

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

ANGIJAD PARIC,

Claimant,

vs.

DES MOINES PUBLIC SCHOOLS,,

Employer,
Self-Insured,
Defendant.

File No. 1649535.01

ARBITRATION DECISION

Head Note Nos.: 1402.40, 1803.1,
1804, 2907

Claimant Angijad Paric filed a petition in arbitration on September 22, 2020, alleging he sustained a large, full thickness left rotator cuff tearing involving the supraspinatus tendon, dislocation and tearing of the biceps tendon, and partial thickness into substance tearing of the left subscapularis, involving the body was a whole, while working for Defendant Des Moines Public Schools on April 23, 2018. Des Moines Public Schools filed an answer on October 5, 2020, admitting Paric sustained a full thickness tear of the supraspinatus tendon in his left shoulder as a result of the April 23, 2018 injury, but denying he sustained any other injuries and that the injury was to the body as a whole.

An arbitration hearing was held *via* CourtCall video conference on October 21, 2021. Attorney Jason Neifert represented Paric. Paric appeared and testified. Zijo Suceška provided Bosnian interpretation services during the hearing. Attorney Matthew Grotnes represented Des Moines Public Schools. Cathy McKay appeared on behalf of Des Moines Public Schools, but did not testify. Joint Exhibits ("JE") 1 through 15 and Exhibits 1 through 3 were admitted into the record. The record was held open through December 10, 2021, for the receipt of post-hearing briefs. The briefs were received and the record was closed.

The parties submitted a Hearing Report, listing stipulations and issues to be decided. The Hearing Report was approved at the conclusion of the hearing. Des Moines Public Schools waived all affirmative defenses.

STIPULATIONS

1. An employer-employee relationship existed between Des Moines Public Schools and Paric at the time of the alleged injury.

2. Paric sustained an injury, which arose out of and in the course of his employment with Des Moines Public Schools on April 23, 2018.

3. The alleged injury is a cause of temporary disability during a period of recovery.
4. Temporary benefits are no longer in dispute.
5. The alleged injury is a cause of permanent disability.
6. The commencement date for permanent partial disability benefits, if any are awarded, is February 21, 2019.
7. At the time of the alleged injury, Paric's gross earnings were \$812.08 per week, he was married and entitled to four exemptions, and the parties believe the weekly rate is \$545.20.
8. Medical benefits are no longer in dispute.
9. Prior to the hearing Paric was paid 128 weeks of permanent partial disability benefits at the rate of \$545.20 per week.
10. Costs have been paid.

ISSUES

1. What is the nature of the injury?
2. What is the extent of disability?
3. Is the disability a scheduled member disability to the left shoulder or an industrial disability?
4. In the event Paric's permanency compensation is limited to a scheduled member, is Iowa's scheduled member disability compensation system unconstitutional?
5. Should costs be assessed against either party?

FINDINGS OF FACT

Paric is married and lives in Des Moines, Iowa. (Transcript, page 11) Paric graduated from high school in Bosnia. (JE 14, p. 121; Tr., p. 12) Following high school Paric attended Commerce College in Bosnia where he studied tourism and hospitality. (JE 14, p. 121; Tr., pp. 12-13) Paric did not complete the program. (Tr., p. 13) Paric has not used a computer and types using two fingers. (Ex. 1, p. 2) At the time of the hearing he was 72. (Tr., p. 11)

While living in Bosnia, Paric worked as a pension insurance clerk. (JE 14, p. 122; Ex. 1, p. 2) Paric worked as a wholesale manager for Banda Loka Shoe Factory from 1978 through 1990, overseeing people working in the warehouse and the accountants. (JE 14, p. 122; Ex. 1, p. 2; Tr., pp. 28-29) Paric's main job was in sales involving wholesale contracts. (Tr., p. 29)

In 1995, Paric moved to the United States. (Tr., p. 11) After moving to the United States, Paric worked as an autobody technician for several autobody shops in the Des Moines area from 1995 through 2008. (JE 14, p. 122; Ex. 1, p. 2; Tr., pp. 13-14) Paric repaired and replaced damaged car parts. (Tr., p. 14) The owner of the last body shop Paric worked for sold the shop in 2008 and the new owner let him go. (Tr., p. 15)

After his employment with the body shop ended, Paric obtained a commercial driver's license. (Tr., p. 16) On September 29, 2008, the Des Moines Public School District hired Paric as a full-time bus driver transporting students. (JE 14, pp. 122, 125; Tr., pp. 16-17) Paric was responsible for driving the bus and cleaning the interior and exterior of the bus. (Tr., p. 16)

Paric has a long history of cardiac disease, including multiple inferior wall myocardial infarctions with multiple stents in the right coronary artery. (JE 10, p. 75) Paric also has a history of dyspnea and fatigue related to his cardiac problems. (JE 10, p. 75) He is also a smoker. (JE 10, p. 75)

On April 23, 2018, Paric was involved in a car accident while driving a bus with students. (Tr., p. 18) Paric was wearing a seat belt at the time of the collision. (Tr., p. 22) Paric reported he felt a "little bit lost," following the collision and later developed pain in his arm and left shoulder as the day went on. (Tr., pp. 19-20) Paric testified the pain in his shoulder radiated from the middle of his shoulder joint toward his neck and down the front of his arm. (Tr., p. 20) Paric relayed the majority of his pain was in his shoulder. (Tr., p. 21) Paric reported the accident to his supervisor and he continued his route with the children. (Tr., p. 21) When he returned to the garage he reported his shoulder pain to his supervisor and completed an incident report. (Tr., p. 22)

At the time of the collision, Paric was 69. (Tr., p. 29) He has been collecting Social Security retirement benefits since he turned 65. (Tr., p. 29)

Des Moines Public Schools arranged for medical care for Paric. (Tr., p. 22) On April 25, 2018, Paric attended an appointment with Richard McCaughey, D.O., an occupational medicine physician with UnityPoint Health-Des Moines Occupational Medicine, complaining of left shoulder pain following a vehicular accident at work on April 23, 2018. (JE 1, page 1) Dr. McCaughey assessed Paric with a left shoulder strain following a jarring injury, and imposed restrictions of no overhead use or lifting above 15 pounds with the left arm. (JE 1, p. 1)

Paric returned to UnityPoint Health-Des Moines Occupational Medicine on May 7, 2018, and Judith Nayeri, D.O., a family medicine specialist, examined him. (JE 1, p. 3) Dr. Nayeri assessed Paric with left shoulder pain, recommended and instructed Paric on home exercises, and told him to take naproxen twice daily and to apply moist heat three times per day. (JE 1, p. 3) Dr. Nayeri imposed a restriction of no driving and ordered left shoulder magnetic resonance imaging. (JE 1, p. 3; Tr., p. 23) Paric has not worked since Dr. Nayeri restricted him from driving. (Tr., pp. 23-24)

On May 11, 2018, Paric underwent left upper extremity magnetic resonance imaging. (Ex. 2) The reviewing radiologist listed an impression of a full-thickness tear of the entire supraspinatus tendon without muscle atrophy, and subscapularis tendinopathy. (Ex. 2, p. 8)

Paric attended a follow-up appointment with Dr. McCaughey on May 17, 2018, reporting his left shoulder felt tender and weak. (JE 1, p. 4) Dr. McCaughey noted the magnetic resonance imaging showed a full-thickness tear of the supraspinatus and subscapularis tendinopathy, imposed restrictions of no driving, no overhead work, and no lifting, pushing, or pulling over 10 pounds, and he referred Paric to orthopedics. (JE 1, pp. 4, 6)

On May 23, 2018, Paric attended an appointment with Patrick Sullivan, M.D., an orthopedic surgeon, complaining of left shoulder pain and discomfort, and weakness in the ability to use his left shoulder. (JE 3, p. 9) Dr. Sullivan examined Paric, listed an impression of a full thickness tear of the left supraspinatus tendon, and recommended surgery to repair the rotator cuff. (JE 3, p. 9)

On July 25, 2018, Paric returned to Dr. Sullivan. (JE 3, p. 12) Dr. Sullivan noted the night before his scheduled surgery Paric had a myocardial infarction and his cardiologist stated he could not have any surgery for six months. (JE 3, p. 12) According to his cardiac treatment records, after developing severe chest pain, Paric had an acute inferior wall infarction and he underwent successful stenting of a thrombosed proximal right coronary artery. (JE 10, p. 87) Dr. Sullivan continued Paric's restrictions, recommended a shoulder injection, and ordered physical therapy. (JE 3, p. 12) Paric returned to Dr. Sullivan's office on August 10, 2018, and Amanda Kroymann, PA-C, administered an ultrasound guided left subacromial injection. (JE 3, p. 13)

Paric attended an appointment with Dr. Sullivan on August 20, 2018. (JE 3, p. 14) Dr. Sullivan continued his restriction of no use of the left upper extremity, ordered physical therapy to help with strength and comfort, and directed him to continue to wear a sling to support his arm until cardiology cleared him for surgery. (JE 3, p. 14) Dr. Sullivan noted "[w]ith a significant enough delay, the tear might become irreparable. However, there is nothing more that the patient or anyone else can do." (JE 3, p. 14)

On October 5, 2018, the Des Moines Public Schools sent Paric a letter stating that he was being terminated effective October 19, 2018, because he had exhausted all sources of leave and he was unable to return to work after 120 calendar days of inactive service. (JE 12, p. 117) Paric has not worked since the Des Moines Public School District terminated his employment. (JE 14, p. 123)

Paric returned to Dr. Sullivan on February 20, 2019, complaining of pain and discomfort from his left rotator cuff tear. (JE 3, p. 15) Dr. Sullivan informed Paric that based on the information he obtained from cardiology his cardiac risk was too high for him to consider a rotator cuff repair, and recommended a second opinion to determine if another orthopedic surgeon believed the cardiac risk was reasonable enough to consider a repair. (JE 3, p. 15)

On exam, Dr. Sullivan found,

[n]o asymmetries of the shoulder. Full active and passive range of motion of the right shoulder. Full passive range of motion of the left shoulder. Active forward flexion is about 40 . Abduction to 40 . Skin and ability normal in both shoulders. Strength normal right shoulder. The left shoulder has grade 2 strength of abduction and grade 2 strength of forward flexion.

(JE 3, p. 15) Dr. Sullivan noted if workers' compensation did not obtain a second opinion, then Paric would be at maximum medical improvement. (JE 3, p. 15) Using the Guides to the Evaluation of Permanent Impairment (AMA Press, 5th Ed. 2001) ("AMA Guides"), Dr. Sullivan opined,

[h]is restricted forward flexion and abduction will give him 10% impairment for flexion and 6% impairment for abduction. This would give him an impairment due to restricted motion of 16%. The strength deficit of 50% for flexion and abduction will give him 12% and 6% impairment respectively. This would give him 18% impairment for weakness. Using the combined values chart, he would get a total impairment of 32% for the upper extremity.

(JE 3, pp. 15-16) Dr. Sullivan imposed restrictions of waist level only work with the left arm and no lifting over 5 to 10 pounds and noted in the future he would anticipate Paric would need to undergo a rotator cuff repair and/or reverse total shoulder surgery. (JE 3, p. 15)

On May 16, 2019, Paric attended an appointment with Mark Fish, D.O., an orthopedic surgeon, for a second opinion. (JE 6) Dr. Fish documented, "[t]he pain in his shoulder is anterolateral and will occasionally radiate down his arm or into his neck. The pain will keep him up at night. He is unable to reach overhead." (JE 6, p. 27) Dr. Fish examined Paric, reviewed his imaging, diagnosed him with a left shoulder complete rotator cuff tear or rupture, left shoulder impingement syndrome, and left shoulder pain, and recommended left shoulder magnetic resonance imaging. (JE 6, pp. 28-29)

Paric underwent left shoulder magnetic resonance imaging on June 6, 2019. (JE 7, p. 42) The reviewing radiologist listed an impression of:

1. Large full-thickness rotator cuff tear involving the supraspinatus tendon. There is no rotator cuff muscle atrophy at this time.
2. Medial dislocation long head of the biceps tendon. The tendon itself is intact, however, there is partial thickness tearing.
3. Partial thickness intrasubstance tearing involving the subscapularis.
4. There are signal changes of blunting involving the posterior superior labrum, likely reflecting underlying labral tearing.

5. Moderate acromioclavicular joint degenerative changes.

(JE 7, p. 42)

On June 20, 2019, Paric attended a follow-up appointment with Dr. Fish. (JE 6, p. 30) Dr. Fish reviewed Paric's imaging and diagnosed him with left shoulder primary osteoarthritis, secondary osteoarthritis, left shoulder complete rotator cuff tear or rupture, left shoulder impingement syndrome, and pain in the left shoulder. (JE 6, p. 31) Dr. Fish recommended a shoulder arthroscopy with CD DCE and rotator cuff repair after his cardiologist cleared him for surgery. (JE 6, p. 31)

Paric attended a cardiology recheck appointment with Randolph Rough, M.D., a cardiologist on July 30, 2019. (JE 10, p. 93) Dr. Rough examined Paric and listed an impression of recent recurrent inferior wall infarction with stenting to an occluded distal right coronary artery, status post multiple inferior wall infarctions with last inferior infarction last year occurring when the patient held his clopidogrel and aspirin, nicotine abuse, severe low back pain, and severe left shoulder pain. (JE 10, p. 93) Paric had requested left shoulder arthroscopy and Dr. Rough opined he was "very high risk right now for any surgery." (JE 10, p. 93)

On January 21, 2020, Paric returned to Dr. Rough, complaining of severe left shoulder pain. (JE 10, p. 99) Dr. Rough noted Paric had been hospitalized two months before with a syncopal spell secondary to anemia secondary to GI bleeding from a duodenal ulcer, which was treated and ablated with no recurrent bleeding. (JE 10, p. 99) Dr. Rough noted Paric was at "very high risk for any surgery" if he would go off his medication (JE 10, p. 99)

Paric returned to Dr. Fish on January 27, 2020, complaining of severe shoulder pain. (JE 6, p. 33) Dr. Fish noted the pain was in the right shoulder and he administered an injection in the right shoulder. (JE 6, p. 33)

On June 15, 2020, Paric attended an appointment with Dr. Fish regarding his left shoulder pain. (JE 6, p. 36) Dr. Fish noted Paric received a left shoulder injection in January 2020, which provided him with relief, but his pain had gradually returned. (JE 6, p. 36) Dr. Fish assessed Paric with a left full thickness rotator cuff tear, noted he continues to have pain in the shoulder with range of motion, overhead activities, and with lifting, he administered an injection, and he imposed restrictions of no overhead work or lifting more than 10 pounds with the left upper extremity. (JE 6, pp. 36-38) Dr. Fish noted given the chronicity of the tear, a future rotator cuff repair may not be viable, and that if Paric is cleared for surgery, a reverse total shoulder arthroplasty would provide him with the best chance of post-operative function and pain relief. (JE 6, p. 36)

On January 6, 2021, John Kuhnlein, D.O., an occupational medicine physician, performed an independent medical examination for Paric and issued his report on January 25, 2016. (JE 9) Dr. Kuhnlein reviewed Paric's medical records and examined him. (JE 9) Dr. Kuhnlein measured Paric's range of motion for his right and left shoulders finding he had 130 degrees flexion for the right shoulder and 40 degrees for

the left shoulder, 45 degrees extension for the right shoulder and 20 degrees for the left shoulder, 100 degrees abduction for the right shoulder and 35 degrees for the left shoulder, 30 degrees adduction for the right shoulder and 0 degrees for the left shoulder, 80 degrees internal rotation for the right shoulder and 70 degrees for the left shoulder, and 20 degrees external rotation for the right shoulder and 15 degrees for the left shoulder. (JE 9, p. 57) Dr. Kuhnlein found Paric had grade 5- strength in flexion, but otherwise normal strength in his right shoulder area musculature, grade 5- strength for the left grip and left opponens strength, grade 3 strength in left shoulder area flexion, internal rotation, and external rotation, grade 4 strength in left shoulder area extension, and grade 5- strength in left shoulder abduction. (JE 9, p. 58) Dr. Kuhnlein noted Paric also complained of pain with left cervical side bending extending into the trapezius muscle from the left paracervical area and tenderness in the left paracervical musculature and across the left trapezius muscle to the shoulder area. (JE 9, p. 57)

Dr. Kuhnlein diagnosed Paric with left shoulder probable adhesive capsulitis based on exam, full-thickness supraspinatus tendon tear without atrophy, medial dislocation of the long head of the biceps tendon, partial subscapularis tendon tear, degenerative labral changes, and acromioclavicular joint degenerative changes, and neck and left trapezius muscle pain. (JE 9, pp. 59-60) Dr. Kuhnlein opined the April 23, 2018 work injury directly caused the rotator cuff tear and “lit up” the pre-existing asymptomatic bony degenerative changes or the work injury “lit up” and made the previously asymptomatic rotator cuff tear and arthritic changes clinically apparent, where they were not before. (JE 9, p. 60) Dr. Kuhnlein stated he believed Paric may have developed adhesive capsulitis as a sequela of the injury, noted the left rotator cuff tear is irreparable, and noted Paric was reticent to pursue either a left rotator cuff repair or reverse total shoulder arthroscopy because of his significant cardiac condition, and found,

. . .his current left shoulder area and neck situation would still be related back to the April 23, 2018, incident.

This is a significant left rotator cuff injury that has limited Mr. Paric’s ability to use the arm, as the muscles’ function has been affected. To compensate for this pathology, Mr. Paric uses the trapezius muscle in a compensatory fashion to move the arm. The trapezius muscle originates at the neck and inserts at the shoulder joint area. It is more likely than not that the neck and trapezius muscle pain developed as a sequela to the left shoulder area injury as he uses this musculature to compensate for the significant left rotator cuff injury.

Mr. Paric was receiving anticoagulant therapy for his coronary disease. The records indicate that the anticoagulant therapy was changed in anticipation of the shoulder area surgery, but he was still on appropriate anticoagulation at the time of the July 3, 2018, myocardial infarction. As a result, the July 3, 2018, myocardial infarction was related to his pre-existing underlying disease and was not a sequela to this injury.

(JE 9, p. 60)

In analyzing the anatomy of the upper body, Dr. Kuhnlein noted,

[t]he trapezius muscle originates on the cervical and thoracic spinal structures away from the shoulder girdle to insert on the clavicle and scapula. The trapezius muscle functions to move the shoulder girdle. Part of the trapezius muscle also serves to move the head and neck. Mr. Paric has significant rotator cuff pathology, leading him to use the trapezius musculature to move his arm. This muscle is also connected to his neck, as noted in the images above. This would be the source of the trapezius and neck pain, related to the shoulder area injury.

(JE 9, p. 66)

Dr. Kuhnlein noted Dr. Fish had stated Paric could repeat the glenohumeral joint space injections every three months, and he encouraged Paric to see Dr. Fish for additional injections and to assess the potential adhesive capsulitis. (JE 9, p. 69) Dr. Kuhnlein opined:

[t]he neck and trapezius pain is more likely than not caused as a response to the shoulder area pathology. If acceptable to his treating cardiologist, massage therapy may be of some benefit for this discomfort. Otherwise, the treatment he is currently using for the shoulder area discomfort would be appropriate for the neck and trapezius pain he experiences. The injections would be of a maintenance nature but are necessary to maintain Mr. Paric's residual shoulder area function. Any future shoulder area surgery would be related to this injury.

(JE 9, p. 70)

Dr. Kuhnlein found Paric reached maximum medical improvement on June 15, 2020, and using the AMA Guides, he opined:

[i]n this case, the neck and trapezius muscle pain represent changes in function related to the shoulder area pathology rather than true injury to the neck, so [to] assign an impairment for the neck would "double-dip" the impairment inappropriately. The neck and trapezius muscle pain impairment would be included intrinsically in the shoulder area pathology rating. This would also support that this is a whole person injury, in my opinion, as the two conditions are linked both anatomically and functionally.

In this case, with the pre-existing right shoulder injury that required surgery and permanent limitations, the right shoulder cannot be used as a control for impairment rating. Therefore, the impairment would be assigned based solely on the left shoulder area measurements.

Figures 16-40, 16-43, and 16-46 would assign a total of 26% left upper extremity impairment for deficits in range of motion. Turning to Table 16-35, page 510, there is 14% left upper extremity impairment for the motor deficits. Turning to the Combined Values Chart on page 604, when these values are combined (26% x 14%), this is a 36% left upper extremity impairment. Turning to Table 16-3, page 439, this would convert to a 22% whole person impairment.

(JE 9, p. 70)

Dr. Kuhnlein found Paric could not return to work as a bus driver because he cannot safely operate a bus or respond appropriately to an emergency situation. (JE 9, p. 70) Dr. Kuhnlein determined, based on his examination, Paric is not capable of lifting 10 pounds with his left upper extremity, and opined Paric would be unable to work at any job that would require material handling functions of more than 1 to 2 pounds rarely, he is unable to crawl or work off ground level, he cannot work above mid abdominal height, and he cannot functionally use hand or power tools regularly. (JE 9, p. 71)

Des Moines Public School District's attorney sent Dr. Sullivan a letter asking for his opinion on April 15, 2021. (JE 4, pp. 20-21) Dr. Sullivan prepared a response letter on April 19, 2021, as follows:

- 1) What was your diagnosis of Mr. Paric?
A: Mr. Paric's diagnosis was a full thickness left supraspinatus tendon tear.
- 2) Did you ever diagnosis [sic] a neck injury or a trapezius muscle injury?
A: I never diagnosed a neck or trapezius muscle injury.
- 3) Did you ever recommend any kind of care or treatment for any kind of neck injury or trapezius injury?
A: I never recommended any care or treatment for a neck injury or trapezius injury because I never diagnosed one.
- 4) What date do you believe Mr. Paric reached maximum medical improvement? Please provide me with your basis for that opinion.
A: I believe he reached his maximum medical improvement on July 5, 2018, the date the surgery was scheduled as he was unable to proceed because of a preoperative MI.
- 5) With respect to the permanent partial impairment ratings you gave Mr. Paric following your evaluation of him on February 20, 2019, please provide me with the specific Figures or Tabela you used to determine Mr. Paric's permanent partial

impairment based on the *AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition*.

A: I used the *Fifth Edition of the Guides to the Evaluation of Permanent Impairment* to rate Mr. Paric's impairment. To rate his impairment for forward flexion I used Figure 16-40. To rate his impairment for abduction I used Figure 16-48. To rate his impairment due to weakness I used Table 16-35.

(JE 4, pp. 22-23)

Phil Davis, M.S., a vocational specialist, issued a vocational opinion for Paric on September 13, 2021. (Ex. 1) Davis reviewed Paric's medical records and interviewed Paric. (Ex. 1, p. 1) Davis noted Paric's past work fell within the medium to heavy level and the restrictions provided by Drs. Kuhnlein and Sullivan fall within the sedentary physical demand level. (Ex. 1, p. 4) Davis opined, considering his physical restrictions, Paric is unable to return to any of his past employment endeavors. (Ex. 1, p. 4) Davis stated he examined Paric's transferable skills and concluded Paric had lost access to greater than 95 percent of his pre-injury labor market and economy. (Ex. 1, p. 5)

On September 23, 2021, Paric returned to Dr. Fish, reporting increased pain in his left shoulder. (JE 6, p. 39) Dr. Fish assessed Paric with left glenohumeral joint osteoarthritis, a full thickness rotator cuff tear, noted he could not undergo surgery due to health issues, and he administered an injection. (JE 6, p. 40)

Paric testified he continues to have pain, as follows:

[t]he pain is right here in the middle of my shoulder, and it's maybe for the past year – maybe even longer – it's been radiating to the neck and down this arm (Indicating). Sometimes, the pain is so bad and goes all the way to the neck, and it prevents me from turning my head. But it feels okay right now. And when I saw Dr. Fish last time, I told him about it; and he said that it's perfectly normal. Those are perfectly normal symptoms for that sort of injury.

(Tr., p. 26)

Paric relayed he has not looked for work for the last few years because his left arm "is toasted," and his past relevant work required the use of his hands and arms. (Tr., p. 27) Paric reported he planned to work as a bus driver as long as possible and that if he had not been injured, he would still be driving. (Tr., p. 27)

CONCLUSIONS OF LAW

I. Applicable Law

This case involves the issues of nature and extent of disability, recovery of costs, and a challenge to the constitutionality of changes made to the Iowa law involving the shoulder in 2017. In 2017, the Iowa Legislature enacted changes to Iowa Code

chapters 85, 86, and 535 effecting workers' compensation cases. 2017 Iowa Acts chapter 23 (amending Iowa Code sections 85.16, 85.18, 85.23, 85.26, 85.33, 85.34, 85.39, 85.45, 85.70, 85.71, 86.26, 86.39, 86.42, and 535.3). Under 2017 Iowa Acts chapter 23 section 24, the changes to Iowa Code sections 85.16, 85.18, 85.23, 85.26, 85.33, 85.34, 85.39, 85.71, 86.26, 86.39, and 86.42 apply to injuries occurring on or after the effective date of the Act. This case involves an injury occurring after July 1, 2017, therefore, the provisions of the new statute involving the nature and extent of disability under Iowa Code section 85.34 apply to this case.

The calculation of interest is governed by Deciga-Sanchez v. Tyson, File No. File No. 5052008 (Ruling on Defendant's Motion to Enlarge, Reconsider, or Amend Appeal Decision Re: Interest Rate Issue), which holds interest for all weekly benefits payable and not paid when due which accrued before July 1, 2017, is payable at the rate of ten percent; all interest on past due weekly compensation benefits accruing on or after July 1, 2017, is 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. Again, given this case concerns an injury occurring after July 1, 2017, the new provision on interest applies to this case.

II. Nature of the Injury

To receive workers' compensation benefits, an injured employee must prove, by a preponderance of the evidence, the employee's injuries arose out of and in the course of the employee's employment with the employer. 2800 Corp. v. Fernandez, 528 N.W.2d 124, 128 (Iowa 1995). An injury arises out of employment when a causal relationship exists between the employment and the injury. Quaker Oats Co. v. Ciha, 552 N.W.2d 143, 151 (Iowa 1996). 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, 3 (Iowa 2000). The Iowa Supreme Court has held, an injury occurs "in the course of employment" when:

. . . it is within the period of employment at a place where the employee reasonably may be in performing his duties, and while he is fulfilling those duties or engaged in doing something incidental thereto. An injury in the course of employment embraces all injuries received while employed in furthering the employer's business and injuries received on the employer's premises, provided that the employee's presence must ordinarily be required at the place of the injury, or, if not so required, employee's departure from the usual place of employment must not amount to an abandonment of employment or be an act wholly foreign to his usual work. An employee does not cease to be in the course of his employment merely because he is not actually engaged in doing some specifically prescribed task, if, in the course of his employment, he does some act which he deems necessary for the benefit or interest of his employer.

Farmers Elevator Co., Kingsley v. Manning, 286 N.W.2d 174, 177 (Iowa 1979).

The question of medical causation is “essentially within the domain of expert testimony.” Cedar Rapids Cmty. Sch. Dist. v. Pease, 807 N.W.2d 839, 844-45 (Iowa 2011). The commissioner, as the trier of fact, must “weigh the evidence and measure the credibility of witnesses.” Id. The trier of fact may accept or reject expert testimony, even if uncontroverted, in whole or in part. Frye v. Smith-Doyle Contractors, 569 N.W.2d 154, 156 (Iowa Ct. App. 1997). When considering the weight of an expert opinion, the fact-finder may consider whether the examination occurred shortly after the claimant was injured, the compensation arrangement, the nature and extent of the examination, the expert’s education, experience, training, and practice, and “all other factors which bear upon the weight and value” of the opinion. Rockwell Graphic Sys., Inc. v. Prince, 366 N.W.2d 187, 192 (Iowa 1985).

It is well-established in workers’ compensation that “if a claimant had a preexisting condition or disability, aggravated, accelerated, worsened, or ‘lighted up’ by an injury which arose out of and in the course of employment resulting in a disability is found to exist,” the claimant is entitled to compensation. Iowa Dep’t of Transp. v. Van Cannon, 459 N.W.2d 900, 904 (Iowa 1990). The Iowa Supreme Court has held,

[a] disease which under any rational work is likely to progress so as to finally disable an employee does not become a “personal injury” under our Workmen’s Compensation Act merely because it reaches a point of disablement while work for an employer is being pursued. It is only when there is a direct causal connection between exertion of the employment and the injury that a compensation award can be made. The question is whether the diseased condition was the cause, or whether the employment was a proximate contributing cause.

Musselman v. Cent. Tel. Co., 261 Iowa 352, 359-60, 154 N.W.2d 128, 132 (1967).

The parties stipulated Paric sustained a temporary and a permanent impairment caused by the work injury. Paric avers he sustained a large, full thickness left rotator cuff tear involving the supraspinatus tendon, dislocation and tearing of the biceps tendon, and partial thickness into substance tearing of the left subscapularis, extending to his neck and trapezius, involving the body was a whole as a result of the April 2018 work injury. Des Moines Public Schools admits Paric sustained a full thickness tear of the supraspinatus tendon in his left shoulder as a result of the April 2018 work injury, but denies he sustained any other injuries and that the injury was to the body as a whole and that Paric’s compensation is limited to the functional loss to his left shoulder.

Iowa Code section 85.34(2) governs compensation for permanent partial disabilities. The law distinguishes between scheduled and unscheduled disabilities. The Division of Workers Compensation evaluates disability using two methods, functional and industrial. Simbro v. Delong’s Sportswear, 332 N.W.2d 886, 887 (Iowa 1983).

The Division applies the functional method for a scheduled injury to each part of the body listed in the statute, including: (1) a thumb; (2) a first finger; (3) a second

finger; (4) a third finger; (5) a fourth finger; (6) a first or distal phalange of the thumb or any finger; (7) loss of more than one phalange of the thumb or a finger; (8) a great toe; (9) one of the toes other than the great toe; (10) a first phalange of any toe; (11) loss of more than one phalange of any toe; (12) a hand; (13) an arm; (14) a shoulder (added in 2017); (15) a foot; (16) a leg; (17) an eye; (18) “loss of an eye, the other eye having been lost prior to the injury;” (19) hearing, other than occupational loss; (20) occupational hearing loss; (21) “loss of both arms, or both hands, or both feet, or both legs, or both eyes, or any two thereof, caused by a single accident;” and (22) disfigurement of the face or head. Iowa Code § 85.34(2)(a)-(u); Westling v. Hormel Foods Corp., 810 N.W.2d 247, 252 (Iowa 2012). Each of these subsections provides a maximum number of weeks of compensation for the complete loss of a scheduled member or body part.

Since 2017, compensation or functional loss for scheduled injuries is determined by taking the number of weeks allowed for a complete loss of the body part or scheduled member, multiplied by a percentage of impairment determined using the AMA Guides. Iowa Code § 85.34(2)(x). The statute also requires compensation be awarded for functional loss if an employee 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.” Id. § 85.34(2)(v). That provision does not apply in this case.

The Division uses the industrial method for “all cases of permanent partial disability other than those” set forth in Iowa Code section 85.34(2)(a) through (u). All other cases are classified as “unscheduled injuries.” Westling, 910 N.W.2d at 252-53. Compensation for unscheduled injuries is determined examining the reduction of earning capacity. Id. at 53.

In 2017, the Iowa Legislature made substantial changes to Iowa Code chapter 85, including a change to how compensation is determined for an injury “for a loss of a shoulder.” Before 2017, shoulder injuries were treated as injuries to the body as whole and were compensated industrially under what is now Iowa Code section 85.34(2)(v) (2017), formerly Iowa Code section 85.34(2)(u) (2016). Second Injury Fund of Iowa v. Nelson, 544 N.W.2d 258 (Iowa 1995). In 2017, the Legislature enacted Iowa Code section 85.34(2)(n), which provides “compensation shall be paid as follows . . . (n) For the loss of a shoulder, weekly compensation during four hundred weeks.”

When determining compensation for functional loss for a scheduled member disability, the extent of loss is to be determined “solely” by using the AMA Guides. Iowa Code § 85.34(2)(x). The statute provides, “[l]ay testimony or agency expertise shall not be utilized in determining loss or percentage of permanent impairment pursuant to paragraphs “a” through “u”, or paragraph “v” when determining functional disability and not loss of earning capacity. Id.

Two experts have provided impairment ratings in this case, Dr. Sullivan, a treating orthopedic surgeon, and Dr. Kuhnlein, an occupational medicine physician who performed an independent medical examination for Paric. Dr. Sullivan assigned Paric a

32 percent left upper extremity impairment, and Dr. Kuhnlein assigned Paric a 36 percent left upper extremity impairment. (JE 3, pp 15-16; JE 9, p. 70)

Dr. Sullivan treated Paric over time. Dr. Kuhnlein examined Paric once for purposes of an independent medical examination. Dr. Sullivan issued his rating following an examination of Paric on February 20, 2019. Dr. Kuhnlein issued his rating following an examination of Paric on January 6, 2021, almost two years later.

Dr. Sullivan documented he found:

[n]o asymmetries of the shoulder. Full active and passive range of motion of the right shoulder. Full passive range of motion of the left shoulder. Active forward flexion is about 40 . Abduction to 40 . Skin and ability normal in both shoulders. Strength normal right shoulder. The left shoulder has grade 2 strength of abduction and grade 2 strength of forward flexion.

(JE 3, p. 15) Dr. Sullivan's record does not record all of the range of motion findings for both shoulders, listing only the flexion and abduction findings for, presumably, the left shoulder. Dr. Sullivan then assigned Paric a 10 percent impairment for flexion and a 6 percent impairment for abduction, for a total 16 percent impairment for restricted motion. (JE 3, p. 16) He also found a strength deficit of 50 percent for flexion and abduction, assigning him 12 percent and 6 percent respectively, for a combine 18 percent impairment for weakness. (JE 3, p. 16) Dr. Sullivan's record does not list all the strength findings for the left shoulder, but notes the right shoulder strength was normal. (JE 3, p. 16)

In contrast, Dr. Kuhnlein's report is very detailed and lists all of his findings on exam, including tests he performed, range and motion findings, and strength findings for both upper extremities. Dr. Kuhnlein found Paric had 130 degrees flexion for the right shoulder and 40 degrees for the left shoulder, 45 degrees extension for the right shoulder and 20 degrees for the left shoulder, 100 degrees abduction for the right shoulder and 35 degrees for the left shoulder, 30 degrees adduction for the right shoulder and 0 degrees for the left shoulder, 80 degrees internal rotation for the right shoulder and 70 degrees for the left shoulder, and 20 degrees external rotation for the right shoulder and 15 degrees for the left shoulder. (JE 9, p. 57) Dr. Kuhnlein found Paric had grade 5- strength in flexion, but otherwise normal strength in his right shoulder area musculature, grade 5- strength for the left grip and left opponens strength, grade 3 strength in left shoulder area flexion, internal rotation, and external rotation, grade 4 strength in left shoulder area extension, and grade 5- strength in left shoulder abduction. (JE 9, p. 58) While the flexion findings for both experts is similar, Dr. Sullivan found adduction for the left shoulder was 40 degrees and Dr. Kuhnlein found adduction for the left shoulder was 0 degrees.

The two opinions differ on whether the injury extends into the body as a whole. Dr. Kuhnlein opined Paric developed neck and trapezius pain as sequela of the left shoulder injury, extending into the body as a whole, and assigned a 22 percent whole

person impairment. (JE 9, pp. 60, 70) In analyzing the anatomy of the upper body, Dr. Kuhnlein noted that “[t]he trapezius muscle originates on the cervical and thoracic spinal structures away from the shoulder girdle to insert on the clavicle and scapula. The trapezius muscle functions to move the shoulder girdle. Part of the trapezius muscle also serves to move the head and neck.” (JE 9, p. 66) Dr. Kuhnlein explained Paric had sustained a significant rotator cuff injury, which limited his ability to use his arm and to compensate for his pathology, Paric has used the trapezius muscle in a compensatory fashion to move his arm, causing him to develop neck and trapezius pain. (JE 9, p. 60)

After receiving Dr. Kuhnlein’s causation opinion finding Paric had developed neck and trapezius pain as sequelae of his left shoulder injury, the Des Moines Public Schools did not request Dr. Sullivan examine Paric. Dr. Sullivan’s examination of Paric was nearly two years before Dr. Kuhnlein’s examination. In response to a letter from counsel, Dr. Sullivan stated, “I never diagnosed a neck or trapezius muscle injury,” or recommended any care or treatment for a neck or trapezius injury. (JE 4, p. 22) Dr. Sullivan has not opined the injury is limited to the shoulder. No expert has opined the injury is limited to the shoulder or challenged Dr. Kuhnlein’s finding that Paric sustained sequelae injuries to his trapezius and neck.

I find Paric has met his burden that he sustained sequelae injuries to his trapezius and neck caused by his left shoulder injury, which extend into the body as a whole. The injuries Paric has sustained to his trapezius and neck caused by his left shoulder injury are comparable to sequela lumbar spine pain caused by a change of gait as a result of a knee or leg impairment, extending into the body as a whole. Injuries to the cervical, thoracic, and lumbar spine and to the trapezius muscle are not included in the schedule. Because Paric sustained an injury a part of the body not included in the schedule, his claim is compensable as an unscheduled injury using industrial disability analysis. Lauhoff Grain v. McIntosh, 395 N.W.2d 834, 837-40 (Iowa 1986) (hip injury is treated as an injury to the body as a whole as opposed to the leg); Barton v. Nevada Poultry Co., 253 Iowa 285, 291, 100 N.W.2d 660, 663 (1961) (when an employee has an injury to a scheduled member and also to a part of the body not included in the schedule, permanent disability is compensable as an unscheduled injury); see also Collins v. Dep’t. of Human Servs., 529 N.W.2d 627, 629-30 (Iowa Ct. App. 1995). As a result of this finding, Paric’s challenge to the constitutionality of the statute is moot.

III. Extent of Disability

Compensation for an unscheduled injury through the industrial method is determined by evaluating the employee’s earning capacity. Westling, 910 N.W.2d at 53; Pease, 807 N.W.2d at 852. In considering the employee’s earning capacity, the deputy commissioner evaluates several factors, including “consideration of not only the claimant’s functional disability, but also [his] age, education, qualifications, experience, and ability to engage in similar employment.” Swiss Colony, Inc. v. Deutmeyer, 789 N.W.2d 129, 137-38 (Iowa 2010). The inquiry focuses on the injured employee’s “ability to be gainfully employed.” Id. at 138.

The determination of the extent of disability is a mixed issue of law and fact. Neal v. Annett Holdings, Inc., 814 N.W.2d 512, 525 (Iowa 2012). Compensation for permanent partial disability shall begin at the termination of the healing period. Iowa Code § 85.34(2). Compensation shall be paid in relation to 500 weeks as the disability bears to the body as a whole. Id. § 85.34(2)(u). When considering the extent of disability, the deputy commissioner considers all evidence, both medical and nonmedical. Evenson v. Winnebago Indus., Inc., 881 N.W.2d 360, 370 (Iowa 2016).

The Iowa Supreme Court has held, “it is a fundamental requirement that the commissioner consider all evidence, both medical and nonmedical. Lay witness testimony is both relevant and material upon the cause and extent of injury.” Evenson, 881 N.W.2d 360, 369 (Iowa 2016) (quoting Gits Mfg. Co. v. Frank, 855 N.W.2d 195, 199 (Iowa 2014)). Paric alleges he is permanently and totally disabled. Des Moines Public Schools rejects his assertion.

In Iowa, a claimant may establish permanent total disability under the statute, or through the common law odd-lot doctrine. Michael Eberhart Constr. v. Curtin, 674 N.W.2d 123, 126 (Iowa 2004) (discussing both theories of permanent total disability under Idaho law and concluding the deputy’s ruling was not based on both theories, rather, it was only based on the odd-lot doctrine). Under the statute, the claimant may establish the claimant is totally and permanently disabled if the claimant’s medical impairment together with nonmedical factors totals 100 percent. Id. The odd-lot doctrine applies when the claimant has established the claimant has sustained something less than 100 percent disability, but is so injured that the claimant is “unable to perform services other than ‘those which are so limited in quality, dependability or quantity that a reasonably stable market for them does not exist.’” Id. (quoting Boley v. Indus. Special Indem. Fund, 130 Idaho 278, 281, 939 P.2d 854, 857 (1997)). Paric did not plead odd-lot on the petition or list odd-lot on the Hearing Report.

“Total disability does not mean a state of absolute helplessness.” Wal-Mart Stores, Inc. v. Caselman, 657 N.W.2d 493, 501 (Iowa 2003) (quoting IBP, Inc. v. Al-Gharib, 604 N.W.2d 621, 633 (Iowa 2000)). Total disability “occurs when the injury wholly disables the employee from performing work that the employee’s experience, training, intelligence, and physical capacity would otherwise permit the employee to perform.” IBP, Inc., 604 N.W.2d at 633.

At the time of hearing Paric was 70. Paric graduated from high school and attended college in Bosnia. Paric’s English is limited. Paric types using two fingers and he is not able to use a computer. I believe he would have difficulty retraining. Since moving to the United States in 1995, Paric has worked in autobody repair and as a bus driver. Drs. Sullivan and Kuhnlein agree he cannot return to work as a bus driver. The Des Moines School District terminated his employment when he could not return to work. The Des Moines School District did not offer Paric a job within his restrictions. As discussed by Davis, Paric’s left upper extremity lifting restriction precludes him from returning to work in autobody repair. The majority of Paric’s work has been in the medium to heavy physical demand level. Paric is very limited in his ability to use his left arm. Considering all of the record evidence, I find Paric is permanently and totally

disabled. Even though he is an older worker, I do not find Paric intended to retire at the time of his work injury. Paric worked full-time for Des Moines Public Schools even after he began collecting Social Security retirement benefits when he turned 65. Benefits run from the date of the filing of the petition, at the stipulated weekly rate of \$545.20.

IV. Costs

Paric seeks to recover interpretation fees of \$225.00 for an appointment with Dr. Kuhnlein on January 6, 2021, \$75.00 for an appointment with Phil Davis on August 18, 2021 and \$100.00 for his deposition preparation and testimony, and the \$1,714.80 cost of the vocational evaluation with Phil Davis. (Ex. 3) Davis charged \$210.00 for a vocational interview, \$150.00 for travel time, and \$1,335.00 for his report. (Ex. 3, p. 13)

Iowa Code section 86.40, provides, “[a]ll costs incurred in the hearing before the commissioner shall be taxed in the discretion of the commissioner.” Rule 876 Iowa Administrative Code 4.33, provides costs may be taxed by the deputy workers’ compensation commissioner for: (1) the attendance of a certificated shorthand reporter for hearings and depositions; (2) transcription costs; (3) the cost of service of the original notice and subpoenas; (4) witness fees and expenses; (5) the cost of doctors’ and practitioner’s deposition testimony; (6) the reasonable cost of obtaining no more than two doctors’ or practitioners’ reports; (7) filing fees; and (8) the cost of persons reviewing health service disputes. The rule allows for the recovery of the attendance of a certified shorthand reporter for a deposition or hearing and for the cost of the transcription, but does not allow for the recovery of the cost of an interpreter. I do not find Paric is entitled to recover the interpreter costs. The rule affords the recovery of a practitioner’s report only. Davis’s report was helpful in determining the extent of industrial disability in this case. I find Paric is entitled to recover the \$1,335.00 cost of Davis’s report.

ORDER

IT IS THEREFORE ORDERED, THAT:

Defendant shall pay the Claimant permanent total disability benefits from April 23, 2018, at the rate of five hundred forty-five and 20/100 dollars (\$545.20) per week, and into the future during the period of Claimant’s continued disability.


Defendant shall receive a credit for all weekly benefits paid to date.

Defendant 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.

Defendant shall reimburse Claimant one thousand three hundred thirty-five and 00/100 dollars (\$1,335.00) for the cost of Davis’s report.

Defendant shall file subsequent reports of injury as required by this agency pursuant to rules 876 IAC 3.1(2) and 876 IAC 11.7.

Signed and filed this 24th day of January, 2022.



HEATHER L. PALMER
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Jason Neifert (via WCES)

Matthew Grotnes (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.