BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JOSE GARRIDO, Claimant, vs. AMVC EMPLOYEE SERVICES, LLC, Employer, and BERKSHIRE HATHAWAY HOME STATE INSURANCE COMPANY, Insurance Carrier, and ACCIDENT FUND INSURANCE COMPANY OF AMERICA, Insurance Carrier, Defendants.	File Nos. 5066290, 5066291 A R B I T R A T I O N D E C I S I O N Head Note Nos.: 1402.30, 1803 2501, 2502

STATEMENT OF THE CASE

Claimant, Jose Garrido, filed petitions in arbitration seeking workers' compensation benefits from AMVC Employee Services, LLC (AMVC), employer, Berkshire Hathaway Home State Insurance Company (Berkshire), insurer, and the Accident Fund Insurance Company of America (Accident Fund), insurer, all as defendants. This matter was heard in Des Moines, Iowa on October 15, 2019 by Deputy Workers' Compensation Commissioner Benjamin Humphrey, with a final submission date of November 19, 2019.

By order of delegation of authority, Deputy Workers' Compensation Commissioner Jim Christenson, was appointed to prepare the findings of fact and proposed decision in this case due to the unavailability of Deputy Workers' Compensation Commissioner Humphrey. As part of that order of delegation, the parties were given 14 days to notify the undersigned if they believed demeanor was a substantial factor in this matter, and whether a rehearing of the demeanor evidence was required.

None of the parties filed a request within 14 days indicating demeanor was a substantial issue, or that a demeanor hearing was required. Under Iowa Code section 17A.15(2) and the Commissioner's order of delegation, the undersigned performs a

review of the evidentiary record in this case and issues this arbitration decision under the direction of the Commissioner.

The record in this case consists of Joint Exhibits 1 through 9; Claimant's Exhibits 1 through 15; defendants AMVC and Berkshire's Exhibits A through J; defendants AMVC and Accident Fund's Exhibits AA through HH; and the testimony of claimant, Daniel Chargo, and Gregory Jensen. Serving as interpreter for the hearing was Rafael Geronimo.

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

ISSUES

For File No. 5066290 (Date of Injury: October 13, 2017):

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

Whether claimant is due reimbursement for an independent medical evaluation (IME).

Whether claimant is due reimbursement for medical mileage.

Costs.

For File No. 5066291 (Date of Injury: October 10, 2016):

Whether claimant sustained an injury that arose out of and in the course of employment on October 10, 2016.

Whether claimant's claim for benefits is barred by application of Iowa Code section 85.23.

Whether the injury is a cause of temporary disability.

Whether the injury is a cause of permanent disability; and if so.

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

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

Whether claimant is due reimbursement for an IME.

Whether claimant is due reimbursement for medical mileage.

Costs.

Whether the Accident Fund is due reimbursement from Berkshire Hathaway for contribution of payments made under Iowa Code section 85.21.

The parties stipulated in the hearing report to claimant's rate for both dates of injury. Claimant's entitlement to temporary benefits was identified as an issue in dispute in both hearing reports. Based on the transcript, that dispute appears to be due to claimant allegedly being underpaid for temporary benefits (Transcript page 9) The issue of claimant's entitlement to temporary benefits was not briefed by any party to this matter. Based on the record, it appears claimant was paid temporary benefits for the periods identified in the hearing report, but allegedly underpaid.

Because the parties appear to agree to the dates claimant should receive temporary benefits, because the parties stipulate to rate for both injuries, and because the parties did not brief the issue of temporary benefits, the issue of entitlement to temporary benefits is not discussed in this decision. The order in this decision will reflect claimant be paid temporary benefits at the stipulated rate.

FINDINGS OF FACT

Claimant was 62 years old at the time of the hearing. Claimant was born in Mexico. Claimant went up to the ninth grade in Mexico. (Transcript pages 19-20)

Claimant speaks a little English, but needs family and friends to help him understand documents in English. (Tr. pp. 19-20)

Claimant has done agricultural work in Mexico and worked with livestock and hay. (Tr. pp. 23-24; Exhibit 8, p. 54) Claimant picked tomatoes in Florida and onions in Texas. (Tr. pp. 24-25, 29-30; Ex. 8, p. 58)

Claimant worked at a chicken processing plant. He worked on a chicken farm raising chickens. (Tr. p. 25, 28, 30-31; Ex. 8, p. 58) Claimant did work for Pioneer Seed Company. (Tr. p. 31-32; Ex. 8, p. 57) Claimant also cleaned and worked with bricks. (Tr. pp. 31-33; Ex. 8, p. 58)

Claimant began work with AMVC in 2015. Claimant was a laborer and worked at a hog confinement facility. (Tr. pp. 36, 38) Claimant's job with AMVC required that he lift 51-100 pounds occasionally, and lift 50 pounds frequently. It also required him to reach above shoulder level frequently. (Ex. 6, pp. 44-45) Claimant testified that on his job he fed hogs, lifted and cleaned piglets, cleaned the confinement areas, castrated piglets, moved large hogs, and used a pressure washer to clean the facility. (Tr. pp. 36-38)

Claimant testified that, on October 10, 2016, he was corralling and moving sows when one of the sows, weighing approximately 400 pounds, turned and rushed him. Claimant said the sow got its head between his legs and then threw him in the air.

Claimant said he landed on his left elbow and shoulder and felt pain immediately. (Tr. pp. 38-41)

Claimant testified that after he was injured, he left the hog confinement area and saw Dan Chargo, an assistant manager. Claimant said he told Mr. Chargo he had an accident and that he hurt his left arm and shoulder. Claimant said Mr. Chargo told him to go to the office, a lunchroom area. (Tr. pp. 41-43)

Claimant went to the lunchroom area and told Greg Jensen, the general manager, about his injury. Claimant said Mr. Jensen told him to ice his arm and got ice for him out of a refrigerator. Claimant said Mr. Jensen gave him a rag to wrap the ice around his arm. Claimant said he was in the office area the remainder of the day icing his arm. (Tr. pp. 42-46)

Mr. Chargo testified that he was the assistant manager at the facility where claimant worked in October 2016. As an assistant manager, Mr. Chargo said he worked closely with claimant from October 2016 through January of 2017. Mr. Chargo testified he did not observe claimant having shoulder problems. He said he had no recollection of claimant reporting a shoulder or left arm injury. He said he never heard claimant complain of shoulder problems. He said he did not recall claimant talking with Mr. Jensen regarding a shoulder injury. (Tr. pp. 103-106)

Mr. Chargo said that he also maintained a farm called Circle B.D. Farms, LLC (Circle). He said claimant also worked at Circle Farms in October of 2016 through November 2016. He said that during the time that Mr. Garrido worked at Circle Farms, he worked on fences, fed cows, did landscaping, painted a house and a chicken shed. He said that during this time, claimant never complained of any injury. (Tr. pp. 107-109)

Mr. Jensen testified that if an employee had an injury he would have completed an accident report. He said he did not do that for an alleged October 10, 2016 injury. He said he did not recall claimant reporting an injury between October 2016 and January 2017. (Tr. pp. 133-134)

Mr. Chargo testified, on cross-exam, that it was possible claimant told him of a work injury. (Tr. pp. 116-118) In deposition, Mr. Chargo said it was possible claimant told him of an injury, but that it was unlikely. (Ex. G, Deposition p. 8)

Mr. Jensen, on cross-exam, said it was possible claimant told him of an October 10, 2016 work injury, but he did not recall that occurring. (Tr. pp. 136-138)

Claimant returned to work at AMVC the next day. Claimant said, that in the days following the accident, he was given lighter work. He said that his left elbow improved, but his left shoulder pain continued. (Tr. pp. 46-47)

Claimant also testified he worked his regular hours at AMVC. The record suggests claimant continued to do work like injecting cows, feeding pigs, cleaning the facility, tagging ears, and farrowing young pigs. (Ex. A, p. 4)

Claimant went to a doctor on his own on October 14, 2016. Claimant said he tried to see his regular family practitioner, Jason Noble, PA. He said that PA Noble was not available. Claimant said that he saw PA Noble's assistant instead, but did not know her name. Claimant said he had seen PA Noble's assistant on prior occasions. (Tr. pp. 48-51; Ex. F, Deposition pp. 17-18)

Claimant said he told PA Noble's assistant about his work injury on October 10, 2016, but the assistant refused to treat claimant as it was a work injury, and AMVC did not authorize the treatment. (Tr. pp. 48-50)

On October 14, 2016, claimant was evaluated by Melanie Tolle, CMA. Claimant complained of fever, chills, night sweats and headaches. Claimant was assessed as having malaise and headaches. He was recommended to take Tylenol. There is no mention of an arm or shoulder injury in these records. (Ex. J, pp. 30-32)

Claimant testified he talked to Mr. Chargo about authorizing care for his shoulder after the appointment and that he mentioned his shoulder to Mr. Chargo numerous times. He said Mr. Chargo disregarded his requests. (Tr. pp. 50-51)

Mr. Chargo testified that claimant never asked him for treatment for his shoulder. (Tr. pp. 110, 112)

On January 12, 2017, claimant was evaluated by PA Noble. Claimant complained of headaches. Claimant also complained of shoulder pain for the last eight days. The records indicate claimant told PA Noble he worked at Tyson and injured his shoulder while wrestling a pig at a door. Claimant was assessed as having headaches and rotator cuff tendinitis. Claimant was given a prescription for Naprosyn and given home exercises for the shoulder. Claimant was also told to use ice and heat on the shoulder. (Joint Ex. 3, pp. 33-35)

Claimant testified that perhaps PA Noble did not understand him regarding working at Tyson. (Tr. pp. 53-54)

In approximately February of March of 2017, Mr. Chargo became manager of the facility. (Tr. p. 110; Ex. 14, Deposition p. 12)

Claimant testified then on October 11, 2017, Mr. Chargo finally gave him paperwork regarding his shoulder injury of October 2016 so he could get treatment. Claimant testified Mr. Chargo told him to write October 10, 2016 as the date of injury as this was the date claimant injured his shoulder. (Tr. pp. 57-58) A copy of that report is found at Exhibit G, page 49 and Exhibit 10, page 64.

Mr. Chargo testified he did not fill out the injury report with claimant. Mr. Chargo said that if he had received the accident report, he would have signed it and submitted it to the office. Mr. Chargo's signature is not on the accident report. (Tr. pp. 109-111; Ex. 10, p. 64)

On October 13, 2017, claimant injured his right hand at work. Claimant testified that once Mr. Chargo found out about the injury, he directed claimant to the hospital. (Tr. pp. 64-65, 97)

On the same day, claimant was evaluated by David Huante, M.D. Claimant had an injury to the right hand using a rotary drill used to release feed to pigs. Dr. Huante noted a displaced fourth proximal metacarpal and referred claimant to a hand surgeon. (Jt. Ex. 4, pp. 49-50)

On October 16, 2017, claimant was seen by Gregory Yanish, M.D. for a fracture of the right hand. Claimant had a non-displaced fracture of the shaft of the fourth metacarpal. Casting of the hand was discussed and chosen as a treatment option. Claimant's right hand was put in a cast and he was restricted to left hand work only. (Jt. Ex. 5, pp. 63-66)

Claimant said that when he began using the left hand more, his left shoulder pain increased. (Tr. p. 67)

On November 6, 2017, claimant returned to PA Noble with complaints of left shoulder pain. Claimant was only using the left upper extremity to work due to a right hand casting. Claimant indicated he injured his left shoulder at work in January of 2017, but did not report an injury to his employer. Claimant was having increased symptoms of tendinitis as he was only using his left upper extremity. Claimant was assessed as having rotator cuff tendinitis. Claimant was told by PA Noble that he could not continue to evaluate claimant for a workers' compensation claim. (Jt. Ex. 3, pp. 44-46)

On the same date, claimant returned to Dr. Yanish. Claimant indicated pain in the left shoulder due to working with only the left arm. Claimant was to continue immobilization in the cast for two more weeks. (Jt. Ex. 5, pp. 67-69)

Claimant returned to Dr. Yanish on November 20, 2017. Claimant was allowed to use the right hand for light activities only. (Jt. Ex. 5, pp. 71-72)

Claimant returned to Dr. Yanish on December 11, 2017. Claimant indicated stiffness and limitations in range of motion in the right hand. Claimant was returned to work at full duty. (Jt. Ex. 5, pp. 75-80)

On December 28, 2017, claimant was evaluated by Todd Petersen, M.D. for left shoulder pain. Claimant injured his left shoulder when he fell over a year prior. Claimant was assessed as having a strain of the muscles and tendons of the left rotator cuff and a left shoulder impingement. An MRI of the left shoulder was recommended. Claimant was returned to work at full duty. (Jt. Ex. 5, pp. 81-85)

On December 28, 2017, claimant had an MRI of the left shoulder. It showed a full-thickness tear with mild retraction of the rotator cuff. (Jt. Ex. 5, p. 86)

On January 17, 2018, claimant returned to Dr. Yanish. Claimant was undergoing physical therapy. Claimant was working full duty at work but had hand pain. Claimant was offered a cortisone injection, but turned down the treatment. Claimant was to continue physical therapy. (Jt. Ex. 5, pp. 87-90)

On January 19, 2018, claimant was seen by Dr. Petersen in follow-up. The MRI was discussed. Surgery was discussed and chosen as a treatment option. (Jt. Ex. 5, pp. 92-94)

Claimant returned to Dr. Yanish on February 14, 2018. Claimant had arthritic changes in the right hand aggravated by the fracture. Claimant was given a cortisone injection in the right hand. (Jt. Ex. 5, pp. 97-99)

Dr. Yanish saw claimant on March 14, 2018. Claimant was frustrated with his right hand, that it was still stiff. Claimant was told that he would not reach full healing until one year later. Claimant was found to be at maximum medical improvement (MMI). He was returned to work with no restrictions regarding the right hand. (Jt. Ex. 5, pp. 101-105)

On March 28, 2018, claimant underwent surgery to the left shoulder performed by Dr. Petersen. Surgery consisted of a repair of the rotator cuff, a labral repair and a distal clavicle resection. (Jt. Ex. 8) Claimant was off work for approximately four months following surgery. (Tr. pp. 74-75)

In a March 30, 2018 letter, Dr. Yanish found that claimant had a 43 percent permanent impairment to the digit, converting to a 4 percent permanent impairment to the right hand. (Jt. Ex. 5, p. 106)

Claimant returned in follow-up with Dr. Petersen from April of 2018 through July of 2018. (Jt. Ex. 5, pp. 108-123) Records indicate claimant was doing well following surgery and slowly progressing. (Jt. Ex. 5, pp. 108-123)

On July 25, 2018, claimant saw Dr. Yanish. Claimant's hand was stiff and claimant wanted restrictions for his hand. Dr. Yanish noted claimant's job was becoming overwhelming for him. Dr. Yanish did not feel it was appropriate to restrict claimant from using his right hand. (Jt. Ex. 5, pp. 120-121)

On July 26, 2018, claimant returned to Dr. Peterson. Claimant was having pain in the shoulder due to work. Dr. Petersen recommended claimant change jobs and try to avoid working with animals. Clamant was returned to work. He was limited to no overhead work, no lifting, pushing, pulling over 40 pounds, and working no more than 8 hours a day. (Jt. Ex. 5, pp. 123-125)

Claimant returned to Dr. Petersen on September 13, 2018. Claimant was continuing to work and going to physical therapy. Claimant had tenderness in the shoulder and was given a cortisone injection. Claimant was limited to modified duty. (Jt. Ex. 5, pp. 127-129)

On November 6, 2018, claimant underwent an MRI to the left shoulder. It showed the rotator cuff intact and mild AC joint arthrosis. (Jt. Ex. 5, p. 134)

On November 8, 2018, claimant returned to Dr. Petersen. Claimant's MRI was discussed. Claimant was returned to full duty. Dr. Petersen discussed with claimant the possibility of finding a new job. Claimant was found to be at MMI for the shoulder. Dr. Petersen found that claimant had a five percent permanent impairment to the left upper extremity. (Jt. Ex. 5, pp. 135-138)

In a December 17, 2018 report, Sunil Bansal, M.D., gave his opinions of claimant's condition following an IME. Claimant complained of constant pain in the left shoulder. Claimant had pain in his right hand and felt he had loss of grip strength. (Ex. 1, pp. 1-9)

Regarding the left shoulder, Dr. Bansal believed claimant was at MMI as of November 8, 2018. He opined that claimant was at MMI for the right hand as of March 14, 2018. (Ex. 1, pp. 11-12)

Dr. Bansal believed claimant injured his left shoulder when he landed on his shoulder after being tossed by a pig at work. (Ex. 1, p. 12)

Dr. Bansal opined claimant had a 15 percent permanent impairment to the left upper extremity, which converted to a 9 percent permanent impairment to the body as a whole. He found claimant to have 77 percent permanent impairment to the digit, converting to an 8 percent permanent impairment to the hand. (Ex. 1, p. 13) Dr. Bansal recommended claimant lift no more than 20 pounds occasionally, 10 pounds frequently, and do no overhead lifting with the left arm. (Ex. 1, p. 14)

In February of 2019, claimant quit his job with AMVC. Claimant said he quit as he had difficulty doing work due to shoulder pain. (Tr. pp. 77, 85-86) Claimant testified he applied for jobs at Tyson, Stine and Fareway. Claimant said he eventually got a job with Maya Landscaping. (Tr. p. 78)

Claimant said he worked for Maya Landscaping for approximately three to four weeks. He said he was fired, as the owner of the company wanted claimant to load and unload trucks. Claimant said he was unable to do that work and was fired. (Tr. p. 78) Claimant said that after he left Maya he applied for Social Security retirement benefits. (Tr. p. 81)

On July 9, 2019, claimant was evaluated by Dr. Huante regarding upper extremity pain. Dr. Huante believed claimant's ongoing pain was due to trauma to the soft and/or connective tissue. Dr. Huante assessed claimant as having chronic myofascial pain syndrome. Dr. Huante recommended claimant be treated with prescription medication and physical therapy. (Jt. Ex. 9)

In a September 19, 2019 report, Charles Mooney, M.D., gave his opinions of claimant's condition following an IME. Claimant had ongoing left shoulder pain.

Dr. Mooney opined that claimant did not sustain an acute rotator cuff tear or a permanent aggravation of an underlying condition due to the alleged October 10, 2016 date of injury. (Ex. A, pp. 1-7)

Dr. Mooney found claimant at MMI on November 8, 2018 regarding the left shoulder. Dr. Mooney suggested claimant might benefit from cortisone injections in the shoulder. He found that claimant had a 14 percent permanent impairment to the left upper extremity. He recommended claimant lift no more than 10 pounds above shoulder height. (Ex. A. p. 8)

In an October 1, 2019 supplemental report, Dr. Bansal indicated he had reviewed Dr. Huante's and Dr. Mooney's reports. Claimant had continued left shoulder pain. Claimant had continued pain in the right hand. Dr. Bansal disagreed with Dr. Mooney's opinions regarding causation and lifting restrictions. (Ex. 1, pp. 15A-15E)

In a September 16, 2019 affidavit, Katarzyna Pikul testified she was the claims representative for Third Coast Underwriters (Third Coast), a subsidiary of the Accident Fund. The affidavit indicates the Accident Fund had a workers' compensation policy covering AMVC for workers' compensation losses from November 21, 2016 through November 21, 2017. (Ex. AA)

The affidavit indicates that on or about November 10, 2017, AMVC reported a claim to Third Coast involving an injury sustained by claimant to the left shoulder. Due to an oversight and "communication barriers" the claim was mistakenly set for a date of injury of November 10, 2017. (Ex. AA)

After further investigation, Third Coast discovered that the alleged date of injury was actually October 10, 2016. This was before the Accident Fund policy was effective. On January 23, 2019, the Accident Fund's attorney demanded Berkshire Hathaway reimburse them for benefits paid on or about March 5, 2019. Berkshire Hathaway refused to reimburse. (Ex. AA)

As of September 16, 2019, the Accident Fund had paid $62,627.09 in indemnity and medical benefits for claimant's alleged October 10, 2017 date of injury. (Ex. AA) See also, Ex. BB, CC, and EE.

CONCLUSIONS OF LAW

The first issue to be determined is whether claimant sustained an injury that arose out of and in the course of employment on October 10, 2016 (File No. 5066291).

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 Rule of Appellate Procedure 6.14(6).

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" referred 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 Electric v. Wills, 608 N.W.2d 1 (Iowa 2000); Miedema, 551 N.W.2d 309. An injury occurs "in the course of" employment when it happens within a period of employment at a place where the employee reasonably may be when performing employment duties and while the employee is fulfilling those duties or doing an activity incidental to them. Ciha, 552 N.W.2d 143.

The claimant has the burden of proving by a preponderance of the evidence that the injury is a proximate cause of the disability on which the claim is based. A cause is proximate if it is a substantial factor in bringing about the result; it need not be the only cause. A preponderance of the evidence exists when the causal connection is probable rather than merely possible. George A. Hormel & Co. v. Jordan, 569 N.W.2d 148 (Iowa 1997); Frye v. Smith-Doyle Contractors, 569 N.W.2d 154 (Iowa App. 1997); Sanchez v. Blue Bird Midwest, 554 N.W.2d 283 (Iowa App. 1996).

The question of causal connection is essentially within the domain of expert testimony. The expert medical evidence must be considered with all other evidence introduced bearing on the causal connection between the injury and the disability. Supportive lay testimony may be used to buttress the expert testimony and, therefore, is also relevant and material to the causation question. The weight to be given to an expert opinion is determined by the finder of fact and may be affected by the accuracy of the facts the expert relied upon as well as other surrounding circumstances. The expert opinion may be accepted or rejected, in whole or in part. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); IBP, Inc. v. Harpole, 621 N.W.2d 410 (Iowa 2001); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995). Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417 (Iowa 1994). Unrebutted expert medical testimony cannot be summarily rejected. Poula v. Siouxland Wall & Ceiling, Inc., 516 N.W.2d 910 (Iowa App. 1994).

Claimant testified that when he was thrown by a sow, he injured his left shoulder. Claimant testified he reported the accident to his assistant manager, Mr. Chargo, and later informed the general manager, Mr. Jensen. He said Mr. Jensen gave him ice for his shoulder and told claimant to ice his arm. Claimant contends his detailed testimony regarding his injury is consistent with his deposition, his statement given to the insurer, and various medical records. (Tr. pp. 38-46; Ex. 13, pp. 120-125; Ex. F, Deposition pp. 14-16; Jt. Ex. 5, pp. 81-85; Jt. Ex. 9, pp. 166-167; Ex. 1, p. 8) In his IME report, Dr. Bansal found claimant's alleged October 10, 2016 injury was the cause of his left shoulder problems. (Ex. 1, p. 12)

There are a number of inconsistencies with the record regarding claimant's alleged October 10, 2016 injury.

Neither Mr. Chargo nor Mr. Jensen recalls claimant reporting a shoulder injury of October 10, 2016. (Tr. pp. 103-106, 133-134) Mr. Chargo did testify, in deposition, it was possible claimant could have reported the injury to him. However, Mr. Chargo also testified that this was "unlikely." In deposition, Mr. Chargo testified,

> Q. Okay. Mr. Garrido testified in his deposition in this case that when that injury happened, on October 10, 2016, that he mentioned to you that same day after the incident that he had pain in his left upper extremity. Do you remember that?
>
> A. No, sir.
>
> Q. Okay. Is it possible that it happened and you just don't remember?
>
> A. Unlikely.
>
> Q. Is it possible?
>
> A. No, sir.
>
> Q. Okay. Why is that not possible?
>
> A. That's a pretty extreme injury or pretty extreme – yeah, pretty extreme circumstance. It would not have been something that I would have forgotten. I can remember a lot of injuries. I just don't remember that.
>
> Q. Okay. You don't remember it. I understand that. But are you saying it's impossible that that happened?
>
> A. I can't say that.

(Ex. G, Deposition p. 8)

Mr. Jensen did testify that it was possible claimant told him of a left shoulder injury. However, Mr. Jensen testified he did not know claimant injured his left shoulder at the time of injury.

Mr. Chargo testified that he worked daily with claimant and never heard claimant complain of a left shoulder injury from November 2016 through January 2017. (Tr. pp. 103-109)

Claimant went to a medical provider on October 14, 2016 at Mercy Family Care, four days after the date of injury. There is no reference in the medical records from this date regarding a left shoulder injury. (Jt. Ex. 3, pp. 30-32)

Claimant testified he told the medical provider, CMA Tolle, that he had a left shoulder problem caused by work. He said that CMA Tolle refused to treat his injury or document it, as AMVC did not authorize treatment. (Tr. pp. 48-50)

This rationale, as to why the alleged left shoulder condition was not documented in the October 14, 2016 visit, does not make sense. The left shoulder injury was documented in a Mercy Family Care record on January 12, 2017 and care was not authorized at that time by AMVC. (Jt. Ex. 3, pp. 33-35)

Claimant was evaluated on January 12, 2017 by PA Noble. Claimant had shoulder pain from an accident occurring on or about January 4, 2017. The record also indicates that claimant worked at Tyson. (Jt. Ex. 3, pp. 33-35)

Claimant testified that on or about October 11, 2017, Mr. Chargo finally gave claimant paperwork regarding his alleged shoulder injury of October 2016 so he could get treatment. Claimant said Mr. Chargo helped him complete the paperwork. (Tr. pp. 57-58; Ex. 1, p. 64)

Mr. Chargo testified that he did not fill out the accident report with claimant. He said that if he received the accident report, he would have signed the report. The report does not have Mr. Chargo's signature. (Tr. pp. 109-111) Mr. Chargo testified that he did give the form, found at Exhibit 10, page 64, to claimant for his hand injury. He testified he did not see Exhibit 10, page 64, regarding an alleged shoulder injury, until after claimant filed a workers' compensation claim regarding that alleged date of injury. (Ex. G, pp. 18-20)

The next medical report regarding a shoulder injury is on a return visit to PA Noble on November 16, 2017, approximately one year later from the initial treatment. Claimant indicated he injured his left shoulder in January 2017 but did not report the injury to his employer. (Jt. Ex. 3, pp. 44-46)

As noted above, in the findings of fact, defendant employer did immediately report and authorize treatment for claimant's right hand injury of 2017. There is no explanation offered why defendant employer would timely report claimant's right hand injury, but fail to report or authorize treatment for claimant's left shoulder injury.

As noted above, Dr. Bansal did opine that claimant's left shoulder injury was caused by the November 10, 2016 work injury with the sow. (Ex. 1, p. 8) However, Dr. Bansal did not review the medical record from October 14, 2016, when claimant did not report a shoulder injury. Dr. Bansal also did not review the record from January 12, 2017, indicating claimant had a shoulder injury on January 4, 2017, but did not report it to the employer. Because Dr. Bansal was unable to see these records, indicating that claimant did not have a shoulder injury until January 4, 2017, his opinion regarding causation is found not convincing.

Neither Mr. Chargo nor Mr. Jensen recalls claimant reporting a shoulder injury in October 2016. Mr. Chargo testified that he worked closely with claimant at two different jobs and claimant never complained to him of a shoulder injury. Claimant testified he was given ice for his shoulder at the time of the alleged injury. Mr. Chargo testified that he was unaware of anywhere in the place of the facility where there was ice. (Ex. 14, Deposition pp. 10-11) Claimant treated with a medical care provider four days after the

alleged injury. There is no mention of a shoulder injury regarding the October 14, 2016 visit. Nearly a year after the alleged injury, claimant saw PA Noble. PA Noble's notes indicate claimant injured his left shoulder on January 4, 2017 and did not report the injury to his employer. Claimant testified Mr. Chargo eventually gave him an accident report regarding the alleged left shoulder injury in October 2017 and helped him fill it out. Mr. Chargo testified he gave claimant an accident form for his right hand injury and did not help claimant fill out the report. Defendant employer reported and authorized care for an injury to claimant's right hand. The opinions of Dr. Bansal regarding causation are found not convincing.

Given the totality of the above-discussed record, it is found that claimant has failed to carry his burden of proof he sustained a shoulder injury arising out of and in the course of employment on October 10, 2016.

I admire claimant. He immigrated to this country as a young man. He speaks little English. Yet, claimant has worked hard and made a life for himself in this country. I also recognize that there is a language barrier, as evidenced by the record. (E.g., medical records indicating claimant worked at Tyson) However, given the totality of the number of inconsistencies in the record regarding the description of reporting the injury, and when the injury allegedly occurred, as detailed above, I am unable to find in claimant's favor on this issue.

As claimant failed to carry his burden of proof he sustained an injury on October 10, 2016, arising out of and in the course of employment, all other issues regarding the October 10, 2016 date of injury, in File No. 5066291, except for the issue of reimbursement of the IME, are moot. This includes the Accident Fund's claim for contribution against Berkshire Hathaway under Iowa Code section 85.21.

The next issue to be determined is the extent of claimant's entitlement to permanent partial disability benefits regarding the October 13, 2017 injury to the right hand.

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

Two experts opined regarding claimant's permanent impairment to the right hand. Dr. Yanish treated claimant for an extended period of time and performed claimant's surgery. He found that claimant had a four percent permanent impairment to

the right hand. (Jt. Ex. 5, p. 106) Dr. Bansal evaluated claimant once for an IME and found that claimant had an eight percent permanent impairment to the right hand. (Ex. 1, p. 13) Dr. Bansal performed grip strength tests on claimant's right hand to find permanent impairment. Dr. Bansal's ratings were also performed closer to hearing and are a more accurate reflection of claimant's permanent impairment at the time of hearing. Given this record, it is found that Dr. Bansal's opinions regarding permanent impairment to the right hand are more convincing than those of Dr. Yanish. Claimant is due 15.2 weeks of permanent partial disability benefits for the right hand based on Dr. Bansal's rating (190 weeks x 8 percent).

The final issue to be determined is whether claimant is due reimbursement for the IME.

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 IME 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 IME, a claimant can still be reimbursed at hearing for the costs associated with the preparation of the written report as a cost under rule 876 IAC 4.33. Young at 846-847.

Regarding the right hand, Dr. Yanish gave his opinions of permanent impairment to the right hand on March of 2018. Dr. Bansal gave his opinion of claimant's right hand and shoulder impairment in a December 17, 2018 report. Dr. Mooney gave his opinion of claimant's left shoulder impairment in a September 2019 report. As there is no apportionment in Dr. Bansal's billing for the report between the hand and the shoulder injury, it is found that claimant is not due reimbursement under Iowa Code section 85.39 for Dr. Bansal's IME. Dr. Bansal does indicate, in his billing, that he charged $2,282.00 for preparation of the report. (Ex. 1, p. 15) Claimant is due reimbursement for $2,282.00 for the cost of the report under rule 876 IAC 4.33(6).

Claimant also seeks reimbursement for the supplemental report from Dr. Bansal. Claimant has been found entitled to reimbursement for the preparation of Dr. Bansal's IME under rule 876 IAC 4.33(6). Claimant is not entitled to reimbursement for a second supplemental report from Dr. Bansal under rule 876 IAC 4.33(6).

Regarding costs, costs are determined at the discretion of the agency. Claimant failed to prevail on almost all issues regarding the alleged shoulder injury. Claimant was able to prevail regarding the right hand injury. Along with Dr. Bansal's IME report as discussed above, claimant is due reimbursement for the filing fee and the services costs associated with the right hand injury (File No. 5066290).

ORDER

THEREFORE, IT IS ORDERED:

Regarding File No. 5066291 (Date of Injury October 10, 2016):

Claimant shall take nothing in the way of benefits from this case.

Regarding File No. 5066290 (Date of Injury October 13, 2017):

That defendants shall pay claimant fifteen point two (15.2) weeks of permanent partial disability benefits at the rate of six hundred seventy-one and 02/100 dollars ($671.02) per week commencing on March 14, 2018.

Defendants shall pay interest on unpaid weekly benefits awarded herein as set forth in Iowa Code section 85.30. Defendants shall pay accrued weekly benefits in a lump sum together with interest at the rate of ten percent for all weekly benefits payable and not paid when due which accrued before July 1, 2017, and all interest on past due weekly compensation benefits accruing on or after July 1, 2017, shall be 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. See Gamble v. AG Leader Technology, File No. 5054686 (App. Apr. 24, 2018).

That defendants shall be given credit for benefits previously paid.

That defendants shall pay claimant temporary benefits at the stipulated rate.

That defendants shall pay the filing fee and service costs as detailed above.

That defendants shall pay claimant's medical mileage as detailed in Exhibit 11.

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

Regarding both file numbers:

That defendant Accident Fund and AMVC shall reimburse claimant two thousand two hundred eighty-two and 00/100 dollars ($2,282.00) for Dr. Bansal's IME report.

Signed and filed this 24th day of July, 2020.

JAMES F. CHRISTENSON
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

James C. Byrne (via WCES)

Robert Cardell Gainer (via WCES)

Andrew Portis (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.