

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JAMES CHARLES,

Claimant,

vs.

ARCONIC, INC.,

Employer,

and

INDEMNITY INSURANCE COMPANY
OF NORTH AMERICA,

Insurance Carrier,

and

SECOND INJURY FUND OF IOWA,

Defendants.

File No. 5064956

ARBITRATION DECISION

JAMES CHARLES,

Claimant,

vs.

ARCONIC, INC.,

Employer,

and

INDEMNITY INSURANCE COMPANY
OF NORTH AMERICA,

Insurance Carrier,
Defendants.

File Nos. 5067440, 5067441

ARBITRATION DECISION

Head Note Nos: 1402.30; 1402.40;
1803; 2502

STATEMENT OF THE CASE

Claimant, James Charles, filed petitions in arbitration seeking workers' compensation benefits from Arconic, Inc. f/k/a Alcoa, Indemnity Insurance Company of North America (Indemnity), and the Second Injury Fund of Iowa (Fund), all as defendants. This matter was heard on April 9, 2021, with a final submission date of May 7, 2021.

The record in this case consists of Joint Exhibits 1-6, Claimant's Exhibits 1-2, Defendants' (Arconic and Indemnity) Exhibits A-F, Defendant Fund's Exhibits AA-EE and the testimony of claimant and Katherine Barrett.

The parties filed a hearing report at the commencement of the arbitration hearing. On the hearing report, the parties entered into various stipulations. All of those stipulations were accepted and are hereby incorporated into this arbitration decision and no factual or legal issues relative to the parties' stipulations will be raised or discussed in this decision. The parties are now bound by their stipulations.

ISSUES

For file number 5064956 (DOI: 05/19/2018)

1. Whether the injury resulted in a permanent disability.
2. The extent of claimant's entitlement to permanent partial disability benefits.
3. Commencement date of benefits.
4. Whether claimant has a qualifying first or second injury for the purposes of Fund benefits.
5. Commencement date of Fund benefits.
6. Costs.

For file number 5067440 (DOI: 01/05/2018)

1. Whether the injury resulted in a permanent disability.
2. The extent of claimant's entitlement to permanent partial disability benefits.
3. Costs.

For file number 5067441 (DOI: 06/25/2018)

1. Whether the claimant sustained an injury that arose out of and in the course of employment.
2. Whether claimant's claim for benefits is barred by application of Iowa Code section 85.23).
3. Whether the injury is a cause of a temporary disability.
4. Whether the injury is a cause of a permanent disability; and if so,

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

6. Costs.

FINDINGS OF FACT

Claimant was 59 years old at the time of hearing. Claimant has a GED. Claimant has taken classes in electrical work, auto and diesel mechanics, welding and auto body repair at a community college. (Ex. BB, p. 7)

Claimant has worked as an electrician and a millwright mechanic. Claimant was a foreman for a construction company. (Ex. BB, p. 7)

Claimant began with Arconic in 2012. Claimant worked as a millwright mechanic. (Ex. AA, p. 3; TR p. 74)

Claimant testified that on January 5, 2018, his right thumb was crushed in a machine. (TR p. 25)

On January 10, 2018, claimant was evaluated at ORA for a thumb injury. Claimant was assessed as having a left thumb distal phalanx tuft fracture and a hematoma. The hematoma was drained. (JE 1, pp. 1-2)

Claimant returned on January 30, 2018, for a recheck of his thumb with Matthew Lindaman, D.O. Claimant was recommended to continue with a band-aid on the thumb where the hematoma was drained. (JE 1, p. 3)

Claimant returned to Dr. Lindaman on February 15, 2018. Claimant was limited to work and activity as tolerated. (JE 1, p. 5)

On May 18, 2018, claimant was found to be at maximum medical improvement (MMI) for the left thumb injury. He was returned to work without restrictions. (JE 1, p. 7)

Claimant testified that on May 19, 2018, he and other co-workers were cutting a steel band off a "cone." Claimant said he jumped back. He said the banding skipped off the floor and hit him in the leg and threw him to the floor. Claimant said he landed on his elbow and that he bounced across the floor on the top of a segment that weighed 450 pounds. (TR pp. 18-19)

Claimant said eventually his knee swelled up bigger than a basketball. He said his shoulder also hurt. Claimant said he went to the company medical department and asked to go to ORA but was refused. On May 19, 2018, claimant was seen in the Arconic Medical Department. The report indicates that when banding was cut off a "cone," claimant jumped to avoid the banding, but landed in a straddle position and was struck on the right thigh. Claimant was assessed as having a minor abrasion to the right thigh with no swelling. (JE 2, p. 29)

Claimant said that on June 25, 2018, he was working on the ground repairing a leaking hydraulic hose. Claimant was using a wrench. Claimant said the wrench slipped and his arm went flying. Claimant said, "Something popped." (TR pp. 32-33, 67-68) Claimant said he could not lift his arm after the accident.

On June 28, 2018, claimant went to the Health Department at Arconic for a follow-up visit for the right knee pain. Claimant was assessed as having right knee pain. He was told to use ice and heat on the knee and use over-the-counter ibuprofen. (JE 2, p. 35)

Claimant returned to Dr. Lindaman for his thumb injury on July 6, 2018. Claimant indicated the thumb nail was not growing back and was irritating the skin. Claimant was referred to a hand surgeon for further care. (JE 1, p. 8)

On July 24, 2018, claimant was evaluated by Jonathan Winston, M.D., for a left thumb injury. Claimant indicated if he used the left thumb, the thumb became sensitive, and he had nail problems. Claimant was put on light duty. (JE 1, p. 10)

On July 24, 2018, claimant was evaluated at the Arconic Medical Department for his thumb. During the visit, claimant complained of right knee, right ankle and generalized right shoulder pain. Claimant indicated he had right shoulder pain since the day he hit his right knee on equipment. Claimant indicated two weeks prior he was at the coil car when his right shoulder just popped. Claimant was told to use ice and heat. (JE 2, p. 41)

Claimant returned to the Arconic Medical Department on August 7, 2018, and August 15, 2018, with continued complaints of pain in the right knee, right ankle and right shoulder. On August 15, 2018, claimant was referred to an orthopedic specialist for causation opinion. (JE 2, pp. 43-44)

On September 4, 2018, claimant was evaluated by Dr. Winston for his right thumb. Claimant was returned to work with no restrictions. (JE 1, p. 11)

On September 12, 2018, claimant was evaluated by Jennifer Wilson, PA-C. Claimant had right shoulder pain that occurred when he was hit on the right knee and thrown in the air, landing on his right elbow and jamming his right shoulder. Claimant had a level 10 pain on a scale where 10 is excruciating pain. Claimant had crepitus with passive range of motion. Claimant was assessed as having right shoulder pain with severe osteoarthritis. He was given a cortisone injection in the shoulder. (JE 1, pp. 13-15)

In a September 14, 2018 statement, Brian DeHaven indicated claimant did not get thrown in the air regarding the banding incident. Mr. DeHaven indicated claimant told him the banding hit him in the leg. (Ex. C, p. 12)

In a September 19, 2018 statement, Arlo Ruduechol indicated claimant did not get thrown in the air and that claimant had no complaints regarding his right knee, ankle, or shoulder. (Ex. C, p. 11)

In an October 18, 2019 statement, Rich Carlson indicated claimant fell on "Brian D." Mr. Carlson indicated claimant did not complain about right knee, ankle, or shoulder pain. (Ex. C, p. 13)

On September 11, 2018, claimant was evaluated by N. Chelli, M.D., with the Arconic Medical Department. Dr. Chelli indicated he believed claimant had an injury to his knee and thigh as he had a large, resolving hematoma. Claimant did not initially complain of an ankle or shoulder injury. Claimant's injury report indicated he went to a straddle position when the accident first occurred. Claimant now contended he fell on his shoulder. Dr. Chelli opined claimant's ankle and shoulder condition were not work related. (JE 2, p. 56)

In a September 21, 2018 letter, defendant-insurer informed claimant it was accepting the May 19, 2018 injury regarding the right thigh and knee, but was denying liability for a right ankle and shoulder injury. (Ex. D, p. 14)

Claimant returned to Dr. Winston on October 5, 2018. Claimant was found to be at MMI for his thumb and returned to work without restrictions. (JE 1, pp. 16-17)

Claimant was seen by Suleman Hussain, M.D., on October 10, 2018 for his right shoulder. Claimant indicated he was hit with a piece of equipment in May of 2018 that caused him to fall, landing on his forearm and elbow. X-rays showed claimant had grade IV glenohumeral arthritis. Claimant was assessed as having right shoulder impingement with grade IV glenohumeral arthritis. (JE 1, pp. 18-19)

In an October 22, 2018 letter, Dr. Winston found claimant had a 1 percent permanent impairment to the thumb. (JE 1, p. 20)

Claimant returned to Dr. Hussain on November 5, 2018. Surgery was discussed and chosen as a treatment option. (JE 1, p. 21)

On December 13, 2018, claimant underwent right shoulder surgery consisting of a right total shoulder arthroplasty and a biceps tenodesis. (JE 3, pp. 64-66)

Claimant testified he was off work until approximately September 2019 following surgery. Claimant testified he received short-term disability benefits during this time. (TR p. 74)

On May 22, 2019, claimant was seen by Dr. Hussain for his right knee. Claimant was given a right knee injection. Claimant was told he needed to deal with anxiety issues regarding an MRI before extensive treatment was performed on the knee. Claimant was restricted from using ladders and limited to standing and walking no more than 20 minutes. (JE 1, p. 23)

In a May 24, 2019 letter, Dr. Hussain indicated claimant's right shoulder condition was bone-on-bone osteoarthritis, which is a condition related to natural degenerative processes. Dr. Hussain indicated that there was no indication claimant's right shoulder condition was aggravated or caused by work. (Ex. E, pp. 18-20)

In a June 28, 2019 report, Sangeeta Shah, M.D., gave her opinions of claimant's condition following an IME. Claimant had difficulty using his right shoulder and left thumb. (Ex. 1)

Dr. Shah found claimant had a right knee injury on May 19, 2018, when a 400-pound piece of metal broke off and hit him in the right thigh. Claimant tried to jump and landed on his forearm, hand and knee. Dr. Shah found that claimant had a right shoulder injury after a wrench slipped and claimant had a popping injury to the right shoulder. (Ex. 1, pp. 15-16)

Dr. Shah found claimant had a 17 percent permanent impairment to the upper extremity for his shoulder injury, converting to a 10 percent permanent impairment to the body as a whole. She opined claimant had a 33 percent impairment to the right thumb. She noted that claimant had a 5 percent permanent impairment to the right lower extremity. Dr. Shah combined all permanent impairments to find that claimant had a 20 percent permanent impairment to the body as a whole. (Ex. 1, pp. 16-17)

On July 3, 2019, claimant was evaluated by Dr. Hussain for his right knee. Claimant was assessed as having grade III medial compartment arthritis and grade IV patellofemoral arthritis in the right knee. (JE 1, p. 25)

On August 2, 2019, claimant had an MRI of the right knee. It showed that claimant had a cyst and suspicion of a tear of the medial meniscus. It also showed that claimant had moderate tricompartmental arthritis. (JE 4, pp. 70-71; JE 1, p. 27)

Claimant was seen by Dr. Hussain on August 9, 2019, for his right knee. Claimant was told he needed to have a knee replacement. He was told to lose weight and told to improve his attitude regarding his injury. (JE 1, p. 27)

In an August 9, 2019 letter, Dr. Hussain detailed his interactions with claimant. Claimant was very angry and accused Dr. Hussain of "... being in the pocket of Arconic in regard to trying to deny his work comp claim..." Dr. Hussain indicated claimant had a soft tissue injury. He indicated the MRI showed significant signs of osteoarthritis and degeneration of the joint. Dr. Hussain repeated that claimant was very angry regarding his knee condition. (Ex. E, pp. 21-22)

On September 18, 2019, claimant was seen at the Arconic Medical Department with his union representative regarding the alleged right knee injury. Based on the MRI and ORA report, Dr. Chelli opined that claimant's knee condition was a personal issue and not work related. (JE 2, p. 63)

On October 22, 2019, Dr. Hussain gave his opinion regarding claimant's right knee condition. He opined that claimant had a soft tissue injury to the right knee at the time of the injury. The MRI showed no structural soft tissue damage, and the findings were consistent with osteoarthritis in the knee. (Ex. E, p. 25)

Dr. Hussain reiterated that claimant had a soft tissue injury. He indicated that claimant's MRI was consistent with degenerative osteoarthritis of the knee. Claimant

would require further care of the knee. Dr. Hussain did not believe that further care was related to any work-related injury. (Ex. E, pp. 25-26)

In an August 12, 2020 letter, Dr. Hussain indicated claimant's right knee condition of underlying osteoarthritis was a pre-existing condition. He indicated claimant had a work-related soft tissue injury. He opined that further treatment of claimant's knee was not due to a work-related condition. He opined that claimant had a 0 percent permanent impairment to the right knee. (Ex. E, p. 29)

In a July 31, 2020 letter, Dr. Winston indicated claimant had inconsistent findings regarding total transverse sensory loss. He also noted that Dr. Shah's report, indicating loss of range of motion in the MP joint and thumb, was inconsistent. He indicated that claimant's fracture only affected claimant's IP joint. (Ex. F, p. 37)

Claimant testified he has continued problems with his legs and has difficulty walking, climbing stairs or kneeling. (TR p. 23) Claimant said he is limited in lifting his right arm. (TR pp. 38-39) Claimant testified he has difficulty sleeping due to his shoulder condition. (TR p. 41)

CONCLUSION OF LAW

The first issue to be determined is whether claimant sustained an injury that arose out of and in the course of employment on June 25, 2018.

The party who would suffer loss if an issue were not established has the burden of proving that issue by a preponderance of the evidence. Iowa R. App. P. 6.904(3).

The claimant has the burden of proving by a preponderance of the evidence that the alleged injury actually occurred and that it both arose out of and in the course of the employment. Quaker Oats Co. v. Ciha, 552 N.W.2d 143 (Iowa 1996); Miedema v. Dial Corp., 551 N.W.2d 309 (Iowa 1996). The words "arising out of" refer to the cause or source of the injury. The words "in the course of" refer to the time, place, and circumstances of the injury. 2800 Corp. v. Fernandez, 528 N.W.2d 124 (Iowa 1995). An injury arises out of the employment when a causal relationship exists between the injury and the employment. Miedema, 551 N.W.2d 309. The injury must be a rational consequence of a hazard connected with the employment and not merely incidental to the employment. Koehler Elec. v. Wills, 608 N.W.2d 1 (Iowa 2000); Miedema, 551 N.W.2d 309. An injury occurs "in the course of" employment when it happens within a period of employment at a place where the employee reasonably may be when performing employment duties and while the employee is fulfilling those duties or doing an activity incidental to them. Ciha, 552 N.W.2d 143.

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).

Claimant contends he sustained a right shoulder injury on June 25, 2018, when a wrench slipped, causing claimant to have a pop in his right shoulder. (TR p. 32) There is no record evidence that claimant sought treatment on the date of injury. On June 28, 2018, claimant sought treatment with the Arconic Medical Department. There is no mention in this record of a right shoulder injury or right upper extremity injury that occurred when a wrench slipped. (JE 2, p. 35)

On July 2, 2018, claimant treated at the Arconic Medical Department. There is no mention in this record of a right shoulder injury or right upper extremity injury that occurred when a wrench slipped. (JE 2, p. 36)

Claimant returned to the Arconic Medical Department on July 10, 2018, July 11, 2018, July 16, 2018, and July 19, 2018. There is no mention in any of these records of a right shoulder injury or right upper extremity injury that occurred when a wrench slipped. (JE 2, pp. 37-40)

On July 24, 2018, claimant went to the Arconic Medical Department for follow-up treatment of the crush injury to the thumb and for leg pain. Claimant also indicated he had shoulder pain for the first time. Claimant indicated he had right shoulder pain since the May 19, 2018, date of injury. There is no mention, in this visit, of a right shoulder injury caused by a slipped wrench. (JE 2, p. 41)

Claimant returned to the Arconic Medical Department on August 7, 2018, and August 15, 2018, for right shoulder pain. There is no mention of a July 2018 shoulder injury caused by a slipped wrench. (JE 2, pp. 43-44)

Claimant was evaluated at ORA for right shoulder pain. Claimant indicated the pain began on May 19, 2018. There is no mention in this record of a right shoulder condition caused by a slipped wrench. (JE 1, pp. 13-15)

Claimant went on to treat with Dr. Hussain for his right shoulder from October of 2018 through May of 2019. There is no mention in any of the records of a right shoulder injury caused by a slipped wrench. (JE 1, pp. 18-23)

The only document in the entire record that refers to a shoulder injury caused by a slipped wrench is in the IME report from claimant's own expert, Dr. Shah. (Ex. 1, p. 16) Dr. Shah's review of medical records also indicates there is no reference in any treatment record regarding a right shoulder injury caused by a slipped wrench. (Ex. 1, pp. 7-12)

Claimant alleges he injured his right shoulder on June 25, 2018, when a wrench slipped at work. The first reference to a shoulder injury occurs in a July 24, 2018, Arconic record. The treatment record makes no mention of a shoulder injury caused by a slipped wrench. There are no treatment records in the record to indicate claimant had a shoulder injury due to a slipped wrench. The review of the medical records by claimant's own expert makes no reference to a right shoulder injury caused by a slipped wrench. Given this record, claimant has failed to carry his burden of proof he sustained an injury that arose out of and in the course of employment due to a slipped wrench injury on June 25, 2018.

As claimant failed to carry his burden of proof he sustained an injury on June 25, 2018, that arose out of and in the course of employment, all other issues regarding file number 5067441 (DOI 06/25/2018), are moot except for costs.

The next issue to be determined is whether claimant sustained a permanent disability from his May 19, 2018 and January 5, 2018 dates of injury.

The law regarding the burden of proof and causal connection, detailed above, pertains to both injuries, but will not be repeated.

Regarding the January 5, 2018, date of injury (file number 5067440), both Dr. Winston and Dr. Shah opine claimant had a permanent impairment regarding his thumb injury. Given this record, claimant has carried his burden of proof he sustained a permanent disability regarding the January 5, 2018, date of injury.

Regarding the May 19, 2018, date of injury (file number 5064956), claimant alleges both a right leg and a right shoulder injury. Regarding the right shoulder injury, the only expert opinion regarding that claimant had a work-related shoulder injury comes from Dr. Shah. Dr. Shah opined claimant had a permanent impairment due to a June 25, 2018, date of injury caused by a slipped wrench. Dr. Shah gave no permanent impairment regarding a shoulder injury concerning a May 19, 2018, date of injury. As detailed above, claimant failed to carry his burden of proof he sustained a right shoulder injury on June 25, 2018, that arose out of and in the course of employment. Given this record, claimant has failed to carry his burden of proof he sustained a permanent impairment to his right shoulder caused by a May 19, 2018, date of injury.

Regarding the right leg, claimant's testimony at hearing regarding his right leg injury is inconsistent. On May 19, 2018, claimant reported the injury to the Arconic

Medical Department, indicating that when the banding came off the cone, he jumped, landed in a straddle position, and the banding struck his right thigh. (JE 2, p. 29)

At hearing, claimant testified the banding slammed him to the ground, causing shoulder and knee injuries. (TR pp. 31-32) Claimant also testified he did not get "slammed to the ground," but the banding hit him in the knee and knocked his leg out from under him. (TR pp. 51-52) Claimant also testified his body flew into the air and that he slammed into the ground. (TR p. 53) Claimant testified that all three co-workers saw him get "slammed to the ground." (TR p. 53)

Statements from two of the three co-workers indicate that claimant did not get thrown into the air and to the ground. (Ex. C, pp. 11-12)

Claimant was treated by Dr. Hussain for his right leg pain for an extended period of time. Dr. Hussain is an orthopedic specialist. Dr. Hussain indicated in several opinions that claimant sustained a temporary soft tissue injury, that claimant had osteoarthritis in the knee, and that claimant had no permanent impairment from the May 19, 2018, injury to his right leg. (Ex. E, pp. 18-22, 25-26, 29)

This opinion was corroborated by Dr. Chelli. (JE 2, p. 56)

Dr. Shah evaluated claimant once for an IME. Dr. Shah opines that claimant had a permanent impairment to the right knee due to locking and knee pain. (Ex. 1, p. 17) Dr. Shah's rating regarding the knee is problematic. Dr. Shah makes no reference, in her rating to the right knee, to the AMA Guides to the Evaluation of Permanent Impairment, fifth edition. I have no idea how Dr. Shah arrived at the value for permanent impairment that is given to claimant's right knee in her report. Given this problem, it is found that Dr. Shah's opinion regarding permanent impairment as to the right knee for the May 19, 2018, date of injury is found not convincing.

Dr. Hussain and Dr. Chelli found that claimant had no permanent impairment to the right knee regarding the May 19, 2018, date of injury. Dr. Shah's opinion regarding permanent impairment to the right knee is found not convincing. Given this record, claimant has failed to carry his burden of proof the May 19, 2018, date of injury resulted in a permanent disability.

As it is found that claimant failed to carry his burden of proof that the May 19, 2018, date of injury resulted in a permanent disability, all other issues regarding file number 5064956, except for reimbursement of costs, are moot.

Because claimant failed to prove he sustained a qualifying second injury, claimant has also failed to carry his burden of proof he is entitled to any benefits from the Fund.

The next issue to be determined is the extent of claimant's entitlement to permanent partial disability benefits regarding the January 5, 2018, date of injury to the right thumb.

Under the Iowa Workers' Compensation Act, permanent partial disability is compensated either for a loss or loss of use of a scheduled member under Iowa Code section 85.34(2)(a)-(t) or for loss of earning capacity under section 85.34(2)(u). The extent of scheduled member disability benefits to which an injured worker is entitled is determined by using the functional method. Functional disability is "limited to the loss of the physiological capacity of the body or body part." Mortimer v. Fruehauf Corp., 502 N.W.2d 12, 15 (Iowa 1993); Sherman v. Pella Corp., 576 N.W.2d 312 (Iowa 1998). The fact finder must consider both medical and lay evidence relating to the extent of the functional loss in determining permanent disability resulting from an injury to a scheduled member. Terwilliger v. Snap-On Tools Corp., 529 N.W.2d 267, 272-273 (Iowa 1995); Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417, 420 (Iowa 1994).

Dr. Winston is an orthopedic surgeon specializing in hand surgery. He treated claimant for an extended period of time. Dr. Winston found that claimant had a 1 percent permanent impairment to the left thumb. (JE 1, p. 20)

Dr. Shah evaluated claimant once for an IME. Dr. Shah is a neurologist. She opined that claimant had a 21 percent permanent impairment to the left thumb (Ex. 1, p. 17)

There are several problems with Dr. Shah's opinion regarding permanent impairment. Dr. Shah found that claimant had a permanent impairment, in part, due to alleged sensory impairment. There is no evidence in Dr. Shah's report that she performed any sensory deficit testing on claimant, or that claimant's sensory loss was allegedly permanent. There are also unexplained inconsistencies in Dr. Shah's finding regarding loss of range of motion. On page 14 of her report, she opines that claimant has 30 degrees of flexion of the MP joint. On page 17 of the report, Dr. Shah indicates that claimant actually has 40 degrees of flexion of the MP joint. (Ex. 1, p. 17) Because of the lack of sensory testing and inconsistencies with the range of motion values, Dr. Shah's opinion regarding permanent impairment of the thumb is found not convincing.

I am able to follow and understand Dr. Winston's findings of permanent impairment to the thumb. Dr. Winston is an orthopedic surgeon who treated claimant for an extended period of time. Dr. Shah's opinion regarding permanent impairment is not convincing. Given this record, claimant is due \$474.87 in permanent partial disability benefits for the left thumb injury (1 percent x 60 weeks x \$791.36). (Iowa Code section 85.34(2)(a))

The final issue to be determined is whether claimant is due reimbursement for an IME performed by Dr. Shah. On his report, claimant indicated he sought reimbursement of the IME as a cost. Reimbursement of the IME will be evaluated under Iowa Code section 85.39 in 876 IAC 4.33.

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).

Regarding the IME, the Iowa Supreme Court provided a literal interpretation of the plain language of Iowa Code section 85.39, stating that section 85.39 only allows the employee to obtain an independent medical evaluation at the employer's expense if dissatisfied with the evaluation arranged by the employer. Des Moines Area Reg'l Transit Auth. v. Young, 867 N.W.2d 839, 847 (Iowa 2015).

Under the Young decision, an employee can only obtain an IME at the employer's expense if an evaluation of permanent disability has been made by an employer-retained physician.

Iowa Code section 85.39 limits an injured worker to one IME. Larson Mfg. Co., Inc. v. Thorson, 763 N.W.2d 842 (Iowa 2009).

The Supreme Court, in Young noted that in cases where Iowa Code section 85.39 is not triggered to allow for reimbursement of an independent medical examination (IME), a claimant can still be reimbursed at hearing the costs associated with the preparation of the written report as a cost under rule 876 IAC 4.33. Young at 846-847.

Regarding the June 25, 2018, date of injury, no expert from defendant-employer gave an opinion regarding permanent impairment for this date of injury. Given this record, claimant has failed to carry his burden of proof he is due reimbursement for an IME as it relates to the June 25, 2018, date of injury.

Regarding the May 19, 2018, date of injury, Dr. Hussain gave an opinion regarding permanent impairment in a report dated April 12, 2020. Dr. Shah's opinion regarding permanent impairment is dated June 28, 2019. Given the chronology of the reports, claimant has failed to carry his burden of proof that he is entitled to reimbursement for an IME under Iowa Code section 85.39 for this date of injury.

Regarding the January 5, 2018, date of injury, Dr. Winston gave his opinion of permanent impairment in an October 22, 2018 letter. (JE 1, p. 20) As noted, Dr. Shah's IME report is dated June 28, 2019. Claimant is due reimbursement for a proportional share of the costs of the IME report as it relates to the January 5, 2018, date of injury.

Dr. Shah charged \$5,125.00 for the IME for all three dates of injury. Claimant is due reimbursement for one-third of the IME report under Iowa Code section 85.39 for the January 3, 2018, date of injury, or \$1,709.00 (\$5,125.00 divided by 3).

ORDER

THEREFORE IT IS ORDERED

For file number 5067441 (DOI 6/25/2018)

That claimant shall take nothing.

That both parties shall pay their own costs.

For file number 5064956 (DOI 5/19/2018)

That claimant shall take nothing in the way of additional benefits.

That both parties shall pay their own costs.

That defendants shall file subsequent reports of injury as required by this Agency under rule 876 IAC 3.1(2).

For file number 5067440 (DOI 01/05/2018)

That defendants shall pay claimant four hundred seventy-four and 87/100 dollars (\$474.87) commencing on October 15, 2018.

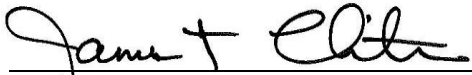
Defendants shall pay accrued weekly benefits in a lump sum together with interest at an annual rate equal to the one-year treasury constant maturity published by the federal reserve in the most recent H15 report settled as of the date of injury, plus two percent.

That defendants shall be given credit for benefits previously paid.

That defendants shall pay costs, including reimbursement of one thousand seven hundred nine dollars (\$1,709.00) for one-third of Dr. Shah's IME.

That defendants shall file subsequent reports of injury as required by this Agency under rule 876 IAC 3.1(2).

Signed and filed this 12th day of August, 2021.



JAMES F. CHRISTENSON
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

James P. Hoffman (via WCES)

Jane V. Lorentzen (via WCES)

Joshua Duden (via WCES)

Amanda R. Rutherford (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.