

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

PAMELA SALAZAR,

Claimant,

vs.

FEDERAL EXPRESS CORPORATION,

Employer,

and

INDEMNITY INS. CO. OF N. AMERICA,

Insurance Carrier,
Defendants.File Nos. 1664432.01
1658294.01

ARBITRATION DECISION

Headnote: 1803

STATEMENT OF THE CASE

Pamela Salazar filed two petitions in arbitration, seeking workers' compensation benefits from her employer, Federal Express Corp. (FedEx), and its insurance carrier, Indemnity Insurance Company of North America (Indemnity). The agency consolidated the resulting cases, File Nos. 1658294.01 and 1664432.01, and the undersigned presided over a hearing held via Internet-based video on January 15, 2021. Salazar participated personally and through attorney James Ballard. The defendants participated through attorney John Cutler.

ISSUES

Under rule 876 IAC 4.149(3)(f), the parties jointly submitted two hearing reports (one for each file number) defining the claims, defenses, and issues submitted to the presiding deputy commissioner. The hearing report was approved and entered into the record via an order because it is a correct representation of the disputed issues and stipulations in this case.

File No. 1658294.01

For File No. 1658294.01, the parties identified the following disputed issues in the hearing report:

- 1) What, if any, permanent disability resulted from Salazar's December 13, 2018 work injury to her right shoulder?
- 2) What were Salazar's gross earnings on December 13, 2018?
- 3) What is the commencement date for permanent partial disability benefits, if any are awarded?
- 4) Are costs taxed against the defendants under Iowa Code section 86.40?

File No. 1664432.01

For File No. 1664432.01, the parties identified the following disputed issues in the hearing report:

- 1) What, if any, permanent disability resulted from the May 2, 2019 work injury Salazar sustained to her right shoulder?
- 2) Are costs taxed against the defendants?

STIPULATIONS

The parties' hearing reports also contain stipulations. They are listed below under the corresponding file number.

File No. 1658294.01

For File No. 1658294.01, the parties entered into the following stipulations:

- 1) An employer-employee relationship existed between Salazar and FedEx on December 13, 2018.
- 2) Salazar sustained an injury to her right shoulder on December 13, 2018, which arose out of and in the course of her employment with FedEx.
- 3) At the time of the stipulated injury:
 - a) Salazar was single.
 - b) Salazar was entitled to one exemption.
- 4) The costs listed in Claimant's Exhibit 2 have been paid.

File No. 1664432.01

In the hearing report for File No. 1664432.01, the parties entered into the following stipulations:

- 1) An employer-employee relationship existed between Salazar and FedEx on May 2, 2019.
- 2) Salazar sustained an injury to her right shoulder on May 2, 2019, which arose out of and in the course of her employment with FedEx.
- 3) The May 2, 2019 work injury caused permanent disability.
- 4) At the time of the stipulated injury:
 - a) Salazar's gross earnings were nine hundred thirty-eight and 00/100 dollars (\$938.00) per week.
 - b) Salazar was single.
 - c) Salazar was entitled to one exemption.
- 5) Prior to hearing, the defendants paid to Salazar twelve (12) weeks of compensation at the rate of five hundred eighty and 53/100 dollars (\$580.53) per week.
- 6) The costs listed in Claimant's Exhibit 2 have been paid.

The parties' stipulations are accepted and incorporated into this arbitration decision. The parties are bound by their stipulations. This decision contains no discussion of any factual or legal issues relative to the parties' stipulations except as necessary for clarity with respect to disputed factual and legal issues.

FINDINGS OF FACT

The evidentiary record in this case consists of the following:

- Joint Exhibits (Jt. Ex.) 1 through 5;
- Claimant's Exhibits (Cl. Ex.) 1 through 2;
- Defendants' Exhibits (Def. Ex.) A through C; and
- Hearing testimony by Salazar.

After careful consideration of the evidence and parties' post-hearing briefs, the undersigned makes the following findings of fact.

At all times material to this case, Salazar worked for FedEx as a courier. (Hrg. Tr. p. 12) Her job duties included loading her truck with packages and delivering them. (Hrg. Tr. p.13) Thus, Salazar had to lift and carry packages, sometimes with the help of a two-wheel cart. (Hrg. Tr. p. 42) FedEx required couriers such as Salazar to lift upwards of 50 pounds. (Hrg. Tr. p. 14)

Salazar's right shoulder was healthy before and during her FedEx employment until December 13, 2018. (Hrg. Tr. p. 17) On that day, she carried a box that weighed about 50 pounds from her truck to the front door of the home to which she was delivering it. (Hrg. Tr. p. 17; Jt. Ex. 1, p. 1) Salazar set the box on the top step and felt a sharp pain in her right shoulder when she pushed the box to get it closer to the front door. (Hrg. Tr. p. 18; Jt. Ex. 1, p. 1)

Despite the injury, Salazar kept working because it was the holiday season and FedEx was very busy. (Hrg. Tr. p. 19) She felt she could get through the peak season if FedEx provided her with a rider to carry boxes for her from the truck to the delivery site. (Hrg. Tr. p. 19) FedEx granted her request and Salazar finished out the holiday season with the help of a rider. (Hrg. Tr. p. 18)

Because Salazar's shoulder did not improve during her holiday deliveries, FedEx sent Salazar to Occupational Medicine West on December 27, 2018. (Jt. Ex. 1, p. 1) She complained of aching, burning, constant, sharp, and throbbing pain. (Jt. Ex. 1, p. 1) A nurse practitioner diagnosed Salazar with a sprained shoulder and prescribed prednisone for the pain. (Jt. Ex. 1, p. 8) The nurse practitioner also gave Salazar work restrictions of no overhead work and no lifting, pushing, or pulling more than 20 pounds, which prevented her from returning to work with FedEx. (Jt. Ex. 1, p. 8)

Because Salazar's pain continued, she followed up on January 3, 2019. (Jt. Ex. 1, p. 10) A nurse practitioner prescribed naproxen and physical therapy. (Jt. Ex. 1, p. 13) Salazar participated in physical therapy for about six weeks. (Jt. Ex. 1, pp. 13, 28–29)

At Occupational Medicine West, Salazar also received a cortisone shot in her right shoulder to help with symptoms. (Jt. Ex. 1, p. 18–19) After a follow-up appointment at which she denied pain, Occupational Medicine West released her to return to work without any restrictions effective January 25, 2019. (Jt. Ex. 1, pp. 23, 27, 28) There is an insufficient basis in the evidence from which to find Salazar sustained a permanent impairment due to the December 13, 2018 work injury.

On May 2, 2019, Salazar was unloading boxes onto a two-wheeler, which was not sitting level on the ground. (Hrg. Tr. p. 24) She placed a heavy box on the two-wheeler, which caused it to recoil and strike her on the head and right shoulder. (Hrg. Tr. p. 24; Jt. Ex. 1, p. 30) Salazar felt pain, but finished her shift and returned to work on May 3, 2019. (Hrg. Tr. p. 25) Salazar was unloading a box that weighed about 20 pounds when she felt a pop and rip in her right shoulder. (Hrg. Tr. p. 25; Jt. Ex. 1, p. 30)

Salazar notified FedEx management of the injury, left work because she was in intense pain, and sought care at MercyOne West Des Moines Occupational Health, the same facility she received care for her first injury. (Jt. Ex. 1, p. 30) She complained of constant and sharp pain that she rated as an eight on a scale of zero to ten. (Jt. Ex. 1, p. 30) Salazar received an injection and Joanne Harbert, ARNP, recommended physical therapy and magnetic resonance imaging (MRI). (Jt. Ex. 1, p. 33) Harbert also assigned

Salazar work restrictions including no use of the right arm and lifting, pushing, and pulling up to five pounds. (Jt. Ex. 1, p. 34)

On May 29, 2019, Salazar followed up for her MRI results, which showed:

- Partial tearing of the distal subscapularis tendon;
- Tearing along the insertional fibers of the distal supraspinatus/infraspinatus tendons;
- Complete biceps tendon tear from the anchor with severe retraction;
- Degenerative tear of the superior through posterior superior labrum;
- Mild acromioclavicular arthrosis; and
- Anterior capsular stripping as described. (Jt. Ex. 1, pp. 36, 38; Jt. Ex. 2, pp. 41–43)

Harbert referred Salazar to see an orthopedist. (Jt. Ex. 1, p. 39) The defendants sent her to Scott Meyer, M.D., at Iowa Ortho on June 3, 2019. (Jt. Ex. 3, pp. 44–46) Dr. Meyer agreed with Salazar's preference to try physical therapy for one month. (Jt. Ex. 3, p. 46) At a follow-up exam on June 28, 2019, Dr. Meyer recommended surgery for her right rotator cuff tear and conservative treatment for her biceps rupture. (Jt. Ex. 3, p. 48)

On July 18, 2019, Dr. Meyer performed a right shoulder subacromial decompression with debridement of partial-thickness rotator cuff tear and labral tears. (Jt. Ex. 3, p. 49) Salazar was on work restrictions while she rehabilitated her shoulder with physical therapy and dealt with other health issues. (Jt. Ex. 3, pp. 52, 54) Dr. Meyer ultimately released Salazar to return to work without restrictions on October 24, 2019. (Jt. Ex. 3, p. 57)

Sedgwick, an entity working as a third-party claims administrator, sent Dr. Meyer a check-box letter dated November 4, 2019, with multiple questions, boxes to check to indicate "Yes" or "No," and space for additional comments. (Jt. Ex. 3, pp. 59–60) Dr. Meyer signed and dated his responses on December 2, 2019. (Jt. Ex. 3, p. 60) In them, he indicated Salazar was at maximum medical improvement (MMI) as of October 23, 2019, could return to full-duty work, and had no restrictions on her physical abilities. (Jt. Ex. 3, p. 59) Dr. Meyer also used Figure 16-46 on page 479 of the Fifth Edition of the American Medical Association's Guides to the Evaluation of Permanent Impairment (Guides) to assign Salazar a three percent impairment of the "right shoulder." (Jt. Ex. 3, p. 59)

Salazar returned to see Dr. Meyer on February 2, 2020, stating she went back to work and began to feel pain in her right shoulder again. (Jt. Ex. 3, p. 61) The pain had "gotten significantly worse within the last couple of weeks." (Jt. Ex. 3, p. 61) Salazar complained of her shoulder "feeling stuck" and that "her pain shoots all the way down into her RIGHT hand." (Jt. Ex. 3, p. 61) Dr. Meyer informed Salazar he thought she was

having a recurrence of right shoulder inflammation and it was “doubtful anything has significantly changed in her right shoulder” because her surgery was over six months prior. (Jt. Ex. 3, p. 63) Dr. Meyer advised Salazar she may “need to find another line of work that does not require her to do as much lifting.” (Jt. Ex. 3, p. 63)

Salazar received a cortisone injection on February 5, 2020, and completed more physical therapy. (Jt. Ex. 3, p. 64) She returned for a follow-up appointment at Iowa Ortho on March 4, 2020. (Jt. Ex. 3, p. 64) Salazar shared it took the cortisone a few days to kick in and then it provided relief. (Jt. Ex. 3, p. 64) She also felt the physical therapy was helping. (Jt. Ex. 3, p. 64) Even after Salazar’s improved symptoms, Dr. Meyer concluded she would probably need permanent work restrictions and recommended a functional capacity evaluation (FCE). (Jt. Ex. 3, p. 65)

Salazar completed the FCE at Mercy Occupational Health. (Jt. Ex. 3, p. 66) She returned to Dr. Meyer, who remarked she “did a lot better on her [FCE] than I anticipated.” (Jt. Ex. 3, p. 67) On March 16, 2019, Dr. Meyer released her to return to work without restrictions based on her FCE performance but counseled her “that her shoulder does have some underlying issues and she might want to think about another line of work. One that is not as demanding on her shoulders.” (Jt. Ex. 3, pp. 67, 69)

On July 6, 2020, Mark Kirkland, D.O., saw Salazar for an independent medical examination (IME). (Cl. Ex. 1, p. 1) Dr. Kirkland reviewed Salazar’s medical records and examined her personally. (Cl. Ex. 1, p. 1) He took the following range of motion measurements with a goniometer and made the chart recreated below from Claimant’s Exhibit 1, page 5:

	Right Shoulder	Left Shoulder
Flexion	124	159
Extension	39	35
Abduction	124	162
Adduction	21	27
External Rotation	79	79
Internal Rotation	41	58

Dr. Kirkland concluded Salazar’s partial disability was caused by the December 13, 2018 and May 2, 2019 work injuries. (Cl. Ex. 1, p. 5) However, given the fact that Salazar recovered from her December 13, 2018 injury to the point where she informed her medical provider she had virtually no pain and was then released to full-duty work, it is more likely than not that injury did not cause any permanent disability. Rather, the weight of the evidence establishes Salazar sustained a permanent disability from the May 2, 2019 work injury.

On the question of permanent disability, Dr. Kirkland opined:

[Salazar] has a 4% impairment to her right upper extremity secondary to lack of shoulder flexion, 1% impairment secondary to lack of shoulder extension, 3% impairment secondary to lack of abduction, 1% impairment secondary to lack of adduction, and a 3% impairment secondary to loss of internal rotation. This gives [Salazar] a 12% impairment to her right upper extremity secondary to range of motion loss. These values are obtained from Figure[s] 16-40, 16-43, and 16-46 of the [Guides]. It is also my opinion that Pam has a 5% impairment to her right upper extremity secondary to surgical coplaning of the acromioclavicular joint. The combination of 12 and 5 gives a combined value of 16. A 16% impairment to the right upper extremity can be converted to 10% of the whole person.

(Cl. Ex. 1, p. 6) Dr. Kirkland did not assign any permanent work restrictions based on Salazar's desire to not have any and her FCE performance. (Jt. Ex. 1, p. 6)

Defense counsel sent Dr. Meyer questions regarding Salazar's permanent impairment, which Dr. Meyer answered in a letter dated December 11, 2020. (Jt. Ex. 3, p. 70) In response to a question about whether Salazar's permanent impairment had changed due to Dr. Meyer's examination of her on March 17, 2020, he indicated it had not because "her exam was not significantly different." (Jt. Ex. 3, p. 70) In response to a question based on a passage on page 453 of the Guides about the use of an uninvolved joint measurements as a baseline for an involved joint, Dr. Meyer opined:

I think it is reasonable to take into consideration a patient's noninvolved upper extremity joint range of motion because most joints at their baseline normal are usually quite similar. There is a lot of variability amongst patients in what is their baseline of normal and the [Guides] use what is considered to be an average of normal so it is not unreasonable to take into consideration the opposite extremity joint range of motion when calculating impairment ratings.

(Jt. Ex. 3, p. 70)

Defense counsel then asked Dr. Meyer what he believed was the applicable impairment rating when using the Guides and the range of motion scores in Dr. Kirkland's report. (Jt. Ex. 3, p. 70) Dr. Meyer opined:

If using Dr. Kirkland's measurements from his report July 6, 2020, and using the [Guides], according to Figure 16-40, Dr. Kirkland's measurements of 124 degrees of shoulder flexion would equate to an impairment rating of approximately 4% (it should be noted that only round numbers are given ending in the digit 0 for impairment ratings so for this number we round down). The impairment rating on the opposite shoulder was 159 degrees, which we rounded to 160 degrees, which gives an impairment rating of 1%. Thus 4 minus the 1% would be a 3% impairment rating. The shoulder extension had extension of 39 degrees on the right and 35 degrees on the left, which should be a 0 difference an impairment,

both giving a 1% impairment rating. Shoulder abduction was measured as 124 degrees, which according to Figure 16-43 is a 3% impairment rating. The opposite shoulder had a range of motion of 162 degrees, which has a 1% impairment rating and thus the difference would be 2%. The shoulder adduction again had no difference between the 2 shoulders basically with 21 degrees on the right shoulder, which is 1% impairment rating and 27 degrees on the left, which is also a 1% rating. Shoulder external rotation was measured to 79 degrees for both shoulders and this is a 0% impairment rating and a 0 difference. Shoulder internal rotation was 41 degrees on the right shoulder, which was a 3% impairment rating and the left shoulder was 58 degrees, which is rounded to 60 degrees and this would be an impairment rating of 2%. Thus, a 1% difference adding these up, they are added to a 6% impairment rating for the right upper extremity.

(Jt. Ex. 1, p. 71)

Defense counsel's final question to Dr. Meyer was about Dr. Kirkland's opinion that the co-planing of Salazar's distal clavicle caused a five percent permanent impairment. (Jt. Ex. 1, p. 71) In response, Dr. Meyer stated, "In use of the [Guides], I am not aware of any way to provide a rating of the co-planing of the undersurface of the distal clavicle." (Jt. Ex. 1, p. 71)

The Guides provide instructions on how to measure impairment to the shoulder joint. Guides, § 16.4i, p. 474. According to the Guides, "The shoulder has three functional units of motion, each contributing a relative value to its function." Id. The three functional units of motion are:

- 1) Flexion and extension, the impairment of which is determined using Figure 16-40 on page 476;
- 2) Abduction and adduction, the impairment of which is determined using Figure 16-43 on page 477; and
- 3) Internal and external rotation, the impairment of which is determined using Figure 16-46 on page 479.

On December 2, 2019, Dr. Meyer issued an initial impairment rating for Salazar's shoulder using only Figure 16-46 on page 479 of the Guides. His opinion did not reference flexion, extension, abduction, adduction, Figure 16-40, or Figure 16-43. It is therefore more likely than not Dr. Meyer's initial impairment rating was not determined utilizing the Guides. Dr. Meyer's initial impairment rating on December 2, 2019, is consequently unpersuasive.

Dr. Kirkland assigned Salazar an impairment of five percent for the co-planing of Salazar's right distal clavicle. However, Dr. Meyer opined he is unaware of any way to provide a rating of the co-planing of the undersurface of the distal clavicle using the Guides and Dr. Kirkland did not identify one when given the opportunity to respond. It is

therefore more likely than not, based on the evidentiary record in this case, that Dr. Kirkland did not utilize the Guides when determining Salazar sustained a five percent permanent impairment because of the co-planing of the distal clavicle. This portion of his opinion therefore does not meet the statutory requirement to solely utilize the Guides when determining impairment and is not credible. Nonetheless, his impairment rating of Salazar's shoulder using Figures 16-40, 16-43, and 16-46 is persuasive.

Chapter 16 of the Guides covers the upper extremities, which includes the shoulder. The chapter's introduction instructs the user to review Chapters 1 and 2. Id. at § 16.1a, p. 434. Chapter 1 provides:

Loss, loss of use, or derangement implies a change from a normal or "preexisting" state. **Normal** is a range or zone representing healthy functioning and varies with age, gender, and other factors such as environmental conditions. For example, normal heart rate varies between a child and adult and according to whether the person is at rest or exercising. Multiple factors need to be considered when assessing whether a specific or overall function is normal. A normal value can be defined from an individual or population perspective.

When evaluating an individual, a physician has two options: consider the individual's healthy preinjury or preillness state or the condition of the unaffected side as "normal" for the individual if this is known, or compare that individual to a normal value defined by population averages of healthy people. The Guides uses both approaches. Accepted population values for conditions such as extremity range-of-motion or lung function are listed in the Guides; it is recommended that the physician use those values as detailed in the Guides when applicable. In other circumstances, for instance, where population values are not available, the physician should use clinical judgment regarding normal structure and function and estimate what is normal for the individual based on the physician's knowledge or estimate of the individual's preinjury or preillness condition.

Id. at § 1.2a, p. 2.

Further, the Guides provide:

If a contralateral "normal" joint has a less than average mobility, the impairment value(s) corresponding to the uninvolved joint can serve as a baseline and are subtracted from the calculated impairment for the involved joint. The rationale for this decision should be explained in the report.

Id. at § 16.4c, p. 453.

Thus, the Guides recommend that a physician use the accepted population values for conditions such as extremity range-of-motion listed in them like those for the

shoulder. They do not require the use of a contralateral “normal” joint with less than average mobility as a baseline for the injured joint—it is an option when rating permanent impairment to a joint. The Guides instruct that in the report, the rating physician should give the rationale for using a contralateral “normal” joint with less average mobility as a baseline if a physician chooses to do so.

Dr. Meyer opined that generally it is reasonable to use a noninvolved contralateral joint with less than average mobility as a baseline for the injured joint because the Guides rely on averages, there is a lot of variability amongst patients in what constitutes their respective baseline normal, and most individuals have a baseline normal for contralateral joints that is quite similar. But he does not explain why it is preferable in Salazar’s case to use this method instead of the method of using accepted population values for range-of-motion as the Guides expressly recommends. Dr. Meyer’s silence on why it is appropriate to use Salazar’s noninvolved shoulder as a baseline instead of the method recommended by the Guides makes his opinion unpersuasive.

For these reasons, Dr. Meyer’s impairment ratings are rejected because they are not persuasive. Dr. Kirkland’s impairment rating of Salazar’s right shoulder using the method recommended by the Guides and Figures 16-40, 16-43, and 16-46 is most credible. The weight of the evidence shows Salazar’s June 3, 2019 work injury caused a 12 percent impairment to her right shoulder.

CONCLUSIONS OF LAW

In 2017, the Iowa legislature amended the Iowa Workers’ Compensation Act. See 2017 Iowa Acts, ch. 23. The 2017 amendments apply to cases in which the date of an alleged injury is on or after July 1, 2017. *Id.* at § 24(1); see also Iowa Code § 3.7(1). Because the injuries at issue in this case occurred after July 1, 2017, the Iowa Workers’ Compensation Act, as amended in 2017, applies. Smidt v. JKB Restaurants, LC, File No. 5067766 (App. Dec. 11, 2020).

1. File No. 1658294.01.

The claimant has the burden to prove permanent disability caused by a work injury. Westling v. Hormel Foods Corp., 810 N.W.2d 247, 252 (Iowa 2012). As found above, there is an insufficient basis in the evidence from which to conclude Salazar sustained a permanent disability resulting from her 2018 right shoulder injury. Rather, it is more likely than not she sustained a work injury to her right shoulder that caused a temporary disability from which she recovered and was able to return to work without any permanent impairment or work restrictions before her 2019 injury. Because the evidence does not support a finding that Salazar sustained a permanent disability from her 2018 work injury, this decision does not address the other disputed issues relating to this injury.

2. File No. 1664432.01.**a. Permanent Disability.**

“In this state, the right to workers' compensation is purely statutory.” Downs v. A & H Const., Ltd., 481 N.W.2d 520, 527 (Iowa 1992) (citing Caylor v. Employers Mut. Casualty Co., 337 N.W.2d 890, 893 (Iowa App. 1983)). The “broad purpose of workers' compensation” is “to award compensation (apart from medical benefits), not for the injury itself, but the disability produced by a physical injury.” Bell Bros. Heating and Air Conditioning v. Gwinn, 779 N.W.2d 193, (Iowa 2010) (citing 4 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law § 80.02, at 80–2 (2009)). With the 2017 amendments, the legislature altered how this is done under the Iowa Workers' Compensation Act. Multiple of these legislative changes are at issue in the current case.

The Iowa Workers' Compensation Act contains a schedule of body parts. See Iowa Code §§ 85.34(2). Compensation for work injuries to body parts listed in the schedule are limited to functional disability over a number of weeks set by the statute. Injuries to body parts not included in the statutory list are considered unscheduled. Disability caused by such injuries is deemed to the whole body and compensation is based on industrial disability, the impact on the injured worker's earning capacity.

Consequently, the maximum amount of compensation to which an injured worker is entitled under the statute can “differ radically” depending on whether the worker's injury is to a scheduled member or the body as a whole. Mortimer, 502 N.W.2d at 15. “The very purpose of the schedule is to make certain the amount of compensation in the case of specific injuries and to avoid controversies” Gilleland v. Armstrong Rubber Co., 524 N.W.2d 404, 407 (Iowa 1994) (quoting Dailey v. Pooley Lumber Co., 10 N.W.2d 569, 571 (Iowa 1943)). “The schedule brings a windfall to the worker in some cases and gross hardship to the worker in others.” Id. at 409 (Lavarto, J., concurring specially) (quoting Graves v. Eagle Iron Works, 331 N.W.2d 116, 119–20 (Iowa 1983 (McCormick, J., concurring specially))). Thus, the legislative purpose of the statutorily prescribed schedule is not so much beneficence to the worker, though that sometimes is the result, as cost certainty and limiting controversies resolved by litigation. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181, 188 (Iowa 1980) (citing Cedar Rapids Cmty. Sch. Dist. v. Cady, 278 N.W.2d 298, 299 (Iowa 1979); Wetzel v. Wilson, 276 N.W.2d 410, 411–12 (Iowa 1979); and Hoening v. Mason & Hanger, Inc., 162 N.W.2d 188, 190 (Iowa 1968)) (“The primary purpose of the workers' compensation statute is to benefit the worker and his or her dependents, insofar as statutory requirements permit.”).

Before 2017, the shoulder was not included in the statutory list of scheduled members. See Second Injury Fund of Iowa v. Nelson, 544 N.W.2d 258, 269 (Iowa 1995) (citing Lauhoff Grain Co. v. McIntosh, 395 N.W.2d 834, 837–39 (Iowa 1986) and Alm v. Morris Barick Cattle Co., 38 N.W.2d 161, 163 (Iowa 1949)). Instead, shoulder injuries such as the one at issue in this case were considered unscheduled injuries under Iowa law. Alm, 38 N.W.2d at 163; Westling, 810 N.W.2d at 252. Permanent partial disability

caused by shoulder injuries that occurred before July 1, 2017, was considered industrial. *Id.*; *Westling*, 810 N.W.2d at 252. Compensation was based on the loss of earning capacity the worker suffered due to the work-related shoulder injury. *Id.*; *Westling*, 810 N.W.2d at 252.

In 2017, the legislature enacted a bill that made multiple changes to the statutory framework governing workers' compensation in Iowa. See 2017 Iowa Acts ch. 23. As part of the 2017 amendments, the legislature added the shoulder to the codified list of scheduled members. 2017 Iowa Acts ch. 23, § 7 (now codified at Iowa Code § 85.34(2)(n)). Under the statute, as amended, work injuries to the shoulder that occur on or after July 1, 2017, are treated as scheduled member injuries and the award of benefits is consequently limited in the interest of cost certainty and limiting controversies to the injured employee's functional impairment.

Another requirement the legislature added to the Iowa Workers' Compensation Act in 2017 governs the determination of functional disability. Before the 2017 amendments, the agency could use all evidence in the administrative record, as well as agency expertise, when determining the permanent disability of an injured worker. See, e.g., *Miller v. Lauridsen Foods, Inc.*, 525 N.W.2d 417, 421 (Iowa 1994). Under agency rules before the 2017 amendments, the Guides were considered a "useful tool in evaluating disability." *Seaman v. City of Des Moines*, File Nos. 5053418, 5057973, 5057974 (App. Oct. 11, 2019) (quoting *Bisenius v. Mercy Med. Ctr.*, File No. 5036055 (App. Apr. 1, 2013)); see also *Westling*, 810 N.W.2d at 252. However, in cases involving injuries on or after July 1, 2017, the Guides are now more than a tool; they are dispositive.

[W]hen determining functional disability and not loss of earning capacity, the extent of loss or percentage of permanent impairment shall be determined solely by utilizing the guides to the evaluation of permanent impairment, published by the American medical association, as adopted by the workers' compensation commissioner by rule pursuant to chapter 17A. Lay testimony or agency expertise shall not be utilized in determining loss or percentage of permanent impairment pursuant to paragraphs "a" through "u", or paragraph "v" when determining functional disability and not loss of earning capacity.

Iowa Code § 85.34(2)(x).

Thus, the Iowa Workers' Compensation Act now limits the determination of what, if any, permanent disability Salazar has sustained to only her functional impairment. In making that determination, the agency is prohibited from using lay testimony or agency expertise by Iowa Code section 85.34(2)(x). Under the statute, that determination must be made "solely by utilizing" the Fifth Edition of the Guides.

As discussed above, Dr. Kirkland's opinion on impairment caused by co-planing the clavicle is not persuasive because there is an insufficient basis in the evidence from which to conclude he made that part of his rating solely by utilizing the Guides. Further,

Dr. Meyer's opinions on permanent impairment to Salazar's shoulder are less credible than Dr. Kirkland's impairment rating using the method expressly recommended in the Guides. The weight of the evidence establishes the 2019 work injury caused a twelve percent impairment to Salazar's right shoulder.

b. Costs.

"All costs incurred in the hearing before the commissioner shall be taxed in the discretion of the commission." Iowa Code § 86.40. "Fee-shifting statutes using 'all costs' language have been construed 'to limit reimbursement for litigation expenses to those allowed as taxable court costs.'" Des Moines Area Reg'l Transit Auth. v. Young, 867 N.W.2d 839, 846 (Iowa 2015) (quoting Riverdale v. Diercks, 806 N.W.2d 643, 660 (Iowa 2011)). Statutes and administrative rules providing for recovery of costs are strictly construed. Id. (quoting Hughes v. Burlington N. R.R., 545 N.W.2d 318, 321 (Iowa 1996)).

Under the administrative rules governing contested case proceedings before the Iowa workers' compensation commissioner, hearing costs include:

- Costs of service of the original notice and subpoenas; and
- Filing fees when appropriate, including convenience fees incurred by using the payment gateway on the Workers' Compensation Electronic System (WCES).

876 IAC 4.33.

The parties stipulated Salazar paid the costs listed in Claimant's Exhibit 2. They include the filing fee for both petitions and the cost of service via certified mail. Because Salazar did not prevail on the disputed issues in the case stemming from her 2018 work injury, those costs are not taxed against the defendants. She is therefore not entitled to taxation of the filing fee for the petition relating to that injury or the cost of serving it.

Because Salazar prevailed on the question of permanent disability relating to her 2019 shoulder injury, she is entitled to the taxation of the costs of her filing fee for that petition and the service cost for it. Salazar apparently served both petitions simultaneously, which means the defendants must reimburse her half the cost of service.

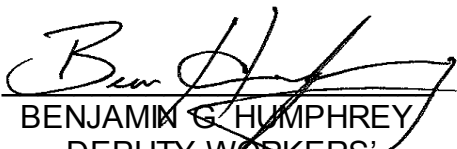
ORDER

Based on the above findings of fact and conclusions of law, it is ordered:

- 1) The defendants shall pay to Salazar forty-eight (48) weeks of permanent partial disability benefits at the rate of five hundred eighty and 53/100 dollars (\$580.53) per week from the commencement date of October 23, 2019.

- 2) The defendants shall pay accrued weekly benefits in a lump sum together with interest on unpaid weekly benefits awarded herein as set forth in Iowa Code section 85.30.
- 3) As stipulated, the defendants shall be given the credit for twelve (12) weeks of permanent partial disability benefits previously paid to Salazar at the rate of five hundred eighty and 53/100 (\$580.53) per week.
- 4) The defendants shall file subsequent reports of injury as required by Rule 876 IAC 3.1(2).
- 5) The defendants shall pay to Salazar the following amounts for the following costs:
 - a) One hundred three and 00/100 dollars (\$103.00) for the filing fee; and
 - b) Three and 48/100 dollars (\$3.48) for the cost of service by certified mail.

Signed and filed this 7th day of January, 2022.


BENJAMIN G. HUMPHREY
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

James Ballard (via WCES)

John Cutler (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.