolda's deposition testimony, claimant acknowledges that the labrum is located entirely within this joint space and should therefore be compensated under section 85.34(2)(n). (Cl. App. Brief, pp. 20-21)

Thus, the true fighting issue in this case is whether claimant's infraspinatus injury should be compensated as a shoulder under section 85.34(2)(n) or as a whole body injury under section 85.34(2)(v).

As noted by the deputy commissioner, the Iowa Legislature modified section 85.34 in 2017 by adding the shoulder to the list of scheduled members. The new subsection states, in its entirety: "For the loss of a shoulder, weekly compensation is paid based on four hundred weeks." Iowa Code § 85.34(2)(n).

Claimant in this case asserts this definition of "shoulder" under this new subsection includes only the glenohumeral joint. Defendants contend the word "shoulder" extends beyond the joint and includes the infraspinatus (along with several other muscles, ligaments, bones and articular surfaces surrounding the joint). In the arbitration decision, the deputy commissioner essentially agreed with claimant and found the infraspinatus was a whole body injury because the muscle is proximal to the glenohumeral joint. For the reasons that follow, however, the deputy commissioner's determination is respectfully reversed.

This is the first Commissioner-level decision addressing a post-July 1, 2017, shoulder claim. As such, many of my determinations will turn on interpretation of the legislature's changes. I recognize the Iowa Supreme Court has repeatedly stated this agency lacks the legislature's expressly vested authority to interpret workers' compensation statutes. See, e.g., Ramirez-Trujillo v. Quality Egg, L.L.C., 878 N.W.2d 759, 770 (Iowa 2016), reh'g denied (May 27, 2016). Practically speaking, however, this agency acts as the front-line authority in interpreting statutory workers' compensation provisions, particularly when statutory amendments are enacted. Thus, while the

appellate courts have the final say, statutory interpretation by this agency is a necessary inevitability.

When conducting statutory interpretation, the goal is to determine the intent of the legislature. When the plain language of the statute is clear as to its meaning, courts apply the plain language and do not search for legislative intent beyond the express terms of the statute. Denison Municipal Utilities v. Iowa Workers' Compensation Com'r, 857 N.W.2d 230 (Iowa 2014). A statute is only ambiguous if reasonable minds could differ or be uncertain as to the meaning of the statute. Iowa Ins. Institute v. Core Group of Iowa Ass'n for Justice, 867 N.W.2d 58 (Iowa 2015). Statutes should be read as a whole, rather than looking at specific words or phrases in isolation. Id.

When the legislature amended section 85.34(2) to add shoulder to the list of scheduled members, no definition was included, nor did the legislature delineate specifically which anatomic parts of the body it intended to fall under the umbrella of the section. Unfortunately, the legislature's use of the generic term "shoulder" has resulted in uncertainly as to the meaning of the statute.

This uncertainty is demonstrated by the explanation offered by one of claimant's treating physicians, Dr. Bolda. In his deposition, Dr. Bolda was asked whether he was "aware of a consensus definition of what is a shoulder in the field of orthopedics." (Def. Ex. A [Depo. Tr., p. 26]) He answered:

> I'm not sure how to answer that. Because like you said, it's somewhat arbitrary, where you draw a line. But you know, the shoulder is affected from the brain and all the way down to the fingertips. And it's artificial where you draw the line to define what's the shoulder or not.
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> . . .
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> I would say the most classic definition of the shoulder joint itself is the glenohumeral joint, the ball and socket itself. And you can add on the ligament structures around that if you like. You can then add the muscles and tendons around there. You can extend it back all the way to the scapula or you can go all the way down to the elbow. It just depends on how you want to define it. All of those are somewhat artificial designations.
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> (Def. Ex. A [Depo. Tr., p. 26])

Dr. Bolda's answer illustrates that even reasonable medical minds can differ regarding what constitutes a "shoulder" under the statute.

Complicating matters is that "[m]edical terminology used to describe an area of the body is not always compatible with the statutory terminology used to describe an area of the body to classify a scheduled injury." Prewitt v. Firestone Tire & Rubber Co., 564 N.W.2d 852, 854 (Iowa Ct. App. 1997). This is evidenced by the legislature's past use of generic language in other subsections of Iowa Code section 85.34(2), which resulted in ambiguity that required this agency and the courts to interpret legislative intent and determine specific meanings. For example, significant litigation was required to clarify when injuries are considered finger versus hand injuries, hand versus arm injuries, and leg versus whole body injuries. See e.g., Lauhoff Grain Co. v. McIntosh, 395 N.W.2d 834 (Iowa 1986); Dailey v. Pooley Lbr Co., 10 N.W.2d 569 (Iowa 1943); Miranda v. IBP, File No. 5008521 (App. Dec., Aug. 2, 2005).

For these reasons, I agree with claimant that while it would be preferable to assign "shoulder" an "ordinary" meaning, there is no such agreed upon "ordinary" meaning. Instead, "shoulder" is a legal term of art and susceptible to more than one reasonable interpretation. I therefore find the legislature's use of the generic term "shoulder" in section 85.34(2)(n) has resulted in an ambiguity in the statute.

Due to this ambiguity, I must consider the rules of statutory interpretation to determine whether the legislature intended the definition of "shoulder" in section 85.34(2) to be limited to the glenohumeral joint or to extend beyond it. Iowa Ins. Inst., 867 N.W.2d at 73.

"In construing an ambiguous statute, the court may consider '[t]he circumstances under which the statute was enacted' and '[t]he legislative history.'" Id. at 76 (quoting Iowa Code § 4.6(2)-(3)).

Both parties in this case agree that the legislature's debates on the house and senate files are not particularly helpful with respect to how the legislature intended to define "shoulder" under the new subsection. (Def. App. Brief, p. 19; Cl. App. Brief, pp. 13-17) What does shed some light on legislature's intent, however, are the study bills that preceded the senate file and later the house file that ultimately became law.

Both House Study Bill 169 and Senate Study Bill 1170 contain the following proposed amendment to section 85.34(2)(m), the section addressing the arm as a scheduled member: "m. The loss of ~~two thirds of~~ that part of an arm ~~between~~ including the shoulder joint ~~and~~ to the elbow shall equal the loss of an arm and the compensation

therefor shall be weekly compensation during two hundred fifty weeks." H.S.B. 169, 87th G.A. § 7 (2017)[1]; S.S.B. 1170, 87th G.A. § 7 (2017)[2].

Notably, neither of these study bills contain a proposed amendment adding the "shoulder" as a separate scheduled member. Thus, based on study bills, it appears the original proposal was to make the shoulder joint and everything on the "arm side" of the joint compensable as an arm under section 85.34(2)(m).

This proposal, however, was not carried over into the version of the bill that was eventually signed by the governor to become law. Instead, on March 20, 2017, amendment S-3172[3] was adopted, which struck the changes to subsection (m) and instead created an additional subsection adding shoulder to the list of scheduled member injuries. These changes in amendment S-3172 were ultimately included in the version of the bill (House File 518) that was sent to the governor and signed into law. H.F. 518, 87th G.A. § 7 (2017)[4].

This change is significant, as it reflects the legislature's consideration but ultimate rejection of adding the shoulder joint to the existing definition of an arm. It also suggests there is an intentional distinction between shoulder and shoulder joint. In other words, had the legislature intended to do what claimant suggests and limit the definition of "shoulder" in section 85.34(2)(n) to only the joint, it could have simply maintained the original proposal in the study bill to include "shoulder joint" in subsection (m), or it could have added the word "joint" to subsection (n).

But that is not what the legislature did. Instead, the legislature scrapped the initial proposed amendments to subsection (m) and drafted an entirely new section that omitted the word "joint." Importantly, "legislative intent is expressed by omission as well as by inclusion of statutory terms." Freedom Fin. Bank v. Estate of Boesen, 805 N.W.2d 802, 812 (Iowa 2011); see In re Myers, 874 N.W.2d 679, 682 (Iowa Ct. App. 2015) ("When the legislature includes specific language in one section but omits it from another, we presume the legislature intended the omission."). Thus, the legislative history is heavily suggestive that the legislature intended section 85.34(2)(n) to encompass more than just the glenohumeral joint.

[1] https://www.legis.iowa.gov/legislation/BillBook?ba=HSB%20169&ga=87
[2] https://www.legis.iowa.gov/legislation/BillBook?ba=SSB%201170&ga=87
[3] https://www.legis.iowa.gov/legislation/BillBook?ba=SF%20435&ga=87
[4] https://www.legis.iowa.gov/legislation/BillBook?ba=HF%20518&ga=87

Another consideration in statutory interpretation is the presumption that the legislature is aware of the courts' prior holdings when crafting new legislation. Roberts Dairy v. Billick, 861 N.W.2d 814, 821 (Iowa 2015) (as amended); State v. Fluhr, 287 N.W.2d 857, 862 (Iowa 1980). As it relates to this case, this agency and the courts have considered similar issues involving how to classify other body parts. What developed was a practice to use the "proximal point of the joint to classify an injury." Holstein Elec. v. Breyfogle, 756 N.W.2d 812, 816 (Iowa 2008).

There are several arbitration decisions addressing post-July 1, 201,7 shoulder injury claims in which the deputy commissioners, like the deputy commissioner in this case, relied on this practice. See Rubalcava v. Siouxpreme Egg Products, Inc., File No. 5066865 (Arb. Dec., June 23, 2020); Deleon v. Kingdom Cargo, LLC, File No. 19700319.01 (Arb. Dec., May 6, 2020); Smidt v. JKB Restaurants, LC, File No. 5067766 (Arb. Dec., May 6, 2020); Chavez v. Technology, L.L.C., File No. 5066270 (Arb. Dec., Feb. 5, 2020). The deputy commissioners in each of these cases, like the deputy commissioner in this case, focused on whether the specific muscle injury at issue was proximal to the glenohumeral joint.

In Smidt, for example, the deputy commissioner provided the following rationale:

> This agency and the courts have had to consider similar issues with respect to different body parts in the past. For instance, carpal tunnel injuries involve the wrist. Disputes arose before this agency whether carpal tunnel injuries were "hand" injuries or "arm" injuries pursuant to Iowa Code section 85.34(2). Ultimately, carpal tunnel and wrist injuries were determined to be proximal to the hand and compensated as "arm" injuries. Miranda v. IBP, File No. 5008521 (Appeal Decision, August 2, 2005). Injuries to the hip were determined to be proximal to the leg and determined to be unscheduled injuries. Lauhoff Grain Co. v. McIntosh, 395 N.W.2d 834 (Iowa 1986); Dailey v. Pooley Lbr Co., 233 Iowa 758, 10 N.W.2d 569 (1943). Injuries involving the joint between the finger and the hand were determined to be hand injuries. Miranda v. IBP, File No. 5008521 (Appeal Decision, August 2, 2005).
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> As noted, injuries to the shoulder area, including rotator cuff tears, were previously considered and determined to be proximal to the arm and considered unscheduled injuries prior to the 2017 statutory changes. Second Injury Fund of Iowa v. Nelson, 544 N.W.2d 258 (Iowa 1995). The courts and this agency have held that injuries proximal to the scheduled member are awarded based upon the more proximal body part, or as an

unscheduled injury if the injury extends beyond all scheduled members. Id.; Miranda v. IBP, File No. 5008521 (Appeal Decision, August 2, 2005).

As a result, the deputy commissioner in Smidt concluded the Legislature "should have been aware that anatomic parts proximal to the specified scheduled member have been determined to be compensable to the more proximal body part or body as a whole."

While it is true that the legislature is presumed to be aware of and understand past interpretations of the law, these "proximal" cases are not directly comparable to the scenario in this case. In those cases, the injuries were to joints that were not specifically listed as a scheduled members, and the agency and courts were tasked with determining which member those joints "belonged to" under section 85.34(2). As mentioned, what developed was a fairly straightforward and bright line rule of looking to the body part proximal to the joint to classify the injury. Holstein Elec., 756 N.W.2d at 816.

This rule developed, in part, based on the court's observation that "the word 'leg' as used in section 85.34 'simply does not include a hip'" and "the word 'arm' . . . simply does not include the shoulder." Second Injury Fund of Iowa v. Nelson, 544 N.W.2d 258, 270 (Iowa 1995), as amended on denial of reh'g (Feb. 14, 1996) (quoting Lauhoff Grain Co., 395 N.W.2d at 839).

In this case, however, claimant's injury involves a joint that is specifically listed as a scheduled member in section 85.34(2). In fact, in the list of scheduled members in section 85.34(2), the shoulder is the only joint.

Further, while it may have seemed "simple" that the word "leg" does not include a hip and the word "arm" does not include the shoulder, the answer is not so straightforward in this case. Instead, the question in this case is whether the word "shoulder" includes the infraspinatus, which is "one of the four muscles of the rotator cuff that wrap around the [humeral] head and whose main function is to stabilize the head and the glenoid, which is the socket of the shoulder." (Def. Ex. A [Depo. Tr., pp. 6-7]) In other words, while the Iowa Supreme Court found the hip and shoulder to be clearly distinct from the leg and arm, respectively, the glenohumeral joint and its surrounding muscles, tendons, bones, and surfaces are extremely intricate and intertwined. As it relates specifically to this case, it is difficult to separate the infraspinatus from the glenohumeral joint given the muscle's primary purpose - to stabilize the socket of the shoulder. Put simply, the functionality of the shoulder is dependent on these surrounding anatomical parts. And as such, there is less of a clear

distinction as it relates to the glenohumeral joint and the complex musculature that surrounds it.

Given the differences between this case and past cases in which the agency and court looked to the proximal body part to classify injuries, I do find these past holdings to be decidedly illustrative of the legislature's intent when drafting section 85.34(2)(n). This is not to say that consideration of whether a surrounding muscle, tendon, bone or surface is proximal to the glenohumeral may not be a useful tool when trying to determine what constitutes a "shoulder" under section 85.34(2)(n). But because of the distinctions between this case and the above-mentioned past cases, it cannot be assumed the legislature intended or even expected that the bright line "proximal" rule would be applied to section 85.34(2)(n).

There are also hundreds of past decisions in which the agency and courts have referred to claimants' shoulders when determining whether to compensate injuries as arms under section 85.34(2)(m) or as unscheduled whole body injuries under former subsection (u) (now subsection (v)). The problem with relying on such cases or imputing these cases to the legislature's intent is that before July 1, 2017, it did not matter whether the injury was technically to the shoulder—all that mattered was whether the injury was to the scheduled member arm or extended beyond it. Before July 1, 2017, the shoulder was not a scheduled member - it was just part of the body as a whole. Thus, the agency and court's references to "shoulder" are often casual and based on a non-technical, layman's understanding of the term. In other words, the context of these references significantly lessens their persuasive weight when it comes to determining what the legislature intended when drafting section 85.34(2)(n).

Ultimately, the courts have "long recognized that statutes should not be interpreted in a manner that leads to absurd results." Iowa Ins. Inst., 867 N.W.2d at 75 (citing Iowa Code § 4.4(3) (setting forth a presumption that "[i]n enacting a statute ... [a] just and reasonable result is intended"); *id.* § 4.6(5) (noting that when a statute is ambiguous, we should consider "[t]he consequences of a particular construction")).

Claimant argues that defining shoulder to include more than the glenohumeral joint would lead to absurd results because it would lead to piecemeal litigation to determine what constitutes a shoulder. As claimant puts it:

> For example, if "shoulder" includes the muscles and tendons of the rotator cuff, would it also include all clavicle injuries? What about all of the muscles which attach to the clavicle, such as deltoid, trapezius, subclavius, conoid ligament, trapezoid ligament and the pectoralis? Does "shoulder" include the scapula, to which eighteen muscles attach? Does it include

> thoracic muscles, some of which intersect with rotator cuff and scapular muscles? If these other body parts are included in a definition of "shoulder" where do those body parts stop and start and more-importantly, what is the textual basis for the dichotomy?

(Cl. App. Brief, p. 19)

Claimant is correct that expanding the definition of "shoulder" to parts other than the glenohumeral joint will result in temporary uncertainty as claimants litigate injuries to the various muscles, tendons, bones and surfaces surrounding the glenohumeral joint. Claimant is also correct that for the short term, this will result in increased litigation as these questions are addressed by this agency and the courts.

However, as discussed above, had the legislature intended to limit "shoulder" to the joint, they could have maintained the amendments in the study bills that would have made the shoulder joint part of the schedule as an "arm" under subsection (m), or they could have added the word "joint" in subsection (n). Further, interpreting "shoulder" to include only the glenohumeral joint would significantly reduce the number of injuries that would be compensable under subsection (n); as noted in claimant's brief, this definition would encompass labral injuries and subacromial bursitis. (Cl. App. Brief, pp. 20-21) Rotator cuff injuries, however - like in the present case - would not be included under such a definition.

But, again, as noted by Dr. Bolda, the main function of the rotator cuff, which includes the infraspinatus, "is to stabilize the head and the glenoid, which is the socket of the shoulder." (Def. Ex. A, [Depo. Tr., 27]) Or as explained by John Kuhnlein, D.O., in Smidt, the rotator cuff is part of the "muscular 'engine' that moves the shoulder joint itself," without which "the structures distal to the shoulder joint would not work as efficiently as they do to allow the arm to perform useful activities." Smidt, File No. 5067766 (Arb. Dec., May 6, 2020). Because of the importance of such muscles to the function of the joint, I find excluding everything but the glenohumeral joint itself would lead to the absurd result of excluding injuries that are and have been commonly considered shoulder injuries.

I recognize the well-established standard that workers' compensation statutes are to be liberally construed in favor of the worker, as their primary purposes is to benefit the worker. See Des Moines Area Reg'l Transit Auth. v. Young, 867 N.W.2d 839, 842 (Iowa 2015) (citations omitted); see also Jacobson Transp. Co. v. Harris, 778 N.W.2d 192, 197 (Iowa 2010); Xenia Rural Water Dist. v. Vegors, 786 N.W.2d 250, 257 (Iowa 2010) ("We apply the workers' compensation statute broadly and liberally in keeping with its humanitarian objective...."); Griffin Pipe Prods. Co. v. Guarino, 663

N.W.2d 862, 865 (Iowa 2003) ("[T]he primary purpose of chapter 85 is to benefit the worker and so we interpret this law liberally in favor of the employee."). This liberal construction, however, cannot be performed in a vacuum. As discussed above, several of the principles of statutory construction indicate the legislature did not intend to limit the definition of "shoulder" under section 85.34(2)(n) to the glenohumeral joint. For these reasons, I conclude "shoulder" under section 85.34(2)(n) is not limited to the glenohumeral joint.

Claimant's injury in this case was to the infraspinatus muscle. As discussed, the infraspinatus is part of the rotator cuff, and the rotator cuff's main function is to stabilize the ball-and-socket joint. As noted by both Dr. Bansal and Dr. Bolda, the rotator cuff is generally proximal to the joint. However, because the rotator cuff is essential to the function of the glenohumeral joint, it seems arbitrary to exclude it from the definition of "shoulder" under section 85.34(2)(n) simply because it "originates on the scapula, which is proximal to the glenohumeral joint for the most part." (Def. Ex. A, [Depo. Tr., 27]). In other words, being proximal to the joint should not render the muscle automatically distinct.

Given the entwinement of the glenohumeral joint and the muscles that make up the rotator cuff, including the infraspinatus, and the importance of the rotator cuff to the function of the joint, I find the muscles that make up the rotator cuff are included within the definition of "shoulder" under section 85.34(2)(n). Thus, I find claimant's injury to her infraspinatus should be compensated as a shoulder under section 85.34(2)(n). The deputy commissioner's determination that claimant's infraspinatus injury is a whole body injury that should be compensated industrially under section 85.34(2)(v) is therefore respectfully reversed.

II. Extent of claimant's permanent partial disability under Iowa Code section 85.34(2)(n).

Having determined claimant's injuries must be compensated as a "shoulder" under section 85.34(2), the next question on appeal is the extent of her permanent disability. I affirm the deputy commissioner's finding that Dr. Bansal's impairment rating is the most convincing and accurate. I therefore affirm the deputy commissioner's finding that claimant sustained an eight percent impairment of the left upper extremity, which equates to a five percent impairment of the body as a whole. (JE 6, p. 79)

The question then becomes whether to apply the upper extremity or whole person rating to the 400-week schedule set forth in section 85.34(2)(n). The plain language of the statute is silent on which rating is to be utilized. Neither side presented any argument on whether the upper extremity or whole person rating should be applied.

The figures Dr. Bansal relies on to assign impairment (figures 16-40 through 16-46) are contained in Chapter 16 of the Guides. Chapter 16 is entitled, "The Upper Extremities." Additionally, for a single scheduled member injury, this agency has historically not utilized a whole person impairment rating. Thus, I conclude it is appropriate to apply the upper extremity impairment rating for this shoulder injury.

Permanent partial disability compensation for the shoulder shall be paid based on a maximum of 400 weeks. Iowa Code § 85.34(2)(n). Having adopted Dr. Bansal's 8 percent impairment rating, I conclude claimant has shown by a preponderance of the evidence that she is entitled to receive 32 weeks of PPD benefits. The deputy commissioner's award of 25 weeks of PPD benefits is therefore modified.

III. Commencement date for claimant's PPD benefits.

The deputy commissioner found claimant reached MMI on September 4, 2018, the date on which Dr. Bolda issued permanent restrictions. Claimant asserts she reached MMI on July 3, 2018, the date on which claimant had no further treatment recommendations. Defendants assert claimant reached MMI on January 10, 2019, the date on which Dr. Bolda saw claimant for purposes of assigning an impairment rating. With the following additional analysis, I affirm the deputy commissioner's finding that claimant reached MMI on September 4, 2018.

Iowa Code section 85.34(2), as amended in 2017, provides as follows:

> 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 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.

MMI is reached upon a "stabilization of the condition or at least a finding that the condition is 'not likely to remit in the future despite medical treatment.'" Bell Bros. Heating & Air Conditioning v. Gwinn, 779 N.W.2d 193, 200 (Iowa 2010) (quoting AMA Guides to the Evaluation of Permanent Impairment 27 (6th ed. 2008)); see Armstrong Tire & Rubber v. Kubli, 312 N.W.2d 60, 65 (Iowa Ct.App.1981) (defining MMI as "that condition in which healing is complete and the extent of the disability can be determined").

After claimant saw Dr. Bolda on July 3, 2018, Dr. Bolda provided as follows:

> I do not know of anything further that I can do for this patient. I suggested the patient be referred to a shoulder subspecialist for an evaluation to see if there is anything else that the shoulder subspecialist recommends be done done [sic]. <u>Once that evaluation is completed if no further evaluation or treatment is recommended, then the patient should be assumed to have reached maximum medical improvement</u> and should work with her physical limitations.

(JE 1, p. 22) (emphasis added)

By the time claimant followed up with Dr. Bolda on September 4, 2018, she had been seen by a shoulder subspecialist who did not recommend surgery. (JE 1, p. 25) Dr. Bolda then assigned permanent restrictions and instructed claimant to follow up "on an as-needed basis." Thus, per Dr. Bolda's July 3, 2018 note, claimant reached MMI as of September 4, 2018, when no further evaluation or treatment was recommended.

I recognize claimant returned to Dr. Bolda in January of 2019 for her impairment rating and Dr. Bolda recommended additional imaging, but claimant's condition continued to be stable. (JE 1, p. 27 ("[P]atient says the pain is the same.")) Thus, with this additional analysis, I affirm the deputy commissioner's finding that claimant reached MMI on September 4, 2018.

IV. Whether penalty benefits should be assessed, and if so, the amount of any such benefits.

I affirm the deputy commissioner's finding that claimant is entitled to receive penalty benefits and that a penalty of $1,000.00 is appropriate. I find the deputy commissioner provided a well-reasoned analysis of the penalty issue and I affirm the deputy commissioner's findings of fact and conclusions of law pertaining to the penalty issue.

V. Whether the cost of Dr. Bansal's supplemental report should be assessed against defendants.

The deputy commissioner awarded claimant the costs of Dr. Bansal's supplemental report in the amount of $356.00. Defendants argue this was an inappropriate assessment because claimant could have raised such questions at the time of her initial IME with Dr. Bansal. While true, it is presumed the $356.00 charged by Dr. Bansal for the supplemental report then would have been absorbed into the cost

of the initial IME report, for which defendants were responsible. Further, the costs of a doctor's report is taxable per Iowa Administrative Code rule 876 IAC 4.33(6). Thus, I affirm the deputy commissioner's taxation of the cost of Dr. Bansal's supplemental IME.

VI. Whether claimant is entitled to reimbursement for mileage.

Claimant also asserts defendants' counsel advised at hearing that defendants agreed to pay any mileage claimed if it had not been paid. Defendants do not assert otherwise in their brief. I therefore order defendants to reimburse claimant for her outstanding mileage in the amount of $171.20.

ORDER

IT IS THEREFORE ORDERED that the arbitration decision filed on February 25, 2019, is affirmed in part, modified in part, and reversed in part.

Defendant shall pay claimant thirty-two weeks (32) weeks of permanent partial disability benefits commencing on September 4, 2018, payable at the weekly rate of six hundred twenty-eight and 46/100 dollars ($628.46).

Defendants shall pay accrued weekly benefits in a lump sum together with interest at an annual rate equal to the one-year treasury constant maturity published by the federal reserve in the most recent H15 report settled as of the date of injury, plus two percent.

Defendants shall receive 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.

Pursuant to rule 876 IAC 4.33, defendants shall reimburse claimant's costs as detailed in the body of the decision totaling four hundred sixty-two and 91/100 dollars ($462.91). The parties shall split the costs of the appeal, including the cost of the hearing transcript.

Pursuant to rule 876 IAC 3.1(2), defendant shall file subsequent reports of injury as required by this agency.

Signed and filed on this 29th day of September, 2020.

Joseph S. Cortese II

JOSEPH S. CORTESE II
WORKERS' COMPENSATION
COMMISSIONER

The parties have been served as follows:

Jennifer Zupp (via WCES)

Eric Lanham (via WCES)

Kathryn Johnson (via WCES)

Jason Neifert (via WCES)

Sara Kleber (via WCES)