BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

COREY TWEETEN, Claimant, vs. LON TWEETEN d/b/a TWEETEN FARMS, Employer, and GRINNELL MUTUAL, Insurance Carrier, Defendants.	File No. 20700058.01 ARBITRATION DECISION Head Note Nos: 1402.30, 1802,1803, 2501, 2502, 3003

STATEMENT OF THE CASE

Claimant, Corey Tweeten, filed a petition in arbitration seeking workers' compensation benefits from Lon Tweeten d/b/a Tweeten Farms (Tweeten Farms), employer, and Grinnell Mutual, insurance carrier, both as defendants. This matter was heard on March 10, 2021, with a final submission date of April 13, 2021.

The record in this case consists of Joint Exhibits 1-12, Defendants' Exhibits A-I, and the testimony of claimant, and Lon Tweeten.

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

1. Whether claimant sustained an injury that arose out of and in the course of his employment.

2. Whether claimant's claim for benefits is barred by application of Iowa Code section 85.26.

3. Whether the injury resulted in a temporary disability.

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

5. The commencement date of benefits.

6. Rate.

7. Whether there is causal connection between the injury and the claimed medical expenses.

8. Whether claimant is due reimbursement for an independent medical evaluation (IME) under Iowa Code section 85.39.

9. Costs.

FINDINGS OF FACT

Claimant works on the family farm owned by Tweeten Farms. Claimant testified that in July of 2017 he began to notice symptoms in his right arm. (Transcript p. 26; Defendants' Exhibit H, p. 45) Claimant testified he believed he injured his arm in July of 2017 when he was vacuuming out grain bins.

On August 14, 2017, claimant was evaluated by Christina Rider, PA-C, for right elbow pain over the last three weeks. Claimant denied an injury. Claimant was given an elbow strap and told to ice. (JE 2, p. 6)

Claimant returned to Physician's Assistant Rider on January 3, 2018. Claimant's right tennis elbow had not improved. Claimant was assessed as having right lateral epicondylitis. Claimant was referred to physical therapy. (JE 2, p. 8)

Claimant said physical therapy initially helped his elbow pain. He stated he began having pain in the deltoid area of his arm.

Claimant testified that between July 2017 and April 2018 his pain changed. He said he initially had pain below his elbow. He said that between June 2017 through April 2018 the pain moved up to his shoulder. Claimant said that when the pain moved to his shoulder, he went to see Darin Eklund, PA-C. (TR p. 28)

Claimant was evaluated by Physician's Assistant Eklund on April 13, 2018, for right elbow pain. Claimant had pain in the deltoid. Claimant was treated with a Medrol Dosepak and medications. (JE 2, pp. 11-12)

Claimant returned to Physician's Assistant Eklund on May 11, 2018. Claimant was going to physical therapy but had pain in the deltoid area. Claimant was given a trigger point injection at the insertion of the deltoid muscle. This did not significantly help the symptoms. Claimant was recommended to have an MRI of the right shoulder. (JE 2, pp. 13-14)

On May 22, 2018, claimant underwent an MRI of the right shoulder. The MRI showed a subcentimeter cyst adjacent to the labrum in the anterior-inferior quadrant. (JE 9, pp. 74-75)

Claimant returned to Physician's Assistant Eklund on May 23, 2018. Claimant was referred to a shoulder specialist. (JE 2, p. 15)

On June 1, 2018, claimant was evaluated by Bryan Warme, M.D., for right shoulder pain. Claimant was assessed as having right-sided upper arm pain. An MRI of the shoulder was ordered. (JE 3, p. 19)

On June 7, 2018, claimant had an MRI of the right humerus. It showed a partial thickness tear at the insertion of the deltoid. (JE 9, p. 78)

Claimant returned to Dr. Warme on June 12, 2018. Claimant's MRI was reviewed, and it was noted claimant had a "significant" deltoid insertion tear. Surgery was discussed and chosen as a treatment option. (JE 3, p. 20)

On June 18, 2018, claimant underwent surgery consisting of an open repair of the right distal deltoid with an Achilles allograft. Surgery was done by Dr. Warme. (JE 3, p. 21)

In an August 29, 2018 report, Steven Aviles, M.D., gave his opinion of claimant's condition following an independent medical evaluation (IME). Dr. Aviles opined he did not think the right lateral elbow pain and the right deltoid injury were caused by the same event. Dr. Aviles opined that the lateral epicondylitis was probably due to chronic repetitive stress. He believed the distal deltoid avulsion was caused by a traumatic injury. Dr. Aviles found it unlikely that two injuries had a relationship to each other. (Ex. B, pp. 4-8)

Claimant testified that Dr. Aviles spent approximately five minutes examining him for his IME. (TR p. 32)

Dr. Aviles did not see a connection to the deltoid avulsion and the workers' compensation claim. (Ex. B, p. 7) Dr. Aviles found claimant at maximum medical improvement (MMI) for the epicondylitis in the right elbow. He opined that claimant had no permanent impairment related to the lateral epicondylitis. (Ex. B, p. 8)

Dr. Aviles testified in deposition he had only seen one deltoid tear in his career. (Ex. I, deposition p. 10) He testified he did not have claimant's complete

medical records at the time of his IME. (Ex. I, depo pp. 22-23) He testified he did not use any instruments in his exam of claimant. (Ex. I, depo p. 18) Dr. Aviles testified he did not see a deltoid tear in his review of the MRI. He conceded Dr. Warme was probably correct in diagnosing a significant deltoid tear. (Ex. I, depo p. 28)

Claimant returned to Dr. Warme on October 16, 2018. Dr. Warme opined claimant had likely overcompensated for the tennis elbow and had some tearing in the deltoid insertion that would have worsened with use. He opined the deltoid injury was work-related. Claimant was continued with physical therapy. (JE 3, p. 28)

In a November 12, 2018 letter, Dr. Aviles indicated he had reviewed Dr. Warme's records. Dr. Aviles disagreed with Dr. Warme's opinion. Dr. Aviles reiterated he did not believe claimant's deltoid tear was work-related. (Ex. B, p. 9)

On August 16, 2019, claimant was evaluated by Brendan Patterson, M.D. Claimant's pain had increased with activity. Claimant had difficulty sleeping due to pain. Claimant used Tylenol and ice for pain control. Dr. Patterson did not recommend further surgery. (JE 5)

In an October 21, 2020 letter, Dr. Aviles indicated it was reasonable to find that claimant's date of injury was July 25, 2017. (Ex. B, p. 10)

Claimant underwent an EMG on October 26, 2020, which showed no evidence of carpal tunnel syndrome on the right. (JE 9, pp. 85-86)

On December 2, 2020, claimant was evaluated by Christopher Camp, M.D., at the Mayo Clinic. Claimant had pain beginning in the supraclavicular area radiating down to the infraclavicular area, the anterior shoulder and arm and forearm. Claimant had also intermittent numbness. Dr. Camp recommended an evaluation in the Thoracic Outlet Clinic at Mayo. (JE 7, pp. 56-57)

Claimant saw Raymond Shields, M.D., on December 9, 2020, at the Vascular Clinic at Mayo. Dr. Shields found claimant's symptoms were not consistent with a thoracic outlet syndrome. A cervical MRI was recommended. (JE 7, p. 57)

On December 23, 2020, claimant had a cervical MRI. It showed a minimal disc bulge at C3-4, and possible mild impingement of the nerve root at C3-4. (JE 9, p. 87)

On January 12, 2021, claimant was evaluated by Derek Stitt, M.D., in Neurology at Mayo. Dr. Stitt opined that claimant's symptoms may be due to a nerve injury caused during surgery. Claimant was referred to the Pain Clinic. (JE 6, pp. 42-46)

In a January 16, 2021 report, Robin Sassman, M.D., gave her opinions of claimant's condition following an IME. Dr. Sassman agreed with Dr. Warme regarding causation of the deltoid insertion tear. She agreed claimant's tear probably occurred due to overcompensation for the tennis elbow. In brief, Dr. Sassman believed

claimant's deltoid insertion tear was directly and causally related to claimant's work duties. (JE 7, p. 62)

Dr. Sassman did not believe claimant was at MMI. She agreed claimant should be seen at the Pain Clinic for his symptoms. (JE 7, p. 63)

Dr. Sassman believed claimant had a permanent impairment of the right shoulder and the cervical spine. She found claimant had a 10 percent permanent impairment to the body as a whole for the work injury. She limited claimant to lifting, carrying, pushing and pulling up to 50 pounds occasionally. (JE 7, p. 64)

Claimant testified Dr. Sassman spent approximately two hours talking and examining him for his IME.

On January 25, 2021, claimant was evaluated at the Pain Medicine Clinic at Mayo. A subscapularis injection was recommended. (JE 6, pp. 48-49)

CONCLUSION OF LAW

The first issue to be determined is whether claimant sustained an injury that arose out of and in the course of his employment.

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).

An employer may be liable for a sequela of an original work injury if the employee sustained a compensable injury and later sustained further disability that is a proximate result of the original injury. Mallory v. Mercy Medical Center, File No. 5029834 (Appeal February 15, 2012).

The Iowa Supreme Court noted "where an accident occurs to an employee in the usual course of his employment, the employer is liable for all consequences that naturally and proximately flow from the accident." Oldham v. Scofield & Welch, 266 N.W. 480, 482 (1936). The Court explained:

> If an employee suffers a compensable injury and thereafter suffers further disability which is the proximate result of the original injury, such further disability is compensable. Where an employee suffers a compensable injury and thereafter returns to work and, as a result thereof, his first injury is aggravated and accelerated so that he is greater disabled than before, the entire disability may be compensated for." Id. at 481.

A sequela can be an after effect or secondary effect of an injury. Lewis v. Dee Zee Manufacturing, File No. 797154, (Arb. September 11, 1989). A sequela can take the form of a secondary effect on the claimant's body stemming from the original injury. For example, where a leg injury causing shortening of the leg in turn alters the claimant's gait, causing mechanical back pain, the back condition can be found to be a sequela of the leg injury. Fridlington v. 3M Co., File No. 788758, (Arb. November 15, 1991).

A sequela can also take the form of a later injury that is caused by the original injury. For example, where a leg injury leads to the claimant's knee giving out in a grocery store, the resulting fall is compensable as a sequela of the leg injury. Taylor v. Oscar Mayer & Co., 3 Iowa Ind. Comm. Rep. 257, 258 (1982).

Claimant testified he injured his elbow and forearm in July of 2017 while vacuuming grain. He said his pain moved from his elbow up into his shoulder between July of 2017 and April of 2018.

All three experts appear to believe claimant sustained a right epicondylitis injury as a result of his work in July of 2017. (Ex. B, pp. 7, 8, 10) The experts differ regarding the cause of claimant's deltoid insertion tear.

Dr. Warme treated claimant for an extended period of time and performed surgery on claimant. Dr. Warme opined that a deltoid tear can occur from blunt forces or a stretch or pulling mechanism. He believed claimant overcompensated for his tennis elbow injury and had an overuse injury at the deltoid insertion. (JE 3, p. 28)

Dr. Sassman evaluated claimant once for an IME. Dr. Sassman agreed with Dr. Warme regarding causation, indicating claimant overcompensated for his tennis elbow and had an overuse injury at the deltoid insertion. (JE 7, p. 62) Dr. Aviles evaluated claimant once for an IME. He opined he did not believe claimant's deltoid avulsion was work-related as a deltoid tear usually occurs only with trauma. (Ex. B, p. 7)

Dr. Aviles testified in deposition he had only seen one torn deltoid in his career. (Ex. I, depo p. 10) He testified he did not have claimant's complete medical records at the time of his IME. (Ex. I, depo pp. 22-23) He testified he did not use instruments on his exam of claimant. (Ex. I, depo p. 18) Dr. Aviles testified he did not see a deltoid tear in his review of claimant's MRI but conceded Dr. Warme was probably correct in diagnosing a significant deltoid tear. (Ex. I, depo p. 28)

Dr. Warme treated claimant for an extended period of time and performed surgery on claimant. As a factual matter, he has a greater familiarity with claimant's medical history and presentation than any other expert. Dr. Sassman evaluated claimant and examined claimant in a two-hour IME. Dr. Aviles spent approximately five minutes talking with claimant. (TR p. 32) He testified he had only seen one deltoid tear in his career. He did not review all of claimant's medical records before his exam of claimant. He did not use any instruments to measure claimant. Given this record, it is found that the opinions of Dr. Warme and Dr. Sassman are more convincing than those of Dr. Aviles regarding causation. Claimant has carried his burden of proof his epicondylitis and the deltoid tear arose out of and in the course of his employment.

The next issue to be determined is whether claimant's claim for benefits is barred by application of Iowa Code section 85.26 for failure to timely file a proceeding for benefits.

Iowa Code section 85.26(1) requires an employee to bring an original proceeding for benefits within two years from the date of the occurrence of the injury if the employer has paid the employee no weekly indemnity benefits for the claimed injury. If the

employer has paid the employee weekly benefits on account of the claimed injury, however, the employee must bring an original proceeding within three years from the date of last payment of weekly compensation benefits.

Failure to timely commence an action under the limitation statute is an affirmative defense which defendants must prove by a preponderance of the evidence. DeLong v. Highway Commission, 229 Iowa 700, 295 N.W. 91 (1940); Venenga v. John Deere Component Works, 498 N.W.2d 422 (Iowa Ct. App. 1993).

When the injury develops gradually over time, the cumulative injury rule applies. The date of injury for cumulative injury purposes is the date on which the disability manifests. Manifestation is best characterized as that date on which both the fact of injury and the causal relationship of the injury to the claimant's employment would be plainly apparent to a reasonable person. The date of manifestation inherently is a fact-based determination. The fact-finder is entitled to substantial latitude in making this determination and may consider a variety of factors, none of which is necessarily dispositive in establishing a manifestation date. Among others, the factors may include missing work when the condition prevents performing the job, or receiving significant medical care for the condition. For time limitation purposes, the discovery rule then becomes pertinent so the statute of limitations does not begin to run until the employee, as a reasonable person, knows or should know, that the cumulative injury condition is serious enough to have a permanent, adverse impact on his or her employment. Herrera v. IBP, Inc., 633 N.W.2d 284 (Iowa 2001); Oscar Mayer Foods Corp. v. Tasler, 483 N.W.2d 824 (Iowa 1992); McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985).

An original proceeding for benefits must be commenced within two years from the date of the occurrence of the injury for which benefits are claimed or within three years from the date of the last payment of weekly compensation benefits if benefits have been paid under Iowa Code section 86.13. Iowa Code section 85.26(1). Under the rule, the time during which a proceeding may be commenced does not begin to run until the claimant, as a reasonable person, should recognize the nature, seriousness and probable compensable character of the condition. Failure to timely commence an action under the limitations statute is an affirmative defense, which defendants must prove by a preponderance of the evidence. Venenga v. John Deere Component Works, 498 N.W.2d 422 (Iowa Ct. App. 1993).

For a cumulative injury, the beginning of that period may not begin, under the discovery rule, until the worker knows the nature of the disability, the seriousness of the disability, and the probable compensable nature of the disability. Chapa v. John Deere Ottumwa Works, 652 N.W.2d 187 (Iowa 2002). See also Larson Mfg. Co. Inc. v. Thorson, 763 N.W.2d 842, 854–55 (Iowa 2009); Midwest Ambulance Serv. v. Ruud, 754 N.W.2d 860, 865 (Iowa 2008); Swartzendruber v Schimmel, 613 N.W.2d 646 (Iowa 2000).

In this case, defendants have the burden of proof to show claimant knew the nature of his injury, the seriousness of the disability, and the probable compensable nature of the disability.

Regarding the nature of the disability, the record indicates that claimant saw Physician's Assistant Rider in August of 2017 and January of 2018 for elbow pain. Claimant testified that between the date of injury and April of 2018, his symptoms began to move up his arm into his shoulder. In April of 2018 claimant saw Physician's Assistant Eklund for elbow and deltoid pain. Given this record, it is found claimant knew the nature of his disability between August of 2017 to April of 2018.

The record indicates that between August of 2017 and June of 2018, claimant's treatment consisted of a brace, some physical therapy, an injection and over-the-counter pain medication. (JE 2) Claimant testified he did not appreciate the seriousness of his injury until his second visit with Dr. Warme on June 13, 2018. At that visit claimant knew, for the first time, he had a tear in his deltoid insertion. (TR p. 35; JE 3, p. 21) After surgery on June 18, 2018, claimant did not return to full-time work on the farm. (TR p. 35) Given this record, it is found claimant did not know of the seriousness of his injury until June 13, 2018. (JE 3, p. 21)

Claimant filed his petition and original notice, in this case, on January 21, 2020. Because it is found claimant did not know of the seriousness of his injury until June 13, 2018, claimant's claim for benefits is not barred by application of Iowa Code section 85.26.

Defendants contend the changes in the Iowa in 2017 to Iowa Code section 85.26, make the law, found in Herrera, Venenga, and other cases detailed above, no longer applicable. (Defendants' post-hearing brief, page 5)

As noted above, prior to the 2017 legislative changes, Iowa Code section 85.26, indicated:

> An original proceeding for benefits under this chapter or chapter 85A, 85B, or 86, shall not be maintained in any contested case unless the proceeding is commenced within two years from the date of the occurrence of the injury for which benefits are claimed or, if weekly compensation benefits are paid under section 86.13, within three years from the date of the last payment of weekly compensation benefits.

Effective July 1, 2017, the Legislature added the following sentence to each section: "For the purposes of this section, 'date of the occurrence of the injury' means the date that the employee knew or should have known that the injury was work-related."

A recent appeal decision found the 2017 changes to Iowa Code section 85.26 did not change the discovery rule found in Herrera, Venenga, and other cases detailed

above. Carter v. Bridgestone Americas, Inc., File No 1649560.01 (App. Dec. July 8, 2021)

The next issue to be determined is whether the injury resulted in a temporary disability.

Healing period compensation describes temporary workers' compensation weekly benefits that precede an allowance of permanent partial disability benefits. Ellingson v. Fleetguard, Inc., 599 N.W.2d 440 (Iowa 1999). Section 85.34(1) provides that healing period benefits are payable to an injured worker who has suffered permanent partial disability until the first to occur of three events. These are: (1) the worker has returned to work; (2) the worker medically is capable of returning to substantially similar employment; or (3) the worker has achieved maximum medical recovery. Maximum medical recovery is achieved when healing is complete, and the extent of permanent disability can be determined. Armstrong Tire & Rubber Co. v. Kubli, Iowa App., 312 N.W.2d 60 (Iowa 1981). Neither maintenance medical care nor an employee's continuing to have pain or other symptoms necessarily prolongs the healing period.

Claimant worked until he had surgery on June 18, 2018. (JE 3, p. 21) Claimant was released to return to work on October 16, 2018. (JE 3, p. 28) Claimant is due temporary benefits from June 18, 2018, through October 16, 2018.

The next issue to be determined is the extent of claimant's entitlement to permanent partial disability benefits.

Two experts opined regarding claimant's permanent impairment. Dr. Aviles testified claimant had no permanent impairment for the tennis elbow. (JE 4, p. 33) Dr. Sassman found that claimant had a 5 percent permanent impairment of the right upper extremity. (JE 7, p. 64) As detailed, Dr. Aviles opined that claimant did not have a work-related deltoid tear, and this is found not convincing. Dr. Aviles did not issue a rating for the deltoid tear. Dr. Sassman issued a rating regarding the deltoid tear. Based on this, it is found that Dr. Sassman's opinion that claimant had a 5 percent permanent impairment to the upper extremity is more convincing. Claimant is due 12.5 weeks of permanent partial disability benefits for the deltoid tear (5 percent x 250 weeks).

Dr. Sassman also found that claimant had a permanent impairment regarding a cervical injury. Because there is little evidence in the record that claimant had a work-related cervical injury, Dr. Sassman's rating, only as it relates to the cervical spine, is found not convincing.

Claimant was returned to work by Dr. Warme on October 16, 2018. Claimant's permanent partial disability benefits shall commence on October 17, 2018.

The next issue to be determined is rate.

Section 85.36 states the basis of compensation is the weekly earnings of the employee at the time of the injury. The section defines weekly earnings as the gross salary, wages, or earnings to which an employee would have been entitled had the employee worked the customary hours for the full pay period in which the employee was injured as the employer regularly required for the work or employment. The various subsections of section 85.36 set forth methods of computing weekly earnings depending upon the type of earnings and employment.

If the employee is paid on a daily or hourly basis or by output, weekly earnings are computed by dividing by 13 the earnings over the 13-week period immediately preceding the injury. Any week that does not fairly reflect the employee's customary earnings is excluded, however. Section 85.36(6).

Claimant contends his monthly compensation while working at Tweeten Farms was $2,650.00 a month. This is based on a contention that claimant was paid $2,000.00 per month and was given housing valued at $650.00 a month, as a part of his compensation. (Claimant's post-hearing brief, pp. 16-17)

The rental where claimant lived was never declared in the W2 wage statements. (Ex. F) Claimant did not declare the value of his rental in his 2017 taxes. (Ex. F, pp. 31-32) Based on this, the rental value of claimant's home is not considered as a part of his average weekly wage.

Claimant testified he was paid $2,000.00 every month. However, wage statements from Tweeten Farms indicate that in the 13 weeks prior to his injury, claimant only received one $2,000.00 payment on January 2, 2018, in the 13-week period before his injury. (Ex. G, p. 58)

Claimant was married with two exceptions. This results in an average weekly wage of $153.84 ($2,000.00 divided by 13 weeks).

Since claimant had an average weekly wage of $153.84, he is subject to the minimum permanent partial rates. Based on this, claimant has an average weekly wage of $301.00. Claimant was married with two exceptions. This results in a rate of $217.99 per week.

The next issue to be determined is whether there is a causal connection between the injury and the claimed medical expenses.

The employer shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance, and hospital services and supplies for all conditions compensable under the workers' compensation law. The employer shall also allow reasonable and necessary transportation expenses incurred for those services. The employer has the right to choose the provider of care, except where the employer has denied liability for the injury. Section 85.27. Holbert v.

Townsend Engineering Co., Thirty-second Biennial Report of the Industrial Commissioner 78 (Review-Reopening October 1975).

Claimant's deltoid tear has been found to have arisen out of and in the course of his employment and that claimant's injury has resulted in a permanent disability resulting in surgery and other treatment. There is no evidence that treatment given to claimant was not reasonable and necessary. There is no evidence that the charges for treatment were not fair and reasonable. Given this record, defendants are liable for payment of the claimed medical expenses.

The next issue to be determined is whether claimant is due reimbursement for an IME exam.

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.

Dr. Aviles gave his opinions of permanent impairment in a report dated August 29, 2018. Dr. Sassman gave her opinion of permanent impairment in a report dated January 16, 2021. Given the chronology of the reports, it is found that claimant is entitled to reimbursement for the Sassman IME, including mileage.

ORDER

THEREFORE IT IS ORDERED:

That defendants shall pay claimant healing period benefits from June 18, 2018, through October 16, 2018, at the rate of two hundred seventeen and 99/100 dollars ($217.99) per week.

That defendants shall pay claimant twelve point five (12.5) weeks of permanent partial disability benefits at the rate of two hundred seventeen and 99/100 dollars ($217.99) per week commencing on October 17, 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 pay the claimed medical expenses.

That defendants shall reimburse claimant for costs associated with Dr. Sassman's IME, including mileage.

That defendants shall pay costs.

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

Signed and filed this 17th day of September, 2021.

JAMES F. CHRISTENSON
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Janece Valentine (via WCES)

Stephen Spencer (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.