BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

SCOTT EVANS, Claimant, vs. BOB BROWN CHEVROLET, INC., Employer, and SECURA INSURANCE CO., Insurance Carrier, Defendants.	File No. 20000128.01 ARBITRATION DECISION Head Notes: 1100; 1108; 1400; 1800; 1801; 1803; 2700

SCOTT EVANS, Claimant, vs. BOB BROWN CHEVROLET, INC., Employer, and FIRST DAKOTA INDEMNITY CO., Insurance Carrier, Defendants.	File No. 21009683.01 ARBITRATION DECISION Head Notes: 1100; 1108; 1400; 1800; 1801; 1803; 2700

STATEMENT OF THE CASE

The claimant, Scott Evans, filed a petition for arbitration seeking workers' compensation benefits from employer Bob Brown Chevrolet, Inc. ("Bob Brown"), and its insurers Secura Insurance Co. and First Dakota Indemnity Co. Jacob Peters appeared on behalf of the claimant. M. Anne McAtee appeared on behalf of the defendant-

employer and Secura Insurance Co. Caroline Westerhold appeared on behalf of the defendant-employer and First Dakota Indemnity Co.

The matter came on for hearing on January 4, 2023, before Deputy Workers' Compensation Commissioner Andrew M. Phillips. Pursuant to an order of the Iowa Workers' Compensation Commissioner, the hearing occurred electronically via Zoom. The hearing proceeded without significant difficulty.

The record in this case consists of Joint Exhibits 1-11, Claimant's Exhibits 1-3, Defendants' Exhibits A-E, and Defendants' Exhibits AA-OO. The exhibits were received and admitted into the record without objection.

The claimant testified on his own behalf. Buffy Nelson was appointed the official reporter and custodian of the notes of the proceeding. Also present were Amanda Motto, and employer's representative Bruce Gast. The evidentiary record closed at the end of the hearing, and the matter was fully submitted on January 20, 2023, after briefing by the parties.

STIPULATIONS

Through the hearing report, as reviewed at the commencement of the hearing, the parties stipulated and/or established the following:

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1. There was an employer-employee relationship at the time of the alleged injury.

2. The claimant sustained an injury, which arose out of, and in the course of, employment on December 18, 2019.

3. The alleged injury is a cause of temporary disability during a period of recovery.

4. That, if the injury is found to be a cause of permanent disability, the disability is a scheduled member disability to the right arm.

5. That, if the injury is found to be a cause of permanent disability, the commencement date for permanent partial disability benefits is March 25, 2021.

6. That, at the time of the alleged injury, the claimant's gross weekly earnings were two thousand one hundred twelve and 00/100 dollars ($2,112.00), that the claimant was single, and entitled to two exemptions. This provided the claimant with a weekly compensation rate of one thousand one hundred ninety-nine and 77/100 dollars ($1,199.77).

7. That the costs listed in Claimant's Exhibit C:1 have been paid.

The defendants waived their affirmative defenses. Entitlement to temporary disability and/or healing period benefits is no longer in dispute. Medical benefits are no longer in dispute. Credits against any award are no longer in dispute.

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1. There was an employer-employee relationship at the time of the alleged injury.

2. That, at the time of the alleged injury, the claimant's gross weekly earnings were two thousand two hundred forty-two and 82/100 dollars ($2,242.82), that the claimant was single, and entitled to one exemption. This provided the claimant with a weekly compensation rate of one thousand two hundred fifty-six and 51/100 dollars ($1,256.51).

3. That, prior to the hearing, the claimant was paid four weeks of compensation at the rate of one thousand two hundred eight and 51/100 dollars ($1,208.51) per week.

4. That the defendants are entitled to a credit pursuant to Iowa Code section 85.38(2) for payment of medical or hospitalization expenses in the amount of one thousand six hundred three and 65/100 dollars ($1,603.65).

5. The costs in Claimant's Exhibit C:2 have been paid.

The defendants waived their affirmative defenses. Entitlement to temporary disability and/or healing period benefits is not in dispute at this time. Entitlement to permanent disability benefits is not in dispute at this time.

The parties are now bound by their stipulations.

ISSUES

The parties submitted the following issues for determination:

File No. 20000128.01

1. Whether the alleged injury is a cause of permanent disability.

2. The extent of permanent partial disability benefits, should any be awarded.

3. Whether the claimant is entitled to a specific taxation of costs in the decision.

File No. 21009683.01

1. Whether the claimant sustained an injury, which arose out of and in the course of his employment on July 2, 2021.

2. Whether the alleged injury is a cause of temporary disability during a period of recovery.

3. Whether the alleged injury is a cause of permanent disability.

4. Whether the claimant is entitled to alternate medical care pursuant to Iowa Code section 85.27.

5. Whether the claimant is entitled to a specific taxation of costs in the decision.

FINDINGS OF FACT

The undersigned, having considered all of the evidence and testimony in the record, finds:

Scott Evans, the claimant, was 43 years old at the time of the hearing. (Testimony). He lives near New Virginia, Iowa, where he operates a farm with some help from his wife. (Testimony). He graduated high school in 1997, and subsequently enrolled in an auto collision repair course at Southwest Community College. (Testimony). After completing his auto collision repair course, he began working in a body shop. (Testimony). He also spent some time working in insurance appraising. (Testimony). He is right-hand dominant. (Testimony).

Mr. Evans previously injured his left shoulder and broke his left hand in a farming accident. (Defendants' Exhibit AA:1-2). He had one previous workers' compensation claim due to a left shoulder injury in 2015. (Testimony; Joint Exhibit 1). He resolved that matter via settlement. (Testimony).

In September of 2019, Mr. Evans began working for Bob Brown in collision repair, as a "body man." (Testimony).

On December 18, 2019, shortly after his lunch break, Mr. Evans worked on a Chevrolet Tahoe. (Testimony). He attempted to straighten the hood of the Tahoe, and testified that he immediately felt a snap in his right arm and elbow. (Testimony). He also felt shooting pain in his right elbow and arm. (Testimony). He proceeded to UnityPoint for an examination. (Testimony). He expressed a desire to have an MRI to see what was the issue, and was subsequently referred to DMOS. (Testimony). He was told that surgery would be beneficial for his right arm issues, but Mr. Evans opined that surgery only reduced his symptoms. (Testimony).

On December 31, 2019, Mr. Evans reported to Alliance Radiology for an MRI of his right elbow due to right elbow pain which radiated up his arm. (JE 2:6-7). There were no bony or muscular abnormalities found on the MRI. (JE 2:6). There was some mild fluid surrounding the biceps tendon and "moderate increased signal in the biceps tendon near the radial tuberosity." (JE 2:6). This suggested "a partial tear in that structure," however, the radiologist found no significant gap or retraction. (JE 2:6). The radiologist opined that the MRI showed "[m]oderate strain and partial tear of the biceps tendon near the radial tuberosity insertion," and "[m]ild increased signal in the radial

collateral ligament near the humeral attachment suggesting a partial tear or a mild sprain." (JE 2:7).

Jeffrey Rodgers, M.D., examined the claimant on January 20, 2020, at Des Moines Orthopaedic Surgeons, P.C., for complaints related to the claimant's right elbow. (JE 6:75-79). Mr. Evans told Dr. Rodgers that he was pulling down on a hood on December 18, 2019, when he felt a snap in his right elbow. (JE 6:75). He subsequently had pain in his right elbow with lifting and turning his forearm. (JE 6:75). He also had numbness and tingling in his right small and ring fingers. (JE 6:75). Upon physical examination, Dr. Rodgers found Mr. Evans to have tenderness over the right ulnar nerve and distal biceps tendon. (JE 6:76). He also had weakness with forearm supination on the right side. (JE 6:76). Dr. Rodgers diagnosed Mr. Evans with a right partial distal biceps tendon tear and right cubital tunnel syndrome. (JE 6:77). Dr. Rodgers also ordered an EMG, after which he would review the results of the testing and make a recommendation to the claimant. (JE 6:77, 79). Dr. Rodgers also provided restrictions of limited use of Mr. Evans' right hand with no frequent lifting over five pounds. (JE 6:78).

Dr. Rodgers referred Mr. Evans for an EMG at Capital Orthopaedics & Sports Medicine, which occurred on January 29, 2020. (JE 3:8-9). The EMG of the right arm showed moderately severe right carpal tunnel syndrome, but no evidence of right ulnar nerve entrapment or axonal loss to the right upper extremity muscles. (JE 3:9).

Mr. Evans reported to Dr. Rodgers' office again on February 10, 2020, for continued follow-up, and a review of the EMG results. (JE 6:80-83). Dr. Rodgers diagnosed Mr. Evans with a high-grade partial right distal bicep avulsion and right carpal tunnel syndrome. (JE 6:80). Mr. Evans agreed with Dr. Rodgers as to surgical intervention to resolve the right elbow issues. (JE 6:80). A reinsertion of the right distal bicep was scheduled for March 5, 2020. (JE 6:83). Dr. Rodgers continued the right arm restrictions from the January 20, 2020, appointment. (JE 6:82).

On March 5, 2020, Mr. Evans reported to the Orthopaedic Outpatient Surgery Center in West Des Moines, Iowa, where Dr. Rodgers performed a surgical reinsertion of the right distal biceps tendon under regional anesthetic. (JE 4:10-11). Dr. Rodgers' postoperative diagnosis was a "[r]ight distal biceps chronic near complete avulsion." (JE 4:10). Dr. Rodgers provided the claimant with a status report indicating that the claimant should not use his right hand and could not work for three days. (JE 6:84).

Dr. Rodgers examined the claimant for a post-operative visit on March 16, 2020. (JE 6:89-92). Mr. Evans took ibuprofen, indomethacin, naproxen, and extra-strength Tylenol. (JE 6:89). He had mild swelling, and his wounds were healing well. (JE 6:89). Dr. Rodgers prescribed a hinged elbow brace due to weakness and instability. (JE 6:90). He provided work restrictions including no use of the right hand. (JE 6:91). Dr. Rodgers also prescribed occupational therapy. (JE 6:92).

The claimant began occupational therapy on March 16, 2020 at Des Moines Orthopedic Surgeons, P.C. (JE 6:85-88). Mr. Evans was to wear his hinged elbow orthosis at all times, except while bathing and exercising. (JE 6:87).

On March 24, 2020, Mr. Evans continued his occupational therapy. (JE 6:93). He told the therapist that his arm was feeling better, and that he was doing his exercises "a lot." (JE 6:93). The therapist found that Mr. Evans made good progress with his range of motion but had some shoulder tightness. (JE 6:93). The therapist added some shoulder range of motion exercises. (JE 6:93). The therapist also adjusted the claimant's brace to allow for additional range of motion. (JE 6:93).

Mr. Evans attended another occupational therapy appointment on March 31, 2020. (JE 6:94). He felt that his arm was doing very well, and that he had no pain with exercises or light use. (JE 6:94). The therapist opined that Mr. Evans was making good progress. (JE 6:94). The therapist also found that Mr. Evans had full range of motion and advanced the range of motion in the claimant's brace. (JE 6:94).

On April 13, 2020, Mr. Evans visited Dr. Rodgers again via Telehealth. (JE 6:95-96). Dr. Rodgers found the claimant to have full supination and pronation with no swelling. (JE 6:95). Dr. Rodgers recommended that Mr. Evans return in six weeks. (JE 6:95). Dr. Rodgers continued a restriction of no use of the claimant's right hand. (JE 6:96).

Dr. Rodgers examined Mr. Evans again on May 27, 2020, for a three-month post-operative follow-up. (JE 6:97-98). Dr. Rodgers requested that the claimant return in three months and allowed him to advance his activities as tolerated. (JE 6:97). He also updated Mr. Evans' restrictions. (JE 6:98). Dr. Rodgers recommended that the claimant limit use of his right hand and limit lifting to 20 pounds. (JE 6:98). In two months, Mr. Evans was to return to full duty with no restrictions. (JE 6:98).

On July 22, 2020, Mr. Evans had another follow-up visit with Dr. Rodgers. (JE 6:99-100). Mr. Evans expressed concern about his ability to return to unrestricted work. (JE 6:99). Dr. Rodgers found Mr. Evans to have no pain and strong supination. (JE 6:99). Dr. Rodgers requested that Mr. Evans return in two months and begin a work hardening program. (JE 6:99, 101). Dr. Rodgers continued restrictions of limited use of the right hand and a 20-pound lifting restriction until Mr. Evans completed a work hardening program. (JE 6:100).

Mr. Evans began work-hardening therapy with Millennium Therapy in Winterset, Iowa, on August 5, 2020. (JE 5:12-17). Mr. Evans did not feel ready to return to work "because his arm/forearm/hand muscles feel weak and get tired quickly." (JE 5:12). He provided examples to the therapist including that using tongs to remove corn from a pot or using a ratchet caused him to weaken and tire quickly. (JE 5:12). The goals for therapy included increasing the claimant's strength and activity tolerance for his right arm. (JE 5:12). The therapist indicated that the claimant had no restrictions while he worked with physical therapy. (JE 5:12). He rated his pain 0 out of 10. (JE 5:12). The therapist noted that Mr. Evans could only perform repetitive upper extremity tasks for 30 seconds to 3 minutes before muscle fatigue set in. (JE 5:12). Mr. Evans could not lift and carry heavy items for his job due to weakness. (JE 5:12). Upon examination, Mr. Evans displayed range of motion within normal limits. (JE 5:13).

On August 17, 2020, Mr. Evans returned to Millennium Therapy for additional work hardening exercises. (JE 5:18-20). Mr. Evans noted that his muscles felt sore

and tired after the last session. (JE 5:18). He took ibuprofen in order to alleviate his pain. (JE 5:18). Upon arriving at the physical therapy appointment, Mr. Evans reported that he had no pain. (JE 5:18). The therapist found that Mr. Evans increased his time of treatment by 10 minutes when compared to the previous session. (JE 5:19). The therapist continued to offer no restrictions. (JE 5:18).

Mr. Evans continued his work hardening at Millennium Therapy on August 19, 2020. (JE 5:21-23). He continued to complain of some soreness after his last session, which he rated 2 out of 10. (JE 5:21). He felt some tingling in his pinky and ring finger after his last physical therapy session, but it went away after he changed positions. (JE 5:21). Mr. Evans had no pain at the time of the appointment, but complained of some shoulder discomfort during therapy after increasing the difficulty of the triceps extension exercises. (JE 5:21-22).

On August 21, 2020, Mr. Evans returned to Millennium Therapy for additional work hardening physical therapy. (JE 5:24-26). He reported some soreness in the front of his shoulder after his last visit, which he rated 5 out of 10; however, ibuprofen alleviated this issue. (JE 5:24). He also felt soreness in his forearm muscles. (JE 5:24). During his visit, he indicated that he had no pain. (JE 5:24). His work hardening therapy was increased to 90 minutes, and some of his other tasks were increased during the appointment. (JE 5:25). Once again, the therapist provided no restrictions. (JE 5:26).

Mr. Evans had another session of work hardening at Millennium Therapy on August 24, 2020. (JE 5:27-29). He told the therapist that his body and arm were "getting used to" the work hardening sessions, as he had less soreness after his last visit. (JE 5:27). He was to begin working the next day, and thought that his boss would only have him working two or three days per week. (JE 5:27). He reported no pain at the outset of his treatment. (JE 5:27). The therapist focused on increasing the duration of the work hardening treatment to 96 minutes. (JE 5:28). The therapist offered no restrictions for Mr. Evans. (JE 5:27).

Work hardening at Millennium Therapy continued for Mr. Evans on August 26, 2020. (JE 5:30-32). Therapy increased to 100 minutes, but the therapist did not increase anything else due to Mr. Evans complaining of soreness after working a full day the day prior to the appointment. (JE 5:31). He reported taking three breaks during the day to sit and rest, which helped some of his soreness. (JE 5:30). Mr. Evans told the therapist that he was not ready to work five days per week. (JE 5:30). He indicated at the outset of his appointment that he had no pain at that time. (JE 5:30). The therapist provided no restrictions. (JE 5:30). The therapist planned to continue progressing Mr. Evans by increasing exercise challenges and difficulty in therapy as he tolerated. (JE 5:31).

On August 28, 2020, Mr. Evans returned to Millennium Therapy for work hardening therapy. (JE 5:33-35). Mr. Evans worked the previous day for about seven hours, and still had some soreness. (JE 5:33). However, he felt "that things are getting better and not quite as sore." (JE 5:33). He again took three 10-minute breaks, which helped. (JE 5:33). Mr. Evans opined that he could perform about 60 percent of his

normal tasks, but that he had to delegate "more strenuous tasks to others." (JE 5:33). At the outset of his appointment, he reported pain of 0 out of 10. (JE 5:33). He completed 100 minutes of therapy. (JE 5:34).

Mr. Evans had another appointment for work hardening therapy on August 31, 2020, at Millennium Therapy. (JE 5:36-39). Mr. Evans told the therapist that he returned to work the previous week, but that he worked two full days and a third day for 45 minutes. (JE 5:36). Mr. Evans felt that he worked at about 60 percent of his capabilities. (JE 5:36). He felt that he could not lift heavy weights due to his arm weakness, rapid fatiguing, and lessening power in his right arm. (JE 5:36). Mr. Evans told the therapist that attending work hardening helped him continue improving. (JE 5:36). At the outset of his appointment, he reported 0 out of 10 pain. (JE 5:36). The therapist noted that Mr. Evans was doing well with the work hardening program, and that he demonstrated the ability "to increase repetitions, resistance, and overall time spent at work hardening." (JE 5:37). The therapist also opined that Mr. Evans showed weakness in his grip strength and a "decreased ability to complete heavier lifting/carrying tasks that are required of his job." (JE 5:37). He completed a 105-minute session, and the therapist provided no work restrictions. (JE 5:36, 38).

Dr. Rodgers prescribed continued work hardening on September 1, 2020. (JE 6:102).

On September 10, 2020, the claimant returned to Millennium Therapy for additional work hardening therapy. (JE 5:40-42). He reported no pain at the outset of his appointment. (JE 5:40). He told the therapist that work was "going pretty well," however, he felt limited on what he could and could not do "because of his restrictions." (JE 5:40). The therapist measured the claimant's range of motion in his shoulder and elbow and found them to be within normal limits on the right side. (JE 5:41). When it was compared to the left side, the therapist opined that the ranges of motion were "visually equal." (JE 5:41). The right elbow showed 4 out of 5 strength for elbow extension and flexion. (JE 5:41). The therapist provided no restrictions, and increased his therapy by five minutes from the last visit. (JE 5:40-41).

Mr. Evans continued his work hardening therapy at Millennium Therapy on September 14, 2020. (JE 5:43-45). He noted working three half days per week and two full days per week. (JE 5:43). Between returning to work and continuing physical therapy strengthening exercises, Mr. Evans noted improvement, including decreased soreness. (JE 5:43). He continued to have some fatigue, but he felt that his muscles were stronger. (JE 5:43). He had no pain at the time of the appointment. (JE 5:43). The therapist provided no additional restrictions of the claimant. (JE 5:43). His therapy appointment lasted 115 minutes, which was an increase over his previous appointment. (JE 5:43-44). The therapist also increased resistance on certain therapeutic exercises. (JE 5:44).

On September 16, 2020, Mr. Evans returned to Millennium Therapy for additional work hardening therapy. (JE 5:46-48). He reported no pain at the outset of the appointment. (JE 5:46). His return to work was "going well," though he had some fatigue on days that he worked and attended work hardening. (JE 5:46). The therapist

increased the appointment to 120 minutes, and also increased the resistance in certain therapeutic activities. (JE 5:47). Mr. Evans had fatigue at the end of the therapeutic session. (JE 5:47). The therapist provided no restrictions. (JE 5:46).

Mr. Evans had another session of work hardening therapy at Millennium Therapy on September 18, 2020. (JE 5:49-51). Again, Mr. Evans reported a pain level of 0 out of 10. (JE 5:49). According to Mr. Evans, he worked at about 70 percent to 75 percent of his normal capabilities. (JE 5:49). He worked about 30 hours per week, while also attending work hardening. (JE 5:49). Mr. Evans was not yet assigned to the heaviest jobs, as he could not pick up and carry heavy items. (JE 5:49). Strength testing revealed that the claimant had 5 out of 5 strength in right elbow extension and flexion. (JE 5:50). Mr. Evans subjectively reported that he did "not have full strength as needed of the heavier more strenuous work tasks," though he felt some improvement in that area. (JE 5:50).

On September 21, 2020, Mr. Evans had another round of work hardening at Millennium Therapy. (JE 5:52-54). After the previous week of work hardening appointments, Mr. Evans noted no increase in pain or soreness over the weekend. (JE 5:52). The length of the session was increased by another five minutes. (JE 5:52). The therapist again offered no restrictions. (JE 5:52). Mr. Evans tolerated the appointment well, and the therapist increased resistance levels on several exercises. (JE 5:53). Mr. Evans could complete more exercises than previous appointments. (JE 5:53).

Mr. Evans returned to Millennium Therapy on September 23, 2020, for continued work hardening therapy. (JE 5:55-57). Mr. Evans noted that he visited with his surgeon who "cleared him to return to work without restrictions." (JE 5:55). This was confirmed in a note from Dr. Rodgers, which indicated that the claimant was "ok" to return to full duty work with no restrictions. (JE 6:103). Mr. Evans told the therapist that he planned to continue working but that he could not do the hardest tasks at work. (JE 5:55). Mr. Evans felt that work hardening helped him with gaining strength and felt that the sessions did more than simply returning to work would have done. (JE 5:55). He told the therapist that he had 0 out of 10 pain at the outset of the appointment. (JE 5:55). He completed an appointment of 2 hours and 10 minutes, and resistance on several exercises was increased. (JE 5:56).

Dr. Rodgers saw the claimant again on September 23, 2020, at which time he recommended a return visit in six months. (JE 6:104). Dr. Rodgers noted that Mr. Evans would achieve maximum medical improvement ("MMI") as of his next visit. (JE 6:104).

On September 25, 2020, the claimant returned to Millennium Therapy for additional work hardening therapy. (JE 5:58-60). Mr. Evans again reported 0 out of 10 pain during therapy, and no pain after work. (JE 5:58). He told the therapist that his arm was doing well and was getting better. (JE 5:58). He felt that he was "close to normal" with work on smaller jobs, but noted that on larger jobs, he continued to get help. (JE 5:58). The length of the appointment was again increased along with resistance on several exercises. (JE 5:59).

Mr. Evans returned to Millennium Therapy for further work hardening therapy on September 28, 2020. (JE 5:61-63). Mr. Evans reported pain of 0 out of 10 at the outset of therapy. (JE 5:61). Mr. Evans told the therapist that "he was lifting quite a bit of boxes & heavy items at his home while cleaning things out," and that "he noticed his arm is still weak especially lifting things overhead that are heavier." (JE 5:61). He felt that work hardening helped him by challenging his muscles. (JE 5:61). Mr. Evans could increase resistance on some exercises, but the therapist encouraged him to monitor his soreness. (JE 5:62). The therapist provided Mr. Evans with no restrictions. (JE 5:61).

On September 30, 2020, Mr. Evans continued his work hardening at Millennium Therapy. (JE 5:64-66). He told the therapist that his pain at the outset of the appointment was 0 out of 10. (JE 5:64). Mr. Evans noticed some arm soreness, but attributed it to a combination of lifting he did over the weekend and "doing a little bit harder things at work this week." (JE 5:64). The therapist increased the pace of exercises, and added additional exercises to address complaints of weakness. (JE 5:65). The therapist offered Mr. Evans no restrictions. (JE 5:64).

The claimant attended additional work hardening therapy at Millennium Therapy on October 2, 2020. (JE 5:67-69). Mr. Evans reported no pain at the beginning of his appointment. (JE 5:67). He had minimal soreness in his right arm, and noted that his new exercises did not bother him. (JE 5:67). He told the therapist that he felt he was "close to his 'normal.'" (JE 5:67). The therapist noted that Mr. Evans could complete three sets of over half of his activities, and had good tolerance to increased time and weight on various exercises. (JE 5:68). The therapist offered no additional restrictions. (JE 5:67).

On October 6, 2020, Mr. Evans reported to Millennium Therapy for additional work hardening therapy. (JE 5:70-71). His pain was reported as 0 out of 10. (JE 5:70). He told the therapist his arm, work, and therapy were doing well. (JE 5:70). He also felt that he was getting stronger. (JE 5:70). He was able to complete exercises with no reported pain. (JE 5:71). The therapist offered no restrictions. (JE 5:70).

Millennium Therapy continued offering work hardening therapy to Mr. Evans on October 7, 2020. (JE 5:72-74). Mr. Evans had no pain at the outset of his appointment. (JE 5:72). He told the therapist that he felt he functioned at 80 percent to 85 percent capacity at work. (JE 5:72). He was cautious about lifting heavy objects as he did not want to tear his right arm bicep again. (JE 5:72). Due to muscle fatigue, he periodically required rest breaks at work, but it was better than it used to be. (JE 5:72). The therapist provided Mr. Evans with no restrictions. (JE 5:73). The therapist noted that Mr. Evans met or "nearly met" all of the established goals of his work hardening, and that discharge was appropriate. (JE 5:73).

On December 18, 2020, James Gerdes, D.O., examined Mr. Evans as a follow-up to an emergency room visit. (JE 9:113-116). Mr. Evans went to the emergency room about one week prior with complaints of severe chest pain that radiated to his left jaw and into his left arm. (JE 9:113). He then had another event on December 15,

2020, with elevated blood pressure. (JE 9:113). Mr. Evans also reported "vague myalgias" and arthralgias in the elbows and shoulders. (JE 9:116).

On March 24, 2021, Dr. Rodgers examined the claimant. (JE 6:106). Mr. Evans had no pain in his right arm, but was having "new onset left antecubital pain with lifting activity. . ." despite no acute work injury on that side. (JE 6:106). Dr. Rodgers issued a work status report allowing the patient to work full duty with no restrictions. (JE 6:105). Dr. Rodgers opined that the claimant achieved MMI as of March 24, 2021. (JE 6:105).

Dr. Rodgers issued a letter to a Secura adjuster dated April 13, 2021. (JE 6:107). In that letter, Dr. Rodgers opined that the claimant had normal supination strength with manual muscle testing on the right side. (JE 6:107). Based upon this examination and the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, Dr. Rodgers found that the claimant had a 0 percent permanent impairment. (JE 6:107). Dr. Rodgers concluded by opining that the claimant needed no future medical treatment or permanent restrictions. (JE 6:107).

Dr. Rodgers issued a letter to claimant's counsel dated April 14, 2021, in response to claimant's counsel's request for an opinion on Mr. Evans. (Defendants' Exhibit E:42-44). Dr. Rodgers provided an opinion based upon the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition. (DE E:44). Dr. Rodgers found the claimant to have normal supination strength on manual muscle testing and thus a 0 percent impairment to the right upper extremity. (DE E:44). He also recommended no permanent restrictions or future medical treatment. (DE E:44).

On May 27, 2021, Dr. Gerdes saw Mr. Evans again for complaints of right elbow pain and weakness. (JE 9:117-119). Mr. Evans experienced a burning sensation when he lifted a heavy box or swung his arm. (JE 9:118). He began experiencing left elbow pain "as he has been over compensating [*sic*] and feels like his left elbow will need surgery too." (JE 9:118). On physical examination, Dr. Gerdes found Mr. Evans to have tenderness at the distal right biceps. (JE 9:119). Dr. Gerdes diagnosed Mr. Evans with right elbow pain and a right biceps tendon rupture. (JE 9:119). Dr. Gerdes ordered an MRI of the right elbow, and opined that the claimant had symptoms akin to cubital tunnel. (JE 9:119).

Mr. Evans returned to Dr. Gerdes' office on June 4, 2021, to review the results of his right upper extremity MRI. (JE 9:120-123). The MRI showed a thickened biceps tendon with irregular margins with an artifact along the posterior aspect of the radius. (JE 9:122). The radiologist opined, "[t]he appearance of the biceps tendon could relate to operative change, although there could be a component of tendinopathy or partial tearing." (JE 9:122). The MRI also showed lateral epicondylitis. (JE 9:122).

Mr. Evans testified that after he injured his right arm, he began to overcompensate with his left arm. (Testimony). This caused his left arm to become sore and fatigued. (Testimony).

Mr. Evans testified that on July 2, 2021, he was working on a bumper for a Chevrolet Silverado. (Testimony). He swung and lifted the bumper onto a stand so that he could remove some coverings from the bumper. (Testimony). He testified that he

reached with his left arm, and immediately felt a snap in his left wrist. (Testimony). He indicated that the pain was under one of the bones in his left wrist. (Testimony). He was again sent to UnityPoint for his left wrist issue. (Testimony). He also had another MRI. (Testimony).

On July 6, 2021, Mr. Evans presented to UnityPoint Des Moines Occupational Medicine. (JE 8:109-110). Jon Yankey, M.D., examined the claimant for left wrist pain. (JE 8:109-110). Mr. Evans reported to Iowa Radiology for left wrist x-rays on July 6, 2021. (JE 7:108). The x-rays showed no abnormalities. (JE 7:108). Dr. Yankey observed an "old-appearing" ossicle over the volar aspect of the left wrist on the lateral view. (JE 7:110). Dr. Yankey diagnosed the claimant with a left wrist strain. (JE 7:110). He recommended that Mr. Evans wear a wrist splint while at work, put ice on his wrist, and work modified work duties. (JE 7:110).

Sara Glover, PA-C, examined the claimant on July 13, 2021, for his left wrist issues. (JE 8:111-112). She also diagnosed the claimant with a left wrist strain. (JE 8:111). The claimant continued to complain of pain in his left wrist, which had a gradual onset over a two-week period. (JE 8:111). He recounted a specific date of injury on July 2, 2021, when he felt a snap and increase in pain in his left wrist. (JE 8:111). He continued to splint his wrist per Dr. Yankey's instructions. (JE 8:111). He noted occasional sharp pain and tingling in his left wrist. (JE 8:111). Ms. Glover found that the claimant had no significant swelling or bruising, but did have tenderness to palpation along the ulnar styloid. (JE 8:111). Mr. Evans was referred for an MRI on the left wrist in order to rule out a "significant tendon injury" before proceeding with more conservative treatment. (JE 8:111).

On July 16, 2021, William Ralston, D.O., examined Mr. Evans for his ongoing right elbow pain. (JE 9:124-129). Mr. Evans reported minimal numbness and tingling in his right hand with decreased grip strength. (JE 9:124). He complained that it was difficult to swing a hammer. (JE 9:124). Dr. Ralston found Mr. Evans to have normal range of motion and strength in his right elbow. (JE 9:126). Dr. Ralston reviewed the MRI and x-rays and noted that they were consistent with Mr. Evans' previous right elbow surgical repair, and that he was neurovascularly intact. (JE 9:127). On examination, Dr. Ralston found the claimant to have weakness in his right elbow. (JE 9:127). He opined that Mr. Evans may have tightness related to scar tissue, and recommended that the claimant have another EMG. (JE 9:127).

Mr. Evans did not want to return to Dr. Rodgers, so he was sent to Dr. Paulson. (Testimony). Mr. Evans reported to Iowa Ortho on July 28, 2021, where Benjamin Paulson, M.D., examined him for left wrist complaints. (JE 10:136-138). Mr. Evans noted that he had a sudden pop with immediate pain on July 2, 2021. (JE 10:136). He wore a brace for the previous two to three weeks. (JE 10:136). Dr. Paulson ordered x-rays, which he reviewed. (JE 10:136). Based upon the x-rays, he noted that Mr. Evans had a degenerative tear of the triangular fibrocartilage complex of the left wrist along with ulnar abutment syndrome. (JE 10:138). Dr. Paulson told Mr. Evans that his treatment options were bracing, injections, and surgery. (JE 10:138). Dr. Paulson administered a Kenalog injection to the claimant's left wrist. (JE 10:138). Dr. Paulson

restricted Mr. Evans to wearing a brace and only lifting 1 pound with the left wrist. (JE 10:138).

Dr. Paulson wrote a letter to an insurance adjuster, dated August 5, 2021, in response to the question:

> Is the degenerative tear of the triangular complex of the left wrist, the ulnar abutment syndrome, and the need for ongoing care a direct result from his accident on July 2, 2021, where he was reaching to remove Styrofoam from a bumper?

(JE 10:142; DE CC:1). Dr. Paulson responded by opining that Mr. Evans' issues were "not a direct result from this accident on July 2, 2021." (JE 10:142; DE CC:1). Dr. Paulson indicated that the ulnar abutment syndrome was likely congenital in nature, and that the "TFCC" tear was degenerative in nature from the MRI likely due to having "ulnar positive variance." (JE 10:142; DE CC:1). Dr. Paulson concluded that Mr. Evans "would have likely become symptomatic from his ulnar positive variance, ulnar impaction, and degenerative tear of the TFCC, no matter what he did for work or activities." (JE 10:142; DE CC:1).

Dr. Ralston saw Mr. Evans again on August 16, 2021, for Mr. Evans' complaints of right elbow pain. (JE 9:130-133). He denied having numbness or tingling. (JE 9:132). He felt that his right elbow got stuck when he flexed his right arm "hard." (JE 9:130). He noted that after his EMG he was sore. (JE 9:130). Dr. Ralston reviewed the EMG results and found them to be "essentially normal," except for carpal tunnel syndrome. (JE 9:132-133). Dr. Ralston diagnosed Mr. Evans with weakness of the right upper extremity and right forearm pain. (JE 9:133). Dr. Ralston was puzzled as to Mr. Evans' continued weakness, and offered to send him to Dr. Paulson and for a functional capacity evaluation ("FCE"). (JE 9:133).

On August 23, 2021, Dr. Paulson wrote another letter to an insurance adjuster in response to the following question:

> Although the current issues are congenital and degenerative in nature, please advise if Mr. Evans' current need for treatment and ongoing care are an aggravation or exacerbation of a preexisting condition due to the accident on July 2, 2021.

(JE 10:145; DE EE:1). Dr. Paulson opined that he did not believe that Mr. Evans' current need for treatment or care were due to his July 2, 2021, incident. (JE 10:145; DE EE:1). Dr. Paulson continued, "I believe he would have been symptomatic today just as much whether he had an accident on that day or not and therefore his work accident was neither an aggravation nor exacerbation." (JE 10:145; DE EE:1).

Dr. Paulson saw Mr. Evans again on August 25, 2021, for another review of his left wrist. (JE 10:146-148). His left wrist pain was improving, but aggravated by movement. (JE 10:146). Mr. Evans had relief from the previous Kenalog injection, until "it catches." (JE 10:146). Dr. Paulson reviewed the treatment options of bracing, injections, and surgery. (JE 10:147). Mr. Evans indicated that he wished to proceed

with arthroscopic surgery on his left wrist. (JE 10:147). Dr. Paulson also provided the claimant with work restrictions of wearing a brace as needed, and a 5-pound lifting restriction. (JE 10:147). These restrictions were noted as temporary. (JE 10:149).

Risk Administration Services, Inc., sent the claimant a letter denying his workers' compensation claim related to the July 2, 2021, work incident on August 27, 2021. (DE KK:1).

On September 24, 2021, Dr. Paulson issued a medical record, though it is unclear in which context he issued the record. (JE 10:150-151). In the record a box was checked indicating that the claimant's condition was due to an injury or illness arising from his employment, and that the condition did not already exist and become exacerbated by employment. (JE 10:150). This record reaffirmed the five-pound lifting restriction. (JE 10:150-151).

Nicholas Bruggeman, M.D., of Ortho Nebraska examined the claimant on October 11, 2021. (CE 3:1-4). Mr. Evans told the doctor that he "threw a Silverado bumper on a stand. He states he felt something snap when he reached out. He notes that he had pain for three to four weeks prior to the injury." (CE 3:1). Mr. Evans noted that his pain worsened with pressure and rotation of his forearm. (CE 3:1). Dr. Bruggeman reviewed the MRI and found the claimant to have a "[d]iffuse fraying degenerative type tearing of the central portion of the TFCC," along with mild ECU tendinitis, and a cystic structure which likely represented a ganglion cyst. (CE 3:2). Dr. Bruggeman indicated that the left ulnocarpal abutment was an aggravation of a prior wrist problem. (CE 3:2). Dr. Bruggeman also recommended a left wrist scope with TFCC debridement and an ulnar shortening osteotomy. (CE 3:2).

Dr. Bruggeman, wrote a letter to claimant's counsel following a review of the claimant's chart on November 30, 2021. (JE 11:152). He provided a diagnosis of right upper extremity weakness of grip and supination following a right distal biceps tendon repair. (JE 11:152). Dr. Bruggeman then opined, "[b]ased on his current situation and the above weakness, Mr. Evans has sustained an eight percent (8%) right upper extremity impairment." (JE 11:152). Of note, Dr. Bruggeman does not indicate that this impairment rating is based upon the AMA's Guides to the Evaluation of Permanent Impairment, Fifth Edition. (JE 11:152). He provided no work restrictions, or future medical care regarding the right elbow. (JE 11:152).

Dr. Bruggeman wrote another letter on November 30, 2021, after reviewing Mr. Evans' chart. (Claimant's Exhibit 3:9). Mr. Evans indicated that his pain increased after a July 2, 2021, incident. (CE 3:9). With regard to Mr. Evans' left wrist issues, Dr. Bruggeman opined:

1. His [Mr. Evans'] diagnosis related to his left arm is left wrist ulnar sided wrist pain, ulnocarpal abutment and TFC irregularity.
2. Based on his history of increasing pain after the injury on July 2, 2021, his injury represents a preexisting condition that was aggravated by a work injury.

3. He [Mr. Evans'] is currently capable of employment and working full time, full duty.
4. We did visit about potential surgical solutions to his problem because he has had a previous injection and he continues to be symptomatic.

(CE 3:9).

On November 22, 2022, Attorney Westerhold sent Dr. Paulson a letter requesting his opinions as to Mr. Evans' left wrist issues. (DE GG:1-19). Attorney Westerhold included portions of the claimant's deposition. (DE GG:1-19). Dr. Paulson responded to the check-box type letter and included some opinions as noted below. (DE HH:1-4). Dr. Paulson indicated that the work accident of July 2, 2021, did not cause the claimant's left ulnar abutment syndrome. (DE HH:2). He noted, "[u]lnar abutment is due to the ulna bone being longer than the radial bone. This is due to the bones growing differently, not an accident." (DE HH:2). Dr. Paulson continued by noting that the July 2, 2021, incident did not cause the left TFCC tear. (DE HH:2). He commented: "[t]he TFCC tear is degenerative, i.e., worn out over time. Not due to a single traumatic incident." (DE HH:2). Dr. Paulson did not believe that the July 2, 2021, incident caused any permanent aggravation of the left ulnar abutment syndrome or TFCC tear. (DE HH:2). Dr. Paulson expected that Mr. Evans would have experienced (and would continue to experience) periodic symptoms associated with his degenerative and congenital issues. (DE HH:3). Dr. Paulson concluded that the attending physician statement did not accurately set forth his opinions as to causation and that Mr. Evans' current symptoms in his deposition were consistent with those expected from an individual with underlying pre-existing conditions. (DE HH:3).

At the time of the hearing, Mr. Evans continued to have pain in his right arm along with reduced range of motion. (Testimony). He testified that his right forearm became fatigued at times, which caused a burning sensation in that area. (Testimony). He felt as though his right arm just was not "right" after his surgery. (Testimony). He has no current restrictions for his right arm. (Testimony). Mr. Evans further testified that he experienced sharp pains and decreased strength in his left wrist. (Testimony). This pain was not getting better as of the time of the hearing. (Testimony).

Mr. Evans testified that he felt that he could no longer perform his job duties as previously required at Bob Brown. (Testimony). Therefore, he never returned to Bob Brown. (Testimony). In December of 2021, he had a conversation with Bob Brown and told them that he could no longer work as a body man. (Testimony; DE LL:1). Bob Brown takes the position that the claimant never contacted them to attempt to return to work, so they terminated him. (DE B:35; LL:1). Their stance appears to be that the claimant abandoned his job with Bob Brown. (DE B:35).

Since leaving Bob Brown, Mr. Evans has been working as a farmer. (Testimony). He runs 500 acres of row crop farm, bales 300-500 bales of hay per season, and has a cow-calf herd of about 100 head. (Testimony). He also maintains a feedlot operation of about 130 cattle, which he has to feed two times per day. (Testimony). His cow-calf operation requires him to tag newborn calves in the spring, and also maintain vaccinations and care for the entire herd. (Testimony). In the spring,

he turns the cow-calf herd onto pasture, at which time he maintains fencing. (Testimony). At one point while maintaining a 50-pound corner post on a fence, he tweaked his right arm. (Testimony). Mr. Evans agreed that farming was physically demanding work. (Testimony).

CONCLUSIONS OF LAW

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 6.904(3).

File No. 20000128.01 – Date of Injury: December 18, 2019

Permanent Disability

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 medical causation is "essentially within the domain of expert testimony." Cedar Rapids Cmty. Sch. Dist. V. Pease, 807 N.W.2d 839, 844-45 (Iowa 2011). The commissioner, as the trier of fact, must "weigh the evidence and measure the credibility of witnesses." Id. The trier of fact may accept or reject expert testimony, even if uncontroverted, in whole or in part. Frye, 569 N.W.2d at 156. When considering the weight of an expert opinion, the fact-finder may consider whether the examination occurred shortly after the claimant was injured, the compensation arrangement, the nature and extent of the examination, the expert's education, experience, training, and practice, and "all other factors which bear upon the weight and value" of the opinion. Rockwell Graphic Sys., Inc. v. Prince, 366 N.W.2d 187, 192 (Iowa 1985). Unrebutted expert medical testimony cannot be summarily rejected. Poula v. Siouxland Wall & Ceiling, Inc., 516 N.W.2d 910 (Iowa App. 1994). Supportive lay testimony may be used to buttress expert testimony, and therefore is also relevant and material to the causation question.

Iowa employers take an employee subject to any active or dormant health problems, and must exercise care to avoid injury to both the weak and infirm and the strong and healthy. Hanson v. Dickinson, 188 Iowa 728, 176 N.W. 823 (1920). While a claimant must show that the injury proximately caused the medical condition sought to be compensable, it is well established that a cause is "proximate" when it is a substantial factor, or even the primary or most substantial cause to be compensable under the Iowa workers' compensation system. Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417 (Iowa 1994); Blacksmith v. All-American, Inc., 290 N.W.2d 348 (Iowa 1980).

Under the Iowa Workers' Compensation Act, permanent partial disability is compensated either for a loss of use of a scheduled member under Iowa Code 85.34(2)(a)-(u) or for loss of earning capacity under Iowa Code 85.34(2)(v). 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).

An injury to a scheduled member may, because of after effects or compensatory change, result in permanent impairment of the body as a whole. Such impairment may in turn be the basis for a rating of industrial disability. It is the anatomical situs of the permanent injury or impairment which determines whether the schedules in Iowa Code 85.34(a) – (u) are applied. Lauhoff Grain v. McIntosh, 395 N.W.2d 834 (Iowa 1986); Blacksmith v. All-American, Inc., 290 N.W.2d 348 (Iowa 1980); Dailey v. Pooley Lumber Co., 233 Iowa 758, 10 N.W.2d 569 (1943); Soukup v. Shores Co., 222 Iowa 272, 268 N.W. 598 (1936).

Where an injury is limited to a scheduled member, the loss is measured functionally, not industrially. Graves v. Eagle Iron Works, 331 N.W.2d 116 (Iowa 1983).

Iowa Courts have repeatedly stated that for those injuries limited to the schedules in Iowa Code 85.34(2)(a)-(u), this agency must only consider the functional loss of the particular scheduled member involved, and not the other factors which constitute an "industrial disability." Iowa Supreme Court decisions over the years have repeatedly cited favorably language in Soukup, 222 Iowa at 277, 268 N.W. at 601 (1936), which states:

> The legislature has definitely fixed the amount of compensation that shall be paid for specific injuries . . . and that, regardless of the education or qualifications or nature of the particular individual, or of his inability . . . to engage in employment . . . the compensation payable . . . is limited to the amount therein fixed.

Our court has even specifically upheld the constitutionality of the scheduled member compensation scheme. Gilleland v. Armstrong Rubber Co., 524 N.W.2d 404 (Iowa 1994). "Loss of use of a member is equivalent to "loss" of the member. Moses v. National Union C.M. Co., 194 Iowa 819, 184 N.W. 746 (1921). Pursuant to Iowa Code 85.34(2)(w), the workers' compensation commissioner may equitably prorate compensation payable in those cases wherein the loss is something less than that provided for in the schedule. Blizek v. Eagle Signal Co., 164 N.W.2d 84 (Iowa 1969).

Additionally, Iowa Code section 85.34(2)(x) requires that permanent partial disability 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." The statute prohibits the undersigned from using agency expertise or lay testimony to determine permanent impairment pursuant to Iowa Code section 85.34(2)(a)-(u). See Iowa Code section 85.34(2)(x). The Agency has adopted the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, to determine the extent of loss or percentage of impairment

for permanent partial disabilities and payment of weekly compensation for permanent partial scheduled injuries. See 876 Iowa Administrative Code 2.4.

The parties stipulated and agreed that Mr. Evans sustained an injury, which arose out of, and in the course of his employment with Bob Brown on July 18, 2019, and that, if the injury is found to be a cause of permanent disability, the disability is a scheduled member disability to the right upper extremity.

Iowa Code section 85.34(2)(m) provides that compensation for the loss of use of the arm is payable on the basis of 250 weeks.

There are two conflicting opinions regarding Mr. Evans' alleged permanent impairment to his right upper extremity. Dr. Rodgers treated the claimant for his right partial distal biceps tendon tear. He performed surgery on Mr. Evans, and followed Mr. Evans' progress after surgery. Dr. Rodgers released the claimant to work with no restrictions, and issued two letters. The first letter, to an insurance adjuster, opined that the claimant had normal supination strength with manual muscle testing on the right side. Based upon his examination, and the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, Dr. Rodgers opined that the claimant had a 0 percent permanent impairment to his right upper extremity. He also concluded that the claimant required no future medical treatment or permanent restrictions. He echoed the same opinions in a letter to claimant's counsel.

Dr. Bruggeman issued an opinion at the solicitation of claimant's counsel. Dr. Bruggeman's opinion indicated that he reviewed Mr. Evans' medical charts. He diagnosed the claimant with right upper extremity weakness of grip and supination following a distal biceps tendon tear. Dr. Bruggeman then assigned an eight percent right upper extremity impairment. Dr. Bruggeman did not indicate whether this was based upon the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition. Additionally, the letter from claimant's counsel seeking the evaluation from Dr. Bruggeman did not ask Dr. Bruggeman to opine based upon the Guides. I reviewed Chapter 16 of the Guides, which pertains to impairment evaluations to the upper extremities. I could not determine from the medical records or the Guides whether Dr. Bruggeman used the Guides to arrive at his final rating.

Dr. Bruggeman's opinions do not comport with applicable Iowa law. I am not allowed to substitute lay testimony or agency expertise in assigning an impairment rating. Additionally, I find the opinions of treating physician Dr. Rodgers to be more persuasive. Dr. Rodgers followed the claimant's progress and performed the surgery on the claimant. He also provided the clearer explanation as to how he arrived at his rating. Therefore, I conclude that the claimant suffered no permanent impairment to his right upper extremity.

Costs

Claimant seeks the award of costs as outlined in Claimant's Exhibit 1. Costs are to be assessed at the discretion of the deputy commissioner hearing the case. See 876 Iowa Administrative Code 4.33; Iowa Code 86.40. 876 Iowa Administrative Code 4.33(86) provides:

> [c]osts taxed by the workers' compensation commissioner or a deputy commissioner shall be (1) attendance of a certified shorthand reporter or presence of mechanical means at hearings and evidential depositions, (2) transcription costs when appropriate, (3) costs of service of the original notice and subpoenas, (4) witness fees and expenses as provided by Iowa Code sections 622.69 and 622.72, (5) the costs of doctors' and practitioners' deposition testimony, provided that said costs do not exceed the amounts provided by Iowa Code sections 622.69 and 622.72, (6) the reasonable costs of obtaining no more than two doctors' or practitioners' reports, (7) filing fees when appropriate, including convenience fees incurred by using the WCES payment gateway, and (8) costs of persons reviewing health service disputes.

Pursuant to the holding in Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839 (Iowa 2015), only the report of an IME physician, and not the examination itself, can be taxed as a cost according to 876 IAC 4.33(6). The Iowa Supreme Court reasoned, "a physician's report becomes a cost incurred in a hearing because it is used as evidence in lieu of the doctor's testimony," while "[t]he underlying medical expenses associated with the examination do not become costs of a report needed for a hearing, just as they do not become costs of the testimony or deposition." Id. (Noting additionally that "[i]n the context of the assessment of costs, the expenses of the underlying medical treatment and examination are not part of the costs of the report or deposition.") The commissioner has found this rationale applicable to expenses incurred by vocational experts. See Kirkendall v. Cargill Meat Solutions Corp., File No. 5055494 (App. December 17, 2018); Voshell v. Compass Group, USA, Inc., File No. 5056857 (App. September 27, 2019).

The claimant requests an award of costs for a DMOS Medical Report, a report from Dr. Bruggeman, and a deposition transcript. In my discretion, I decline to award the claimant costs. There is insufficient evidence in the record to support awarding costs for the reports of Dr. Bruggeman and the "DMOS Medical Report," as the applicable law only allows me to award costs for a report and not an examination. The invoices provided are not detailed enough to show that they are solely for drafting a report.

File No. 21009683.01 – Date of Injury: July 2, 2021

To receive workers' compensation benefits, an injured employee must prove, by a preponderance of the evidence, that the employee's injuries arose out of, and in the course of the employee's employment with the employer. 2800 Corp. v. Fernandez, 528 N.W.2d 124, 128 (Iowa 1995). 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. Id. An injury arises out of employment when a causal relationship exists between the employment and the injury. Quaker Oats Co. v. Ciha, 552 N.W.2d 143, 151 (Iowa 1996). The injury must be a rational consequence of a hazard connected with the employment and not merely incidental to the employment. Koehler Elec. v. Wills, 608 N.W.2d 1, 3 (Iowa 2000). The Iowa Supreme Court has held that an injury occurs "in the course of employment" when:

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

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

The 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 medical causation is "essentially within the domain of expert testimony." Cedar Rapids Cmty. Sch. Dist. v. Pease, 807 N.W.2d 839, 844-45 (Iowa 2011). The commissioner, as the trier of fact, must "weigh the evidence and measure the credibility of witnesses." Id. The trier of fact may accept or reject expert testimony, even if uncontroverted, in whole or in part. Frye, 569 N.W.2d at 156. When considering the weight of an expert opinion, the fact-finder may consider whether the examination occurred shortly after the claimant was injured, the compensation arrangement, the nature and extent of the examination, the expert's education, experience, training, and practice, and "all other factors which bear upon the weight and value" of the opinion. Rockwell Graphic Sys., Inc. v. Prince, 366 N.W.2d 187, 192 (Iowa 1985). Unrebutted expert medical testimony cannot be summarily rejected. Poula v. Siouxland Wall & Ceiling, Inc., 516 N.W.2d 910 (Iowa App. 1994). Supportive lay testimony may be used to buttress expert testimony, and therefore is also relevant and material to the causation question.

Iowa employers take an employee subject to any active or dormant health problems, and must exercise care to avoid injury to both the weak and infirm and the strong and healthy. Hanson v. Dickinson, 188 Iowa 728, 176 N.W. 823 (1920). While a claimant must show that the injury proximately caused the medical condition sought to be compensable, it is well established that a cause is "proximate" when it is a substantial factor, or even the primary or most substantial cause to be compensable under the Iowa workers' compensation system. Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417 (Iowa 1994); Blacksmith v. All-American, Inc., 290 N.W.2d 348 (Iowa 1980).

While a claimant is not entitled to compensation for the results of a preexisting disease, its mere existence at the time of a subsequent injury is not a defense. Rose v. John Deere Ottumwa Works, 247 Iowa 900, 76 N.W.2d 756 (1956). It is well established in workers' compensation that "if a claimant had a preexisting condition or disability, aggravated, accelerated, worsened, or 'lighted up' by an injury which arose out of and in the course of employment resulting in a disability found to exist," the claimant is entitled to compensation. Iowa Dep't of Transp. v. Van Cannon, 459 N.W.2d 900, 904 (Iowa 1990). The Iowa Supreme Court has held,

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

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

The claimant testified that on July 2, 2021, he swung a Chevrolet Silverado bumper onto a bumper rack. He then reached to take off some protective covering from the bumper and immediately felt a sharp pain in his left wrist. Dr. Yankey ordered x-rays, which showed an "old-appearing" ossicle over the volar aspect of the claimant's left wrist. This is likely the evidence of the claimant's prior left hand issues. Dr. Yankey diagnosed the claimant with a left wrist strain.

On July 13, 2021, the claimant indicated that his left wrist had a gradual onset of pain over a two-week period; however, he recounted a specific July 2, 2021, date of injury wherein he felt a snap and increase of pain in his left wrist.

Dr. Paulson ordered x-rays, which showed Mr. Evans to have a degenerative tear of the triangular fibrocartilage complex ("TFCC") of the left wrist along with ulnar abutment syndrome. Dr. Paulson indicated that treatment options included bracing, injections, and potentially a surgery. Dr. Paulson administered a Kenalog injection to Mr. Evans' left wrist. Dr. Paulson also provided work restrictions regarding the claimant's left wrist.

On August 5, 2021, Dr. Paulson wrote a letter to an insurance adjuster. In that letter, he addressed a question regarding the claimant's left wrist issues. Dr. Paulson opined that Mr. Evans' issues were "not a direct result from this accident on July 2, 2021." Dr. Paulson explained that the ulnar abutment syndrome was congenital in nature and that the TFCC tear was degenerative in nature. Dr. Paulson also concluded that the claimant would have "likely become symptomatic from his ulnar positive variance, ulnar impaction, and degenerative tear of the TFCC, no matter what he did for work or activities."

Dr. Paulson wrote another letter to the insurance adjuster on August 23, 2021. In that letter, Dr. Paulson addressed whether the claimant's need for treatment and

ongoing care after July 2, 2021, was an aggravation or exacerbation of a preexisting condition. Dr. Paulson explained that he did not believe that Mr. Evans' issues were due to his July 2, 2021, incident. Dr. Paulson wrote, "I believe he [Mr. Evans] would have been symptomatic today just as much whether he had an accident on that day or not and therefore his work accident was neither an aggravation nor exacerbation."

Dr. Paulson then examined the claimant again on August 26, 2021, wherein Mr. Evans noted that his left wrist pain improved after the Kenalog injection. However, Mr. Evans expressed a desire to proceed with surgical intervention. After that appointment, based upon the opinions of Dr. Paulson, the employer and their insurer denied Mr. Evans' workers' compensation claim related to the alleged July 2, 2021, injury.

Dr. Bruggeman examined the claimant on October 11, 2021, wherein the claimant indicated that he threw a Silverado bumper on a stand, and felt a snap when he reached his hand out. He told Dr. Bruggeman that he had pain for three to four weeks prior to this incident. Dr. Bruggeman confirmed that the claimant suffered from a degenerative type tearing of the central portion of the TFCC, along with mild EDU tendinitis. Dr. Bruggeman indicated that the claimant's left ulnocarpal abutment was an aggravation of a prior wrist problem and recommended a left wrist scope and TFCC debridement along with an ulnar shortening osteotomy.

Dr. Bruggeman then issued a letter on November 30, 2021, noting that the claimant's pain increased after the July 2, 2021, incident, and that this was a preexisting condition aggravated by a work injury. Dr. Bruggeman opined that the claimant could work full time, full duty employment.

Dr. Paulson responded to a check-box type letter from defendants' counsel on November 22, 2022. He indicated that the work incident of July 2, 2021, did not cause the claimant's ulnar abutment syndrome as this is caused by the ulna growing differently than the radius resulting in the ulna bone being longer than the radial bone. Dr. Paulson also opined that the claimant's July 2, 2021, incident did not cause the left TFCC tear, as this was degenerative and developed over time rather than from a single traumatic incident. Dr. Paulson concluded that the incident did not cause permanent aggravation of the claimant's left wrist issues, and that Mr. Evans would have experienced symptoms associated with these issues regardless of the work incident.

Dr. Paulson was a treating physician. The claimant saw him because he did not want to see Dr. Rodgers again. Dr. Paulson works for Iowa Ortho and is an orthopedic physician. Dr. Bruggeman also appears to be an orthopedic physician considering he works for Ortho Nebraska.

I find Dr. Paulson's opinion more persuasive as it relates to the ulnar abutment syndrome. As Dr. Paulson notes, ulnar abutment syndrome is caused by the ulna growing at a different rate than the radius. This is not an issue caused by, or even aggravated by the claimant's work with Bob Brown, nor does any physician explain how this could be caused (or aggravated) by the claimant's work. This is a congenital issue. Additionally, no physician, including Dr. Bruggeman has provided an explanation as to how this injury would cause the claimant to experience pain or disability. No physician has opined as to how this is even an injury and not simply a congenital condition.

Therefore, I find that the ulnar abutment syndrome, and any resulting treatment therefrom did not arise out of, and in the course, of the claimant's employment with Bob Brown.

The situation as it relates to the claimant's left TFCC tear is a bit more complex. Dr. Paulson and Dr. Bruggeman agree that the TFCC tear is a degenerative condition. As Dr. Bruggeman opined, the MRI results showed a "[d]iffuse fraying degenerative type tearing of the central portion of the TFCC." Dr. Paulson opined that the TFCC tear was degenerative in nature due to the ulnar positive variance. Dr. Paulson also concluded that the claimant would have become symptomatic from his degenerative tear of the TFCC no matter what he did for work or activities, and that the claimant would have become symptomatic regardless of his work accident. Dr. Paulson also opined that the July 2, 2021, incident was neither an aggravation nor an exacerbation of the pre-existing injury.

Dr. Bruggeman noted in his examination notes that Mr. Evans "threw a Silverado bumper on a stand. He states he felt something snap when he reached out. He notes that he had pain for three to four weeks prior to the injury." Dr. Bruggeman subsequently diagnosed Mr. Evans with left ulnar-sided wrist pain, an ulnocarpal abutment and "TFC irregularity." Dr. Bruggeman also opined that the injury represented a "preexisting condition that was aggravated by a work injury." Despite this, and a recommendation for surgery, Dr. Bruggeman concluded that Mr. Evans was capable of employment and working full duty, full time, with no restrictions.

Between the claimant's testimony, which I found to be generally credible as it relates to the July 2, 2021, incident, and the findings of Dr. Bruggeman, I find that the July 2, 2021, work incident lit up, and/or aggravated the claimant's degenerative TFCC tear and that the TFCC tear arose out of, and in the course of, Mr. Evans' employment with Bob Brown.

The parties indicated that causation of temporary disability and permanent disability were disputed issues. I find inadequate evidence in the record that the claimant's TFCC tear was a cause of temporary disability. I also find inadequate evidence in the record that the claimant's TFCC tear was a cause of permanent disability. This conclusion is based upon both the opinions of Dr. Paulson and Dr. Bruggeman, which both indicate that the claimant could work full duty. It is also based upon a lack of evidence or opinions from any providers opining as to the claimant's TFCC tear being a cause of temporary disability or permanent disability.

Alternate Medical Care

Iowa Code 85.27(4) provides, in relevant part:

> For purposes of this section, the employer is obliged to furnish reasonable services and supplies to treat an injured employee, and has the right to choose the care. . . . The treatment must be offered promptly and be reasonably suited to treat the injury without undue inconvenience to the employee. If the employee has reason to be dissatisfied with the care offered, the employee should communicate the basis of such dissatisfaction

> to the employer, in writing if requested, following which the employer and the employee may agree to alternate care reasonably suited to treat the injury. If the employer and employee cannot agree on such alternate care, the commissioner may, upon application and reasonable proofs of the necessity therefor, allow and order other care.

Iowa Code 85.27(4).

The employer has the right to choose the provider of care, except where the employer has denied liability for the injury. Iowa Code 85.27. Holbert v. Townsend Engineering Co., Thirty-second Biennial Report of the Industrial Commissioner 78 (Review-Reopening, October 16, 1975). An employer's right to select the provider of medical treatment to an injured worker does not include the right to determine how an injured worker should be diagnosed, evaluated, treated, or other matters of professional medical judgment. Assmann v. Blue Star Foods, File No. 866389 (Declaratory Ruling, May 19, 1988). Reasonable care includes care necessary to diagnose the condition and defendants are not entitled to interfere with the medical judgment of its own treating physician. Pote v. Mickow Corp., File No. 694639 (Review-Reopening Decision, June 17, 1986).

By challenging the employer's choice of treatment - and seeking alternate care – claimant assumes the burden of proving the authorized care is unreasonable. See e.g. Iowa R. App. P. 14(f)(5); Bell Bros. Heating and Air Conditioning v. Gwinn, 779 N.W.2d 193, 209 (Iowa 2010); Long v. Roberts Dairy Co., 528 N.W.2d 122 (Iowa 1995). Determining what care is reasonable under the statute is a question of fact. Long v. Roberts Dairy Co., 528 N.W.2d 122 (Iowa 1995).

An application for alternate medical care is not automatically sustained because claimant is dissatisfied with the care he has been receiving. Mere dissatisfaction with the medical care is not ample grounds for granting an application for alternate medical care. Rather, the claimant must show that the care was not offered promptly, was not reasonably suited to treat the injury, or that care was unduly inconvenient for the claimant. Id. Because "the employer's obligation under the statute turns on the question of reasonable necessity, not desirability," an injured employee's dissatisfaction with employer-provided care, standing alone, is not enough to find such care unreasonable. Id. Reasonable care includes care necessary to diagnose the condition, and defendants are not entitled to interfere with the medical judgement of its own treating physician. Pote v. Mickow Corp., File No. 694639 (Review-Reopening Decision, June 17, 1986).

The claimant is seeking care as recommended by Dr. Bruggeman. To the extent the care recommended by Dr. Bruggeman is related to the claimant's TFCC tear, the alternate medical care is granted. To the extent the care is related to the claimant's left ulnar abutment syndrome, the request for alternate medical care is denied.

Costs

Claimant seeks the award of costs as outlined in Claimant's Exhibit 2. Costs are to be assessed at the discretion of the deputy commissioner hearing the case. See 876

Iowa Administrative Code 4.33; Iowa Code 86.40. 876 Iowa Administrative Code 4.33(86) provides:

> [c]osts taxed by the workers' compensation commissioner or a deputy commissioner shall be (1) attendance of a certified shorthand reporter or presence of mechanical means at hearings and evidential depositions, (2) transcription costs when appropriate, (3) costs of service of the original notice and subpoenas, (4) witness fees and expenses as provided by Iowa Code sections 622.69 and 622.72, (5) the costs of doctors' and practitioners' deposition testimony, provided that said costs do not exceed the amounts provided by Iowa Code sections 622.69 and 622.72, (6) the reasonable costs of obtaining no more than two doctors' or practitioners' reports, (7) filing fees when appropriate, including convenience fees incurred by using the WCES payment gateway, and (8) costs of persons reviewing health service disputes.

Pursuant to the holding in Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839 (Iowa 2015), only the report of an IME physician, and not the examination itself, can be taxed as a cost according to 876 IAC 4.33(6). The Iowa Supreme Court reasoned, "a physician's report becomes a cost incurred in a hearing because it is used as evidence in lieu of the doctor's testimony," while "[t]he underlying medical expenses associated with the examination do not become costs of a report needed for a hearing, just as they do not become costs of the testimony or deposition." Id. (Noting additionally that "[i]n the context of the assessment of costs, the expenses of the underlying medical treatment and examination are not part of the costs of the report or deposition.") The commissioner has found this rationale applicable to expenses incurred by vocational experts. See Kirkendall v. Cargill Meat Solutions Corp., File No. 5055494 (App. December 17, 2018); Voshell v. Compass Group, USA, Inc., File No. 5056857 (App. September 27, 2019).

The claimant requests an award of costs for the filing fee and a report from Dr. Bruggeman. There is insufficient evidence in the record to support awarding costs for the reports of Dr. Bruggeman as the applicable law only allows me to award costs for drafting a report and not an examination. The invoices provided are not detailed enough to show that they are solely for drafting a report. In my discretion, I award the claimant one hundred and 30/100 dollars ($100.30) for the filing fee.

ORDER

THEREFORE, IT IS ORDERED:

File No. 20000128.01 – Date of Injury: December 18, 2019

That the claimant shall take nothing further.

That the defendants shall file subsequent reports of injury (SROI) as required by this agency pursuant to 876 Iowa Administrative Code 3.1(2) and 876 Iowa Administrative Code 11.7.

File No. 21009683.01 – Date of Injury: July 2, 2021

That the claimant's TFCC injury arose out of, and in the course of his employment with the defendant-employer.

That the claimant's left ulnar abutment injury did not arise out of, and in the course of his employment with the defendant-employer.

That the claimant's injury was not a cause of temporary disability.

That the claimant's injury was not a cause of permanent disability.

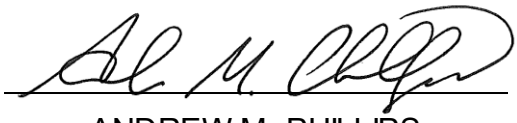
That, to the extent the medical care with Dr. Bruggeman relates to the claimant's TFCC injury, the claimant is entitled to alternate medical care.

That the remainder of the claimant's alternate medical care sought is denied.

That the defendants shall reimburse the claimant one hundred and 30/100 dollars ($100.30) in costs.

That the defendants shall file subsequent reports of injury (SROI) as required by this agency pursuant to 876 Iowa Administrative Code 3.1(2) and 876 Iowa Administrative Code 11.7.

Signed and filed this 1st day of March, 2023.



ANDREW M. PHILLIPS
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Jacob Peters (via WCES)

M. Anne McAtee (via WCES)

Caroline Westerhold (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.