BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

CHARLES ANDERSON, Claimant, vs. BRIDGESTONE AMERICAS INC., Employer, and OLD REPUBLIC INS. CO., Insurance Carrier, and SECOND INJURY FUND OF IOWA, Defendants.	File No. 5067475 ARBITRATION DECISION Head Notes: 1108.50, 1402.40, 1803.01, 2209, 2907, 3202

STATEMENT OF THE CASE

Charles Anderson, claimant, filed a petition in arbitration seeking workers' compensation benefits from Bridgestone Americas, Inc., employer, Old Republic Insurance Company, insurance carrier, and The Second Injury Fund of Iowa as defendants. Hearing was held on April 1, 2021. This case was scheduled to be an in-person hearing occurring in Des Moines. However, due to the declaration of a pandemic in Iowa, the Iowa Workers' Compensation Commissioner ordered all hearings to occur via video means, using CourtCall. Accordingly, this case proceeded to a live video hearing via CourtCall with all parties and the court reporter appearing remotely.

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, as amended on the record, 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.

Claimant, Charles Anderson, was the only witness to testify live at trial. The evidentiary record also includes Joint Exhibits JE1-JE6; Claimant's Exhibits 7-13, Exhibit 14, pages 174-185, and Exhibit 15; Defendants' Exhibits B-F; and Second Injury

Fund of Iowa Exhibits AA, BB, DD, and EE. All exhibits were received without objection. However, it should be noted that Exhibit CC is a First Report of Injury, which pursuant to Iowa Code section 86.11 may only be admitted into evidence if notice under section 85.23 is an issue. Because notice is not an issue in this case, the Second Injury Fund withdrew Exhibit CC. It was also brought to my attention that Claimant's Exhibit 14, page 186 is also a First Report of Injury; Claimant's counsel agreed that it should also be excluded from the record. Therefore, Claimant's Exhibit 14, page 186 was excluded. The evidentiary record closed at the conclusion of the arbitration hearing.

The parties submitted post-hearing briefs on May 3, 2021, at which time the case was fully submitted to the undersigned.

ISSUES

The parties submitted the following issues for resolution:

1. Whether claimant sustained an injury which arose out of and in the course of employment on October 31, 2018.

2. Whether the alleged injury was the cause of temporary disability, and if so, the extent of claimant's entitlement.

3. Whether the alleged injury was the cause of permanent disability, and if so, the nature and extent of claimant's entitlement.

4. Whether claimant is entitled to benefits from the Second Injury Fund of Iowa.

5. Whether claimant is entitled to payment of past medical bills.

6. Assessment of costs.

FINDINGS OF FACT

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

Claimant, Charles Anderson, filed a petition against Bridgestone Americas, Inc., employer, and Old Republic Insurance Company, insurance carrier, alleging injury to his right arm and right shoulder. The petition alleges the injury occurred at work with an alleged injury date of October 31, 2018. During the course of the litigation, claimant filed a motion to amend his petition to add the Second Injury Fund of Iowa ("the Fund") as a defendant. In his first amended petition he alleged a first qualifying injury of February 4, 1988 for a left arm injury. At that time, he was working at Bridgestone Americas, Inc., ("Bridgestone") and developed left carpal tunnel syndrome. Another deputy workers' compensation commissioner granted the motion to amend the petition. Claimant filed a second motion to amend his petition to add another date of first loss of April 1, 1973 for a right foot and ankle injury. No resistance was filed to the motion to

amend the petition for a second time; that same deputy granted the motion. (Testimony; Amended Petitions and Rulings)

At the time of the hearing Mr. Anderson was 68 years old. He is right-hand dominant. Mr. Anderson graduated from high school in 1971; he has no further formal education. He worked for Bridgestone for over 40 years. He started working for Bridgestone on March 1, 1974 and his last day working there was October 31, 2018. Prior to working for Bridgestone, Mr. Anderson worked as a laborer pouring and finishing concrete. He also worked laying telephone cables. This entailed digging holes, filling in holes, running a trencher, and boring underneath streets. He also worked at the V.A. for a few months as an apprentice electrician but left this to go work at Bridgestone.

Mr. Anderson's first job at Bridgestone was stock cutting; he did this for approximately 9 years. This job involved lifting, stretching his arms out and holding weight out in front of his body. Mr. Anderson described it as physical work, but not nearly as physical as tire building. He also worked for a short time on the sort line at Bridgestone. In this position he picked up tires of varying sizes and stacked them. He described it as a physical, fast-paced job with constant walking, lifting, and turning. The tires ranged in weight from approximately 20 to 50 pounds. (Testimony)

During his last 35 years at Bridgestone, Mr. Anderson worked as a tire builder. He moved to this position because it was good money and he was willing to work hard for the money. Bridgestone made tires which varied in size from passenger tires to tractor tires. However, in the 1980's they stopped making passenger tires and since that time, have made all heavy-duty tractor tires. Mr. Anderson testified that a tire builder had to be strong, have strong hands, and had to constantly fight through problems. In his job as a tire builder, he had to use both hands and both feet at the same time. While performing his job, he had to put both arms up approximately 7 feet and to tear ply both directions. Some plies tore easily; some tore really hard; it depended on the gauge or thickness of the ply. A tire builder had to hold his hands and arms out in front of them to tear the plies. If the ply was too thick, then the builder had to cut the material with a hot knife, which involved the same motion of the upper extremities, but while holding a knife. Mr. Anderson described work that involved intense use of his hands and upper extremities and considerable hand and finger strength. His work also involved the use of his hands and upper extremities away from his torso. (Testimony; Cl. Ex. 14, pp. 175-178)

On October 31, 2018, while performing his tire building job, Mr. Anderson tried to reach up to his control panel, but he could not get his right arm past shoulder height. His shoulder felt like it was locking up. The problems he was experiencing with his right arm and shoulder affected his ability to perform his job, so he asked to go to medical. He had also been having problems with his hand going numb for the past month or so. He went to see Todd Troll, M.D., who Mr. Anderson described as the company doctor. Dr. Troll saw him that same day at the Bridgestone plant. (Testimony)

Dr. Troll noted that Mr. Anderson was seen for an evaluation of right shoulder pain and numbness in his right hand. Dr. Troll asked Mr. Anderson if he was about

ready to retire. He told Mr. Anderson that he needed to find a new job. The note states he had no specific injury. He has been building tires for nearly 40 years. Mr. Anderson reported that certain activities, such as tearing stock, caused shoulder pain. Mr. Anderson reported approximately one week ago, he had increased pain in his right shoulder. Dr. Troll's impression was right shoulder pain with mild impingement signs and possible carpal tunnel syndrome. Dr. Troll advised Mr. Anderson to see his primary care physician for the carpal tunnel symptoms. With regard to the shoulder, Dr. Troll noted that there had been a nonspecific work injury. He stated, "I think he is experiencing some wear and tear degenerative changes in his right shoulder and the activities he does in his job tend to exacerbate this non-work-related issue." (JE1, p. 5) Dr. Troll recommended the physical therapist at the plant show Mr. Anderson some exercises to reduce his shoulder symptoms. Mr. Anderson was returned to regular duty work without restrictions. (Testimony; JE1, p. 5)

On that same day Mr. Anderson returned to his workstation and tried to perform his job; he was not able to perform his duties very well. He returned to work the next day and got a pass to go to medical right away. Dr. Troll advised Mr. Anderson there was nothing he could do for him. It was clear to Mr. Anderson that Dr. Troll was not going to provide him any treatment, so he asked Dr. Troll if he could see his own physician; Dr. Troll said yes. (Testimony)

Mr. Anderson went to see his own doctor, David Harrison, D.O., on November 5, 2018. He reported he had pain in his right posterior shoulder for the last 2 weeks. No acute injury, but he does perform very physically demanding work with his upper extremities. Mr. Anderson reported that his pain became significant on October 31 to the point that he went to medical at his job. He was also experiencing issues with his right hand being numb with pins and needles sensation in his hand. He has pain with activities at work, such as cutting items. The assessment was right shoulder pain. Dr. Harrison stated that this could certainly be an overuse injury related to his occupation. The recommendation was for over-the-counter Aleve and a referral to an orthopedic specialist. (JE2, pp. 19-21)

Mr. Anderson returned to see Dr. Harrison on November 16, 2018, for follow-up of continued right posterior shoulder pain in the region of the supraspinatus and infraspinatus tendon. He also reported paresthesias of his right hand, possibly carpal tunnel syndrome. Mr. Anderson had been unable to work. Dr. Harrison's assessment was persistent right posterior shoulder pain as well as paresthesias of the right hand. Mr. Anderson was interested in proceeding with orthopedic surgery. He was kept off work. Dr. Harrison stated that Mr. Anderson's motivation to get back to work was lukewarm. (JE2, p. 23)

On November 28, 2018, Mr. Anderson saw Jeffrey P. Davick, M.D. at Des Moines Orthopaedic Surgeons, P.C. Mr. Anderson reported onset of right shoulder pain at work while performing repetitive motions. He felt a pop in the anterolateral aspect of the right shoulder. His pain increases with overhead and rotational activities. Dr. Davick's impression was right shoulder probable rotator cuff tear. He noted Mr. Anderson has a large, type III acromion and had had injuries at work. Dr. Davick suspected he had a torn rotator cuff. He ordered an MRI arthrogram. (JE3, pp. 56-57)

On December 10, 2018, Mr. Anderson returned to Dr. Harrison. The MRI arthrogram was delayed due to the involvement of worker's compensation. Dr. Harrison's assessment included persistent right shoulder pain, clinically rotator cuff tear, right hand paresthesias. The doctor noted that all have been persistently problematic since around October 31. Mr. Anderson believes these are related to his occupation. The plan was for Mr. Anderson to proceed with the MRI, and he was to remain off work. (JE2, pp. 24-25)

An MRI was performed on December 21, 2018. The imaging revealed moderate to advanced supraspinatus tendinosis with near full thickness bursal-sided tear; mild to moderate infraspinatus tendinosis; suspect small partial tear of subscapularis; and moderate to advanced AC joint arthrosis, small subacromial spurring. Dr. Davick recommended surgery. Dr. Harrison performed a preoperative evaluation on January 14, 2019. Dr. Harrison noted Mr. Anderson had worked as a tire builder for the past 45 years and his shoulder was worn out. (JE4, p. 77; JE2, p. 26)

On February 7, 2019, Dr. Davick performed right shoulder arthroscopy with a subacromial decompression, distal clavicle excision and open rotator cuff repair. The postoperative diagnosis was right shoulder traumatic full thickness rotator cuff tear with acromioclavicular joint arthropathy. Mr. Anderson testified that the surgery was beneficial. Prior to the surgery, he was not able to lift his right arm, but was able to after the surgery. (JE5, pp. 79-80; testimony)

Mr. Anderson returned to Dr. Harrison on February 25, 2019. He was three weeks post right rotator cuff surgery as well as resection of the distal right clavicle. He was recovering well and was to follow-up in one month. The doctor anticipated that it would be a full 6 months before he could return to work, which would be approximately August 7, 2019. Mr. Anderson continued to follow-up with Dr. Harrison. (JE2, pp. 27-36)

On August 6, 2019, Mr. Anderson saw Dr. Harrison. He reported that he saw Dr. Davick the day before and was told it may take up to a full year for recovery. Mr. Anderson continued to have problems with numbness and tingling of his right hand. (JE2, pp. 37-38)

At the recommendation of Dr. Davick, Mr. Anderson saw Jeffrey Rodgers, M.D., also at DMOS. Dr. Rodgers ordered testing on his right upper extremity. On October 8, 2019, Dr. Rodgers performed right carpal tunnel release and right ulnar nerve transposition. (JE5 pp. 81-82)

Mr. Anderson saw Dr. Davick on November 4, 2019. He reported some continued weakness in his right shoulder. His shoulder pain was much less than it was prior to surgery. Dr. Davick noted that Mr. Anderson had recently had cubital and carpal tunnel surgery. He recommended that once Mr. Anderson was able, he should resume his exercises for the right rotator cuff. (JE3, p. 67)

On November 27, 2019, Dr. Davick authored a missive to defendants' counsel. He placed Mr. Anderson at maximum medical improvement (MMI) as of August 5, 2019. He utilized the AMA Guides, Fifth Edition, and assigned 8 percent shoulder

impairment. Dr. Davick did not see a connection between the right shoulder surgery and the subsequent right carpal tunnel surgery. Dr. Davick did not feel that Mr. Anderson had a recent re-tear in his cuff due to a reaching incident. (JE3, p. 73)

On February 12, 2020, Dr. Davick saw Mr. Anderson for follow-up of his shoulder. He noted things were about the same. He again noted that Mr. Anderson was at MMI. Dr. Davick also noted that he had previously provided numbers for an impairment rating and those numbers remained unchanged. (JE3, pp. 69-70)

Mr. Anderson returned to Dr. Harrison for medication management on February 24, 2020. He reported continued numbness, tingling, and weakness of his right upper extremity. He anticipates an attempted return to work in early May. Dr. Harrison completed disability paperwork regarding Mr. Anderson. Dr. Harrison indicated that Mr. Anderson had been continuously disabled from work from November 2, 2018 through May 1, 2020 due to his right shoulder and right arm. (JE2, pp. 41-50)

On March 6, 2020, Dr. Davick issued a missive to claimant's counsel. Dr. Davick opined that Mr. Anderson's right shoulder rotator cuff tear was caused by his work as a tire builder. He reiterated that he felt Mr. Anderson had 8 percent shoulder impairment based on the AMA Guides, Fifth Edition. Dr. Davick stated that he does not believe Mr. Anderson is capable of working as a tire builder. He believes that repetitive lifting up to 75 pounds is too much for his shoulder condition. (JE3, pp. 73, 76)

At the request of his attorney, Mr. Anderson saw Jacqueline M. Stoken, D.O. for an IME on July 8, 2020. In addition to examining Mr. Anderson, Dr. Stoken also reviewed the medical records she was provided. Dr. Stoken opined that the October 31, 2018 injuries were casually linked to Mr. Anderson's employment. She noted he was performing repetitive work with repetitive grasping and pinching. Dr. Stoken utilized the AMA Guides, Fifth Edition, to address the issue of impairment. For the 1988 left upper extremity issue, she determined there was zero impairment. For the right shoulder injury and the right carpal and cubital tunnel syndromes she assigned a total of 42 percent right upper extremity impairment which is the equivalent of 25 percent whole person impairment. She assigned permanent work restrictions as follows: avoid working at or above shoulder level, avoid lifting more than 10 pounds on a frequent basis and 20 pounds on an occasional basis. Dr. Stoken placed him in the light category of work. (Cl. Ex. 7, pp. 100-110)

At the request of his attorney, Mr. Anderson saw Dr. Stoken again on February 23, 2021. Dr. Stoken stated she was asked to assess Mr. Anderson's prior injuries for the Second Injury Fund. In 1973 his feet were run over by a trencher, and he suffered a broken right ankle. His left foot did not sustain any fractures. He was also injured in 1989 while working at Firestone as a tire builder. He developed bilateral carpal tunnel syndrome. He underwent a left carpal tunnel release in 1989. He still experiences some intermittent numbness of his left hand. Grasping items and making a fist makes his symptoms worse. At the appointment, he also reported aching, stabbing, intermittent, sharp, penetrating, and miserable pain in his right foot. Dr. Stoken's impression included: status post work injury in 1973 with right ankle fracture; status post cumulative trauma to the left upper extremity with left carpal tunnel syndrome;

status post left carpal tunnel release in 1989; and chronic right ankle pain and left upper extremity numbness. Dr. Stoken utilized the Fifth Edition of the AMA Guides to assign impairment. For the carpal tunnel she assigned 2 percent impairment of the left upper extremity which equates to 1 percent whole person impairment. For the right ankle she assigned 7 percent impairment of the lower extremity related to ankle extension, 2 percent lower extremity related to ankle inversion and 2 percent impairment of the lower extremity related to ankle eversion. (Cl. Ex. 7, pp. 115-118)

The first issue to be addressed is causation with regard to Mr. Anderson's October 31, 2018 right shoulder injury. Dr. Troll believed Mr. Anderson was experiencing some wear and tear degenerative changes in his right shoulder and the activities he performed at work exacerbated the non-work-related issues. (JE1, p. 5) Dr. Harrison felt Mr. Anderson's shoulder pain certainly may be an overuse injury related to his occupation. He noted that Mr. Anderson had worked as a tire builder for decades and his shoulder was worn out. (JE2, pp. 19-26) Dr. Stoken's impression included status post work injury on October 31, 2018 with right rotator cuff tear. She opined the October 31, 2018 injuries are causally linked to his employment. (Cl. Ex. 7, pp. 100-111) Dr. Davick stated that Mr. Anderson's right shoulder rotator cuff tear was caused by his work as a tire builder. (JE3, p. 76) I find Mr. Anderson has demonstrated that he sustained an October 31, 2018, injury to his right shoulder which arose out of and in the course of his employment. I further find that as the result of that injury he sustained permanent impairment.

Both Dr. Davick and Dr. Stoken offered their opinions regarding permanent impairment for the right shoulder injury. Dr. Davick assigned 8 percent shoulder impairment. He stated that his impairment rating was based on the Guides to the Evaluation of Permanent Impairment, Fifth Edition, but he failed to cite the portion(s) of the Guides he relied on to calculate Mr. Anderson's impairment. Typically, under The Guides, impairment to the shoulder is expressed in terms of the upper extremity or the whole person. Unfortunately, the rating provided by Dr. Davick does not provide the reader with enough information to follow his methodology or determine the basis of his rating. Dr. Stoken also utilized the AMA Guides, Fifth Edition, to render her impairment rating. Dr. Stoken set forth the specific pages, figures, and tables that she utilized to reach her impairment rating. Using the Combined Values Chart on page 604 of the Guides, her impairment ratings for the right shoulder injury amount to 28 percent of the right upper extremity. In this case, I find the impairment rating of Dr. Stoken carries greater weight than that of Dr. Davick.

Next, we turn to the issue of causation with regard to Mr. Anderson's October 31, 2018 right arm injury. Dr. Stoken's impression included status post work injury on October 31, 2018 with right rotator cuff tear, right carpal and cubital tunnel syndrome. She opined the October 31, 2018 injuries are causally linked to his employment. (Cl. Ex. 7, pp. 100-111) Dr. Davick treated Mr. Anderson's right shoulder, and referred Mr. Anderson to his partner, Dr. Rodgers, for his carpal and cubital tunnel syndrome. Dr. Rodgers did not offer his opinion on causation for Mr. Anderson's right arm. Dr. Davick stated that he did "not see any causal connection between Mr. Anderson's right shoulder surgery and subsequent right carpal tunnel surgery." (JE3, p. 73) However,

Dr. Davick did not address whether the right carpal and cubital tunnel syndromes were related to the October 31, 2018 date of injury. On the issue of causation regarding Mr. Anderson's right arm, I find the opinion of Dr. Stoken to carry the greatest weight. I find Mr. Anderson has demonstrated that he sustained an October 31, 2018, injury to his right upper extremity which arose out of and in the course of his employment. I further find that as the result of that injury he sustained permanent impairment.

Dr. Stoken utilized the Fifth Edition of The Guides and cited the specific portions of The Guides she relied on to render her impairment rating. Dr. Stoken assigned 20 percent of the right upper extremity due to Mr. Anderson's right carpal and cubital tunnel syndrome. I find that Dr. Stoken's opinion regarding permanent impairment of the right upper extremity is persuasive.

With regard to restrictions for the October 31, 2018 injury, it is clear that Mr. Anderson cannot return to his prior work at Bridgestone. Dr. Davick stated, "I do not believe Mr. Anderson is capable of returning to work as a tire builder. I think the repetitive lifting up to 75 pounds would be too much given his shoulder condition." (JE3, p. 76) Dr. Stoken assigned permanent work restrictions to Mr. Anderson. She restricted him to avoid working at or above shoulder level and avoid lifting more than 10 pounds on a frequent basis and 20 pounds on an occasional basis. She placed him in the light category of work. (Cl. Ex. 7, p. 110) I find that as a result of the October 31, 2018 work injury, Mr. Anderson has permanent work restrictions. I further find that as a result of the October 31, 2018 work injury, Mr. Anderson is restricted from returning to the work he has performed since 1974. These restrictions also prevent him from performing many of the jobs he held prior to Bridgestone.

Dr. Harrison kept Mr. Anderson off of work. Neither Dr. Harrison nor Dr. Davick returned Mr. Anderson to work at Bridgestone. (Testimony) As of April 30, 2020, Mr. Anderson had been gone from work for 18 months. It is Bridgestone's policy that if an employee has been out of work for 18 months, then there will be a voluntary quit or a termination of the employment. Mr. Anderson retired because he felt he did not have any other choice. If he did not retire, then he would have been terminated and lost his benefits, including his insurance. Prior to his injuries, Mr. Anderson planned to continue working as long as his wife continued to work. He was fully qualified for retirement as of the time of the injury. At the time of the hearing Mrs. Anderson was still working. The record is void of evidence of the specific number of years claimant was anticipated to continue working into the future if he had not been injured. Given Mr. Anderson's age and his proximity to the typical age of retirement, I find that he was likely to retire within 8 years of his injury. (Testimony; JE3, pp. 45-50)

At the time of hearing, Mr. Anderson still had difficulties with his right upper extremity and shoulder. He is able to lift his arm up and down now, which he was not able to do prior to the surgeries. His arm is still weak when it is away from his torso. He can hardly lift anything; he feels he has no strength in his arm. He still has numbness and tingling in his elbow and little finger. (Testimony)

Mr. Anderson received his retirement benefits in a lump sum. He is also receiving monthly Social Security retirement benefits. Since his employment with

Bridgestone ended, Mr. Anderson has not formally applied for any jobs. Mr. Anderson did not testify that he thinks he is incapable of working. He hopes to eventually get a job at a local greenhouse. He has a friend that is a foreman there and he thinks he would hire him. Mr. Anderson is not sure what the hours or pay would be at the greenhouse. He believes the job would involve unloading trucks and that the work would be within his restrictions. However, Mr. Anderson is concerned about catching COVID-19, so he has been laying pretty low. He is waiting for the time to be right with COVID-19 before he seeks employment at the greenhouse or elsewhere. (Testimony) I find that Mr. Anderson's hesitancy to return to the workforce is related to his concerns about COVID-19 and not related to the work injury.

Considering Mr. Anderson's age, educational background, employment history, ability to retrain, lack of motivation to obtain a job, length of healing period, permanent impairment, and permanent restrictions, the number of years in the future it was reasonably anticipated that the employee would work at the time of the injury, and the other industrial disability factors set forth by the Iowa Supreme Court, I find that he has sustained a 50 percent loss of future earning capacity as a result of his work injury with Bridgestone.

Claimant is seeking healing period benefits related to his right shoulder injury. The record demonstrates that Dr. Harrison felt Mr. Anderson was unable to work due to his right shoulder and right arm beginning November 2, 2018. On November 26, 2019, Dr. Davick stated that claimant reached MMI for his shoulder as of August 5, 2019. Dr. Davick saw Mr. Anderson for his shoulder on February 12, 2020 and noted his shoulder was the same. He also stated claimant was at MMI and that his rating from November of 2018 remained unchanged. (JE3, pp. 69-70) Claimant contends he did not reach MMI until February 12, 2020. However, I find claimant reached MMI on August 5, 2019 as originally stated by Dr. Davick. (JE3, p. 73) Although in his February 12, 2020 clinical note Dr. Davick reiterated Mr. Anderson was at MMI, he did not state that this was a new MMI date. There is no indication that there was any substantial change in Mr. Anderson's condition from the original MMI date. In fact, in February 2020, Dr. Davick stated things with Mr. Anderson's shoulder were about the same and his prior numbers had not changed. The AMA Guides define maximal medical improvement (MMI) as "[a] condition or state that is well stabilized and unlikely to change substantially in the next year, with or without medical treatment. Over time, there may be some change; however, further recovery or deterioration is not anticipated." (AMA Guides, p. 601) Therefore, I find Mr. Anderson reached MMI for his right shoulder on August 5, 2019.

Claimant is seeking healing period benefits for his right arm injury. Although Mr. Anderson saw Dr. Troll in the medical department at Bridgestone on October 31, 2018, Dr. Troll did not place any restrictions on his activities. Dr. Harrison later opined that Mr. Anderson was unable to work from November 2, 2018 through May 1, 2020 due to his right shoulder and right arm. (JE2, p. 50) I find that as of November 2, 2018, Mr. Anderson was unable to work due to his injury. Dr. Stoken did not address the issue of MMI with regard to Mr. Anderson's right upper extremity. The last time Mr. Anderson saw Dr. Rodgers, the treating surgeon for his right upper extremity, was on November

15, 2019. At that time, Dr. Rodgers noted that Mr. Anderson's condition was stable. (JE3, p. 68) As noted above, the AMA Guides defines maximal medical improvement (MMI) as "[a] condition or state that is well stabilized and unlikely to change substantially in the next year, with or without medical treatment. Over time, there may be some change; however, further recovery or deterioration is not anticipated." (AMA Guides, p. 601) I find that Mr. Anderson reached MMI for his right upper extremity on November 15, 2019.

We now turn to the Second Injury Fund portion of this case. Mr. Anderson has alleged he sustained a loss of use of his right foot or leg due to an April 1, 1973 injury. In 1973, Mr. Anderson's feet were run over by a trencher and his right ankle was broken. His injury did not require surgical intervention, but he was placed in a cast. A little less than a year after the right foot/leg injury, Mr. Anderson started his job at Bridgestone. Prior to starting his job at Bridgestone, Mr. Anderson underwent a physical examination on February 27, 1974. The examiner did not note any physical limitations for the right leg or foot. Mr. Anderson was cleared to work without restrictions. Mr. Anderson testified that his job at Bridgestone was physically demanding and required constant walking. He performed his job at Bridgestone for decades without any restrictions placed on his right leg or foot. Mr. Anderson's accounts of any ongoing problems with his right foot or leg have not been entirely consistent. Mr. Anderson testified in his deposition that he was only having problems with this right shoulder and right arm. During his first IME with Dr. Stoken, Mr. Anderson did not report any right ankle pain or other symptoms. However, during his second IME with Dr. Stoken he reported a litany of problems with his right ankle. Mr. Anderson told Dr. Stoken that his ankle pain interfered with his ability to walk one block. At the arbitration hearing, Mr. Anderson testified that his right ankle was never the same after the 1973 injury. Due to the inconsistencies in Mr. Anderson's testimony, I do not find him to be credible on this particular issue. (Testimony; Fund Ex. DD, p. 1; Fund Ex. EE, pp. 13-14; Cl. Ex. 7)

The only physician in this case to assign any permanent impairment to Mr. Anderson for his right leg or foot is Dr. Stoken. During Mr. Anderson's first IME with Dr. Stoken she reviewed all of the medical records provided to her and took a medical history from Mr. Anderson. He did not mention any difficulty with his right foot or leg. Dr. Stoken did not assign any permanent impairment, nor permanent restrictions to his right ankle/foot. (Cl. Ex. 7, pp. 100-110) It was not until the second time that he saw Dr. Stoken, that he made any mention of his right foot or leg. At the time of the second IME which took place in February of 2021, Dr. Stoken assigned permanent impairment for the 1973 injury. (Cl. Ex. 7, pp. 115-119)

I do not find Dr. Stoken's impairment rating for Mr. Anderson's 1973 right ankle/foot injury to be persuasive. Mr. Anderson testified about the physical nature of the work he performed for Bridgestone. At Bridgestone he was constantly walking and on his feet. His job also required considerable standing, stooping, turning, bending, and walking. According to Mr. Anderson, his right ankle was never a "roadblock or barrier" to performing his job. (Tr. pp. 26, 90) He worked at Bridgestone for decades without any restrictions on his right lower extremity. I find that Mr. Anderson failed to

demonstrate that he sustained any loss of use of his right ankle or foot as the result of the 1973 injury.

Mr. Anderson alleges he sustained a loss of use of his left hand or arm due to a February 4, 1988 injury. As the result of the injury, Mr. Anderson underwent left carpal tunnel release surgery performed by Dr. Grundberg on February 20, 1989. Dr. Grundberg released Mr. Anderson to return to full duty work on November 13, 1989. (JE5, p. 78; JE3, p. 55) Mr. Anderson returned to working as a tire builder without any restrictions. Dr. Grundberg noted that he had full range of motion when he released him from his care in November of 1989. In July 2020, Mr. Anderson told Dr. Stoken that he did not have any pain in his left wrist. She noted that there was no impairment to his left upper extremity and he had full range of motion, strength, and sensation. (Testimony; JE3, p. 54; Cl. Ex. 7, pp. 108-109) During the second IME in February of 2021, Dr. Stoken noted intermittent numbness and range of motion deficits and she assigned permanent impairment. Dr. Stoken did not explain why this was the first time the range of motion deficits were noted. (Cl. Ex. 7)

I do not find Dr. Stoken's opinions regarding permanent impairment to Mr. Anderson's left arm for the 1988 injury to be persuasive. Mr. Anderson testified about how physically demanding his work at Bridgestone was, including the strength he needed to have in his fingers and hands. A tire builder needed to have strong hands in order to perform the job duties. Mr. Anderson does not and has not had any restrictions placed on his left wrist. Mr. Anderson was able to perform his physically demanding job for decades, without any restrictions. I find that Mr. Anderson failed to demonstrate that he sustained any loss of use of his left hand or arm as the result of the 1988 injury.

CONCLUSIONS OF LAW

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).

Based on the above findings of fact, I conclude Mr. Anderson sustained an injury to his right arm and right shoulder which arose out of and in the course of his employment with Bridgestone on October 31, 2018. I further conclude that Mr. Anderson sustained permanent disability to his right arm and permanent disability to his right shoulder as the result of the work injury.

We now turn to the issue of permanency benefits. A determination must be made as to how Mr. Anderson should be compensated. Iowa Code section 85.34 addresses how injured workers should be compensated for their permanent disabilities. The Code states, "[f]or all cases of permanent partial disability compensation shall be paid as follows:" Iowa Code section 85.34(2). The Code then sets forth a list of specific injuries and a fixed schedule of weeks assigned for the loss of use of certain body parts. It should be noted, the Iowa Legislature modified section 85.34 in 2017 by adding the shoulder to the list of scheduled members. Prior to the 2017 changes, a shoulder was considered proximal to the arm and compensated on the basis of industrial disability. See Alm v. Morris Barick Cattle Co., 240 Iowa 1174, 38 N.W.2d 161 (1949). When an injury resulted in a scheduled member injury and to a portion of the body that is not included in the schedule, claimant was compensated for both injuries on an industrial disability basis. See Mortimer v. Fruehauf Corp., 502 N.W.2d 12, 16 (Iowa 1993). In the present case, there is a single date of injury which resulted in permanent disability to the right arm and permanent disability to the right shoulder. There is a dispute in this case regarding which subsection of Iowa Code 85.34(2) applies to these facts.

When reviewing section 85.34(2), the first potential applicable section is "m" which states: "[t]he loss of two-thirds of that part of an arm between the shoulder joint and the elbow joint shall equal the loss of an arm and the compensation therefor shall be weekly compensation during two hundred fifty weeks." Iowa Code section 85.34(2)(m)(2017). In this case, Mr. Anderson did sustain a loss of his arm, but he also sustained a loss of his shoulder; thus, I conclude section "n" is not the appropriate section in this case.

The second potential applicable subsection is "n" which states: "[f]or the loss of a shoulder, weekly compensation during four hundred weeks." Iowa Code section 85.34(2)(n)(2017). In this case Mr. Anderson did sustain a loss of his shoulder, but he also sustained a loss of his arm; thus, I conclude section "n" is not the appropriate section in this case.

The third potential applicable subsection is "t" which states:

> The loss of both arms, or both hands, or both feet, or both legs, or both eyes, or any two thereof, caused by a single accident, shall equal five hundred weeks and shall be compensated as such; however, if said employee is permanently and totally disabled the employee may be entitled to benefits under subsection 3.

Iowa Code section 85.34(2)(t)(2017).

In this case, Mr. Anderson sustained permanent disability to his right arm and permanent disability to his right shoulder, caused by a single accident. A shoulder is not a listed member in subsection "t." In 2017 the legislature did not change the Code to include a "shoulder" within the scheduled members that may be compensated pursuant to section 85.34(2)(t) for loss resulting from a single accident. Therefore, I conclude that subsection "t" is not the appropriate section in this case.

The next potential subsection is "v" which is often referred to as the "catch-all" section. This section states in pertinent part:

> In all cases of permanent partial disability other than those hereinabove described or referred to in paragraphs *"a"* through *"u"* hereof, the compensation shall be paid during the number of weeks in relation to five hundred weeks as the reduction in the employee's earning capacity caused by the disability bears in relation to the earning capacity that the employee possessed when the injury occurred.

Iowa Code section 85.34(2)(v)(2017).

Based on the above findings of fact, I conclude Mr. Anderson sustained permanent disability to his right arm and permanent disability to his right shoulder, caused by a single accident. I concluded that Mr. Anderson's permanent partial disability does not fall into any single subsection listed in "a" through "u" and therefore, the plain language of the statute provides that he shall be compensated as set forth in subsection "v." I conclude that Mr. Anderson has demonstrated that he should be compensated on the basis of an unscheduled injury based on a 500-week schedule.

Next, a determination must be made as to the extent of industrial disability that claimant is entitled to receive. The 2017 amendments to section 85.34 changed the analysis of industrial disability. The pertinent portion of Iowa Code section 85.34(2)(v) states:

> A determination of the reduction in the employee's earning capacity caused by the disability shall take into account the permanent partial disability of the employee and the number of years in the future it was reasonably anticipated that the employee would work at the time of the injury. If an employee who is eligible for compensation under this paragraph returns to work or is offered work for which the employee receives or would receive the same or greater salary, wages, or earnings than the employee received at the time of the injury, the employee shall be compensated based only upon the employee's functional impairment resulting from the injury, and not in relation to the employee's earning capacity. Notwithstanding section 85.26, subsection 2, if an employee who is eligible for compensation under this paragraph returns to work with the same employer and is compensated based only upon the employee's functional impairment resulting from the injury as provided in this

> paragraph and is terminated from employment by that employer, the award or agreement for settlement for benefits under this chapter shall be reviewed upon commencement of reopening proceedings by the employee for a determination of any reduction in the employee's earning capacity caused by the employee's permanent partial disability.

Iowa Code section 85.34(2)(v)(2017).

In the present case, Mr. Anderson did not return to work with the same employer. Thus, his compensation shall not be based only upon the functional impairment resulting from the injury; rather, his compensation shall be based in relation to his earning capacity.

When evaluating a claimant's loss of earning capacity, the 2017 amendments requires this agency to "take into account the permanent partial disability of the employee and the number of years in the future it was reasonably anticipated that the employee would work at the time of the injury." Iowa Code section 85.34(2)(v)(2017). Based on the above findings of fact, I concluded Mr. Anderson was likely to retire within 8 years of his injury. This is a factor taken into consideration in determining his loss of earning capacity and industrial disability.

Since claimant has an impairment to the body as a whole, an industrial disability has been sustained. Industrial disability was defined in Diederich v. Tri-City Ry. Co. of Iowa, 219 Iowa 587, 258 N.W. 899 (1935) as follows: "It is therefore plain that the legislature intended the term 'disability' to mean 'industrial disability' or loss of earning capacity and not a mere 'functional disability' to be computed in the terms of percentages of the total physical and mental ability of a normal man."

Functional impairment is an element to be considered in determining industrial disability which is the reduction of earning capacity, but consideration must also be given to the injured employee's age, education, qualifications, experience, motivation, loss of earnings, severity and situs of the injury, work restrictions, inability to engage in employment for which the employee is fitted and the employer's offer of work or failure to so offer. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963); Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961).

Considering Mr. Anderson's age, educational background, employment history, ability to retrain, lack of motivation to obtain a job, length of healing period, permanent impairment, and permanent restrictions, the number of years in the future it was reasonably anticipated that the employee would work at the time of the injury, and the other industrial disability factors set forth by the Iowa Supreme Court, I find that he has sustained a 50 percent loss of future earning capacity as a result of his work injury with Bridgestone. See Iowa Code section 85.34(2)(v)(2017). As such, Mr. Anderson has demonstrated entitlement to 250 weeks of permanent partial disability benefits.

Compensation for permanent partial disability shall begin when "it is medically indicated that maximum medical improvement from the injury has been reached and that the extent of loss or percentage of permanent impairment can be determined . . . ." Iowa Code section 85.34(2)(2017). Compensation shall be paid in relation to 500 weeks as the disability bears to the body as a whole. Mr. Anderson reached MMI for the October 31, 2018 injuries as of November 15, 2019. I conclude that his permanent partial disability benefits shall commence on November 15, 2019.

Claimant is seeking healing period benefits in this case. Under Iowa law, if an employee sustained permanent partial disability, the employee is entitled to healing period benefits. The benefits are to begin "on the first day of disability after the injury, and until the employee has returned to work or it is medically indicated that significant improvement from the injury is not anticipated or until the employee is medically capable of returning to employment substantially similar to the employment in which the employee was engaged at the time of the injury, whichever occurs first." Iowa Code section 85.34(1)(2017).

Specifically, claimant is seeking healing period benefits for his right shoulder injury. The record demonstrates Dr. Harrison felt Mr. Anderson was unable to work due to his right shoulder and right arm beginning on November 2, 2018. As noted above, I concluded Mr. Anderson reached MMI for his right shoulder on August 5, 2019. (JE3, p. 73) Based on the above findings of fact, I conclude Mr. Anderson is entitled to healing period benefits for his right shoulder from November 2, 2018 through August 4, 2019. Claimant is also seeking healing period benefits for his right upper extremity injury.

Based on the above findings of fact, I conclude Mr. Anderson was unable to work due to his right shoulder and right arm from November 2, 2018 through May 1, 2020. (JE2, p. 50) I further conclude Mr. Anderson reached MMI for his right upper extremity on November 15, 2019. Mr. Anderson's healing period for his right upper extremity ended on November 14, 2019. At the start of the hearing, claimant agreed that he is not entitled to any overlapping healing periods. (Tr. p. 10) Thus, claimant has demonstrated entitlement to healing period benefits for his right upper extremity from August 5, 2019 through November 14, 2019.

Additionally, claimant is seeking payment of past medical expenses. The employer shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance, and hospital services and supplies for all conditions compensable under the workers' compensation law. The employer shall also allow reasonable and necessary transportation expenses incurred for those services. The employer has the right to choose the provider of care, except where the employer has denied liability for the injury. Iowa Code Section 85.27. Holbert v. Townsend Engineering Co., Thirty-second Biennial Report of the Industrial Commissioner 78 (Review-Reopening October 1975).

Claimant is seeking payment of past medical and mileage expenses related to the October 31, 2018 work injury. (Cl. Ex. 9) Specifically, claimant is seeking reimbursement for medical expenses incurred from November 5, 2018 through March 23, 2020. Claimant is also seeking reimbursement for medical mileage he incurred.

Defendant-employer does not argue that they are not responsible for these expenses. Rather, their argument is that the right shoulder and right arm injuries were not related to the work injury. Because I concluded claimant carried his burden of proof to prove that his right shoulder and right upper extremity were causally connected to the October 31, 2018 work injury, it follows that defendant-employer is responsible for these expenses. I conclude defendant-employer is responsible for the medical expenses and medical mileage set forth in claimant's exhibit 9.

As previously noted, claimant is seeking benefits from the Second Injury Fund of Iowa. Section 85.64 governs Second Injury Fund liability. Before liability of the Fund is triggered, three requirements must be met. First, the employee must have lost or lost the use of a hand, arm, foot, leg, or eye. Second, the employee must sustain a loss or loss of use of another specified member or organ through a compensable injury. Third, permanent disability must exist as to both the initial injury and the second injury.

The Second Injury Fund Act exists to encourage the hiring of handicapped persons by making a current employer responsible only for the amount of disability related to an injury occurring while that employer employed the handicapped individual as if the individual had had no preexisting disability. See Anderson v. Second Injury Fund, 262 N.W.2d 789 (Iowa 1978); 15 Iowa Practice, Workers' Compensation, Lawyer, Section 17:1, p. 211 (2014-2015).

In the present case, claimant alleged two possible injuries as a first qualifying loss in his case against The Fund. Based on the above findings of fact, I conclude that Mr. Anderson failed to carry his burden of proof to demonstrate by a preponderance of the evidence that he sustained a loss of use of his left arm as the result of his 1988 injury. Additionally, I conclude that Mr. Anderson failed to carry his burden of proof to demonstrate by a preponderance of the evidence that he sustained a loss of use of his right foot or leg as the result of the 1973 injury. As such, Mr. Anderson has failed to prove that the Fund's liability has been triggered. Mr. Anderson's claims against the Fund have failed. I conclude Mr. Anderson failed to prove entitlement to benefits from the Fund. As such, all other issues regarding his claim for benefits from the Second Injury Fund of Iowa are rendered moot.

Finally, claimant is seeking an assessment of costs as set forth in Claimant's Exhibit 8. Costs are to be assessed at the discretion of the Iowa Workers' Compensation Commissioner or the deputy hearing the case. 876 IAC 4.33. I find that claimant's case against the defendant-employer was generally successful. I exercise my discretion and conclude that an assessment of costs against the defendant-employer is appropriate.

First, claimant is seeking the filing fee in the amount of $100.00; I find this is an appropriate cost under subsection 7.

Second, claimant is seeking service fees in the amount of $6.85; I find this is an appropriate cost under subsection 3.

Third, claimant is seeking costs in the amount of $375.00 for "cost of doctor's reports submitted as evidence." (Cl. Ex. 8, p. 122) Claimant's Exhibit 8 does not contain

any supporting documentation or any indication which doctor's reports he is referring to, nor any invoices to support this amount. I exercise my discretion and do not assess defendant for this alleged cost.

Fourth, claimant is seeking the "Cost of IME (not reimbursed by Defendant)" in the amount of $2,200.00. Claimant does not attach an invoice or any supporting documentation to Exhibit 8, nor does the statement of costs indicate the date of the IME. I exercise my discretion and do not assess the IME as a cost in this case.

Finally, claimant is seeking the costs of obtaining medical records in this case; I find this is not an appropriate cost under 876 IAC 4.33.

Thus, defendant is assessed costs totaling $106.85.

ORDER

THEREFORE, IT IS ORDERED:

Claimant shall take nothing from the Second Injury Fund of Iowa as the result of these proceedings.

All weekly benefits shall be paid at the stipulated rate of nine hundred seventy-three and 03/100 dollars ($973.03).

Defendant-employer shall pay healing period benefits from November 2, 2018 through November 14, 2019.

Defendant-employer shall pay two hundred fifty (250) weeks of permanent partial disability benefits commencing on November 15, 2019.

Defendant-employer shall be entitled to credit for all weekly benefits paid to date.

Defendant-employer is entitled to credit under Iowa Code section 85.38(2) as set forth on the hearing report.

Defendant-employer shall pay accrued weekly benefits in a lump sum together with interest at an annual rate equal to the one-year treasury constant maturity published by the federal reserve in the most recent H15 report settled as of the date of injury, plus two percent. See Deciga-Sanchez v. Tyson Fresh Meats, Inc., File No. 5052008 (App. March 6, 2018) (Ruling on Defendants' Motion to Enlarge, Reconsider or Amend Appeal Decision re: Interest Rate Issue).

Defendant-employer shall reimburse claimant costs in the amount of one hundred six and 85/100 dollars ($106.85).

Defendant-employer and the Second Injury Fund of Iowa shall file subsequent reports of injury (SROI) as required by this agency pursuant to rules 876 IAC 3.1 (2) and 876 IAC 11.7.

Signed and filed this _____2nd_____ day of September, 2021.

ERIN Q. PALS
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Channing Dutton (via WCES)

Timothy Wegman (via WCES)

Sarah Timko (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.