

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

DANIEL HEMMINGER,

Claimant,

vs.

LENNOX INDUSTRIES, INC.,

Employer,

and

INDEMNITY INSURANCE COMPANY
OF NORTH AMERICA,Insurance Carrier,
Defendants.File Nos. 5068459
5068460

ARBITRATION DECISION

Head Note Nos.: 1100; 1803, 1803.1,
2500, 2501

STATEMENT OF THE CASE

Claimant, Daniel Hemminger has filed a petition for arbitration seeking worker's compensation benefits against Lennox Industries, Inc., employer, and Indemnity Insurance Company of North America, insurer, both as defendants.

In accordance with agency scheduling procedures and pursuant to the Order of the Commissioner in the matter of the Coronavirus/COVID-19 Impact on Hearings, the hearing was held on Thursday, September 4, 2020, via Court Call. The case was considered fully submitted on September 25, 2020, upon the simultaneous filing of briefs.

The record consists of Joint Exhibits 1-8, Claimant's Exhibits 1-7, Defendants Exhibits A-F, and the testimony of claimant.

ISSUES

For File No. 5068459 (Right Shoulder, Date of injury: November 1, 2018):

1. Whether claimant sustained an injury arising out of and in the course of his employment on November 1, 2018.
2. Whether the alleged injury was a cause a permanent disability;
3. Whether that disability is scheduled member or industrial in nature;
4. The extent of permanent disability, if any,
5. Entitlement to reimbursement of an independent medical examination under Iowa Code section 85.39;
6. Future medical care;
7. Assessment of costs.

For File No. 5068460, (Left Shoulder, Date of Injury: January 16, 2018):

1. Whether claimant sustained an injury arising out of and in the course of his employment on January 16, 2018.
2. Whether claimant is entitled to temporary disability from February 15, 2019 through August 15, 2019.
3. Whether the alleged injury is the cause of a permanent disability;
4. Whether that disability is scheduled member or industrial in nature;
5. Whether claimant is entitled to reimbursement of medical expenses;
6. Whether claimant is entitled to reimbursement of an independent medical examination under Iowa Code section 85.39;
7. Assessment of costs.

STIPULATIONS

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

For File No. 5068459 (Right Shoulder, Date of injury: November 1, 2018):

The parties stipulate the claimant was an employee at the time of the alleged injury, but dispute that the claimant sustained an injury arising out of and in the course of his employment on November 1, 2018.

They agreed that if the injury is found to be a cause of permanent disability the commencement date for permanent partial disability benefits would be June 3, 2019. At the time of the alleged injury the claimant's gross earnings were \$727.00 per week. The claimant was single and entitled to one exemption. Based on the foregoing the weekly benefit rate is \$458.76.

Defendants waive all affirmative defenses.

Prior to the hearing the claimant was paid 3.247 weeks of compensation at the rate of \$458.76. The parties agree that the defendant is entitled to a credit of that amount against any award of permanent disability.

For File No. 5068460, (Left Shoulder, Date of Injury: January 16, 2018):

The parties agree that the claimant was an employee at the time of the alleged injury, but dispute that he sustained an injury arising out of and in the course of his employment on January 16, 2018.

While the defendants dispute the claimant's entitlement to temporary benefits, they stipulate that if they are liable for the alleged injury claimant is entitled to benefits from February 15, 2019 through August 15, 2019. They further agree that although entitlement cannot be stipulated, claimant was off work during this time.

If an injury is found to be the cause of a permanent disability, the commencement date for permanent partial disability benefits would be August 16, 2019.

At the time of the alleged injury the claimant's gross earnings were \$807.00 per week. Claimant was single and entitled to one exemption. Based on the foregoing the weekly benefit rate is \$492.42.

Defendants waive all affirmative defenses.

As for the disputed medical expenses, the parties stipulate that the fees and prices charged by the providers are fair and reasonable, that those medical providers would testify as to the reasonableness of their fees and/or treatment set forth in the listed expenses and the defendants do not offer contrary evidence. Further, although causal connection of the expenses to the work injury cannot be stipulated, the list of expenses are at least causally connected to the medical condition upon which a claim of injury is based.

Prior to the hearing, the defendants paid \$8,158.19 in the form of sick pay or disability income and they are entitled to a credit of that amount against any award of benefits.

FINDINGS OF FACT

Claimant, Daniel Hemminger, filed two petitions for arbitration seeking worker's compensation benefits arising out of an alleged injury to his left shoulder on January 16, 2018 and an alleged injury to his right shoulder on November 1, 2018. At the time of the hearing, claimant was a 55-year-old person. He had graduated from high school and studied business administration for two years at a community college, as well as one year at Hamilton Business College.

Prior to his employment with the defendant employer, claimant worked minimum wage jobs at a retail establishment and a motel. He began working for the defendant employer on November 19, 1996 and other than a period of layoffs, he has been continuously employed with the defendant employer since that time.

His past medical history is significant for left carpal tunnel release on February 24, 2014 and right shoulder surgery on June 1, 2012. Claimant asserted bilateral shoulder issues arising out of work in 2014. (See Agency File No. 5040913)

His position prior to the injury and since 2005, was as a forklift operator. He continues to work as a forklift operator with no official restrictions. At the plant, claimant believes that assembly work is the least physically demanding whereas the stockroom floors are the most physically demanding. As a forklift driver, he operates the forklift and must load and unload boxes from the forklift. The weight of the boxes range from very light to 67 pounds. Most frequently he was lifting boxes that weighed approximately 30 pounds and he would often be placing them on a shelf shoulder height or above. Lifting of the boxes is spread throughout the day for approximately three hours out of his eight hour shift.

Claimant missed no work as a result of his November 1, 2018, injury to his right shoulder.

Joint Exhibit 1 are notes kept by the medical department of the defendant employer. The first entry included is October 30, 2012, regarding complaints of numbness and tingling in the left hand. (JE 1:2) It was noted that claimant was in therapy for a back condition already but he was working full duty. (JE 1:2) He complained of left shoulder issues on May 2, 2012, and again on June 1, 2015. (JE 1:2) On June 4, 2015, he was seen for right periscapular region pain. Charles Mooney, M.D., mentioned that because claimant was unable to provide any reasonable description of injury or any information regarding the details of the weight, size, ergonomic positioning of the materials being lifted, that there was not medical plausibility that the right shoulder pain was work related. (JE 1:2) Claimant returned to work fully duty. He later complained of mid back pain on June 27, 2017. (JE 1:2) In a January 2, 2018 medical record pertaining to management of claimant's diabetes, it was noted that claimant suffered from rotator cuff tendinitis from April 26, 2017 to the present. (JE 2:6)

On March 6, 2018, claimant reported left shoulder pain to the company nurse. (JE 1:12) According to the claimant, the left shoulder had been hurting for a couple of months. He had been treating at home with aspirin and had not had any improvement. He believed that lifting boxes and using his left arm to turn the steering wheel was causing his pain. Claimant was referred to Dr. Mooney for an appointment on April 2, 2018.

During the April 2, 2018 visit, Dr. Mooney noted the claimant had been evaluated for shoulder pain in 2008 and 2009, as well as 2012. (JE 3:12) He characterized the claimant as suffering from left shoulder impingement of the long-standing nature and did not believe that based on the job analysis that claimant's left shoulder pain arose from any work activities. (JE 3:12) An injection was administered and claimant was returned to work. (JE 3:12 – 13)

On May 24, 2018, claimant returned to Dr. Mooney reporting that the injection helped to alleviate the pain by over 50 percent, but that he still had pain with overhead motion. (JE 3:16) Dr. Mooney continued to diagnose claimant with chronic left shoulder impingement, recommended that he continue with his home exercises and that there was no need for additional workup. (JE 3:16)

Claimant continued to complain of left shoulder pain. Because of Dr. Mooney's retirement, claimant was referred to Timothy Vinyard, M.D. On August 20, 2018, claimant was seen at Iowa Orthopedic by Dr. Vinyard. (JE 4:21) An MRI was ordered and claimant was released to return to work with no lifting over 20 pounds and to avoid climbing, and work above head or shoulder level. (JE 4:22)

On September 5, 2018, claimant requested to be referred to a different doctor as he was concerned about the efficacy of surgery at the hands of Dr. Vinyard. Claimant had heard that other employees had had surgery with Dr. Vinyard and were not happy with the results. (JE 1:1) Claimant's request to see a different doctor was not granted.

On September 13, 2018, claimant returned to his MRI. (JE 4:23) The history claimant provided included symptoms starting seven months ago, heavy lifting at work, right rotator cuff repair which had good results. (JE 4:23) The MRI showed a partial thickness articular surface tear of the infraspinatus anteriorly, severe osteoarthritis of the AC joint and severe tendinitis of the biceps. (JE 4:24) The claimant wished to proceed with surgery and he was given a modified work duty of no overhead lifting. (JE 4:24 to 25) Dr. Vinyard then wrote a letter to the defendant insurer on October 4, 2018, regarding the issue of causation. (JE 4:26)

Please allow me to address your questions as outlined in your letter dated September 20, 2018. In your letter, you have asked me to essentially address causation for his injury. I would like to say that in this case it is a very difficult determination to make with anything approaching absolute certainty. The patient has been having symptoms for approximately 7 months. He denies any obvious injury. He has a history of shoulder problems with his other side. It is my opinion, within a reasonable degree of medical certainty, that the vast majority of his symptoms and need for treatment are due to an underlying pre-existing degenerative type condition in his shoulder. He does not have a full-thickness tear of his rotator cuff. He cannot pinpoint one incident that would seem to cause significant structural damage. I have reviewed his job description. There is a known association between workers that require heavy lifting, especially overhead work, and the development of pain and structural damage within the shoulder. However, I do not believe this to be the case with this patient. If the patient had a temporary exacerbation of this underlying pre-existing condition, a reasonable treatment for that would have been a cortisone injection, anti-inflammatory medication and physical therapy. It is my understanding he has attempted all three of those treatment modalities. Unfortunately, he continues to have symptoms. Essentially, he has failed conservative treatment for his shoulder condition. I do think it is reasonable for the patient to consider surgical intervention for his shoulder and I have recommended this treatment option to the patient.

(JE 4:26)

Dr. Vinyard recommended surgery, but did not believe it to be covered by worker's compensation. (JE 4:27) On October 23, 2018, defendant insurer informed the claimant via letter that as a result of their investigation, as well as the opinions of Dr. Vinyard, the January 16, 2018 injury was not work related. (Ex C:3, 24)

Claimant sought out care on his own with Thomas Greenwald, M.D., on February 5, 2019. (JE 7:62) On examination, claimant had pain and weakness on resisted supraspinatus activity, as well as resisted forward flexion. (JE 7:62) Claimant desires to proceed with surgery, which Dr. Greenwald agreed to. (JE 7:62) Surgery took place on March 3, 2019. (JE 7:63) During the operation, Dr. Greenwald noted that claimant's rotator cuff had just a few fibers left and had basically suffered a full thickness tear medium in size. (JE 7:64) By May 7, 2019, claimant was improving with mild soreness.

(JE 7:67) He reported ongoing weakness, limited range of motion and pain in June 2019. (JE 7:71) Claimant was kept off of heavy duty labor and encouraged to continue with physical therapy. (JE 7:71) Dr. Greenwald released claimant on August 8, 2019 to return to work on August 16, 2019. (JE 7:76) As of that date, claimant had near full range of motion and strength and was ready to return to work. (JE 7:72) On December 3, 2019, Dr. Greenwald penned an opinion letter opining that claimant's physical exertion which included lifting at shoulder level and above was a substantial contributing factor to materially aggravating, accelerating, worsening, or lighting up his left shoulder condition. (JE 7:77)

On November 9, 2018, claimant reported to the defendant employer's medical facility that he would like to be seen for right shoulder pain. He stated that a week prior on November 1, 2018, he was holding onto the handle of his fork truck when he was climbing down and felt a pop in his shoulder. (JE 1:1) He felt a pop later that week in his shoulder again and on November 9, 2018, reported pain at 9/10 on a 10 scale. (JE 1:1) He had been sick with the flu and opted not to immediately report the injury, hoping that it would improve. It did not. He was referred to Iowa Orthopedic again where he was initially seen by nurse practitioner Kelly Jo Balignasay. (JE 4:30) The history given to NP Balignasay included reference to the right shoulder decompression, labral debridement and debridement of partial surface tear of the supraspinatus tendon on June 1, 2012 performed by Dr. Sneller. (JE 4:30) Dr. Kirkland's IME at the time attributed increased pain to exacerbation caused by steering the forklift. (JE 4:30) NP Balignasay recommended claimant be referred to an orthopaedic surgeon.

On November 19, 2018, claimant was seen again by Dr. Vinyard but this time for the right shoulder. Dr. Vinyard recommended a magnetic resonance arthrogram before future treatment options were discussed. (JE 4:33) The MRI showed a moderate supraspinatus tendinosis with a superimposed articular -sided tear, a small focus of contrast dissecting posteriorly from the articular-sided tear along the deep surface of the infraspinatus tendon. There was no full thickness rotator cuff tear or atrophy of the cuff musculature. (JE 4:40, joint Exhibit 6:61) Initially claimant underwent conservative treatment including a corticosteroid injection. (JE 4:41) In a follow-up visit on February 11, 2019, Dr. Vinyard documented the claimant was happy with his progress and that he would continue with physical therapy. (JE 4:45)

On March 25, 2019, claimant was seen again by Dr. Vinyard with reports of having significant pain following his left shoulder injury but that his right shoulder was progressing well. (JE 4:48) During the April 22, 2019 visit, claimant reported limited range of motion and mild pain throughout his right shoulder. (JE 4:51) Dr. Vinyard encouraged him to continue with physical therapy and home exercises. Claimant was placed on a 25-pound lifting restriction and advised to return in four weeks. (JE 4:52)

During the June 3, 2019 follow-up visit with Dr. Vinyard, claimant described his pain level at 3 on a 10 scale. (JE 4:55) Claimant continued to complain of weakness and right shoulder pain. (JE 4:55) Dr. Vinyard did not believe surgery would be beneficial and returned claimant to work without restrictions, identifying June 3 as the date of maximum medical improvement. (JE 4:56)

Following this visit, Dr. Vinyard wrote a letter of opinion reaffirming that right shoulder surgery would not be beneficial and that claimant may progress in his activities as tolerated. Due to the reduced range of motion, Dr. Vinyard assessed a 1 percent upper extremity impairment rating. (JE 4:58)

On November 15, 2019, Laura Lasack, M.D., provided clarification for a DNR application that she filled out at the request of the claimant. The DNR application was on authorization to use a crossbow for deer and/or turkey hunting by handicapped persons. (JE 2:11) Dr. Lasack had marked that claimant was permanently handicapped but in the opinion letter, wrote that she had given the designation of permanently handicapped as “precautionary in nature” and that she would defer to Dr. Greenwald for any restrictions. (JE 2:9)

Claimant maintains he has never returned to his pre-January 2018 condition. Claimant testified at hearing that the last time he had treatment to his right shoulder was with Dr. Sneller in 2012. He did not remember the 2017 complaints at hearing. Claimant had his memory refreshed on cross examination when excerpts of his testimony from a 2014 workers’ compensation hearing and when he was shown other medical records.

Claimant now drives a forklift in the assembly area. It is less physical and he does not have to lift boxes; however, he did admit that his change of job was due to a tornado that struck the plant in July 2019 rather than his work injury. He is making more today than he was in January 2018. He testified he would have difficulty performing the work he had done prior to January 2018 due to the lifting requirement. He testified that he has limited flexibility and strength and feels weakness in both shoulders. He testified that he still plays golf and still hunts but has modified other recreational activities.

Defendants assert an issue of credibility based on the discrepancies between the October 17, 2014, arbitration transcript, the August 5, 2020, deposition transcript and the September 4, 2020, transcript. The primary issue appears to be claimant’s recollection of his pre-2018 shoulder injuries and treatment. During the August 5, 2020, deposition, claimant testified he did not recall when his left shoulder began to hurt or whether there were any events in 2017 that caused the left shoulder pain to increase. (Ex G, p. 13) In his October 17, 2014, testimony, claimant described popping and snapping in the right shoulder and significant pain. (Ex F: 33-35)

The best records appear to be the contemporaneous complaints claimant made to his care providers which were consistent. He did not recall similar pain and discomfort in his left shoulder preceding 2018 and the popping he experienced in 2018 to his right shoulder was different than the popping and snapping in his right shoulder predating the fall of 2018.

During the 2014 hearing, claimant maintained a bilateral shoulder loss and ongoing pain and dysfunction. Following that hearing, claimant’s condition largely improved. He had little treatment even if there was notations of chronic pain in an unrelated January 2018 medical record. The lack of treatment from 2015 through 2017 bolsters claimant’s testimony that he was largely pain free and symptom free leading up to February 2018.

Thus, these are not significant inconsistencies as defendants describe them. Claimant has returned to work. Other than Dr. Mooney, no other medical providers has described claimant as a malingerer or exaggerator of symptoms. During cross examination, claimant did respond to the questions without much evasiveness although his testimony on direct examination had to be clarified on more than one occasion. Based on the foregoing, it is found that claimant was a credible witness; however, more weight is given to the contemporaneous complaints of the claimant recorded in the medical records and if there is a contradiction between the claimant's recollection at hearing and the recorded medical history, the recorded medical history is relied upon.

On March 23, 2020, claimant underwent an independent medical examination with Mark Kirkland, D.O. (Claimant's Exhibit 1) During the examination, claimant complained of weakness in both shoulders but no neck pain. During the night, pain could wake him if he laid directly on either the right or left shoulder. He had pain while steering the wheel of the forklift and pain when he lifts his left arm over his head. (CE 1:3) At the time of the examination, claimant was working full-time and prior to the coronavirus problem, he was working overtime. He was able to do his regular job with no restrictions although indicated that if there were any heavy boxes to lift he asked for assistance.

The claimant was able to remove his shirt without any guarding or discomfort, he had good symmetrical shoulder motion, and no pain with the cervical range of motion. Side bending to the left triggered some pain in the right side of the neck, but he had good grip strength and good reflexes. He had good range of motion with testing of the right and left shoulder. He was negative for pain upon palpation on either shoulder and only slightly reduced ranges of motion bilaterally.

Dr. Kirkland was left with the impression that claimant suffered from acromioclavicular joint internal derangement/ osteoarthritis that was aggravated on the left by his repetitive lifting boxes at shoulder level and above and by traumatic incident on his right while working for the defendant. (CE 1:6) He further agreed that the surgery performed on the claimant's left shoulder and right shoulder were the result of work-related injuries.

Because of the reduced range of motion in the left shoulder, Dr. Kirkland assessed a 17 percent impairment on the left upper extremity and a 15 percent impairment on the right upper extremity. Together these impairments give a total of 18 percent to the whole person. Dr. Kirkland did not assign any permanent work restrictions as claimant was tolerating his full-time job without official modifications. (CE 1:7)

The independent medical examination was \$5,500.00 with the dictation fee of \$150.00. (CE 1:9)

On June 12, 2020, claimant underwent an IME with William C. Jacobson, M.D. (Ex A) The examination showed a well-healed surgical site with decreased range of motion bilaterally. (Ex A:3) Dr. Jacobson mentioned that in 2008 and 2012, claimant had shoulder symptomology that was not work related and that an IME by Dr. Kirkland now

indicated both shoulder problems were work-related. (Ex D:A) Additionally, Dr. Jacobson mentioned that it was his understanding that both workers' compensation claims for the shoulder had been denied. (Ex A:4)

As to the left shoulder, Dr. Jacobson opined that claimant suffered a cumulative degenerative tear of the rotator cuff secondary to the underlying AC joint arthritis and spurring and the subacromial spur. (Ex A:4) A degenerative tear of this type of shoulder injury is not uncommon per Dr. Jacobson and he went on to conclude that assuming claimant's description of his job is accurate, that the work claimant performed did aggravate a pre-existing condition. (Ex A:5) If the description was not accurate, claimant's work did not contribute to his current symptomatology. (Ex A:5) Based on his review of the medical records, Dr. Jacobson agreed that claimant reached MMI when Dr. Greenwald released claimant to full duty work. (Ex A:5) For impairment, Dr. Jacobson assessed a 9 percent upper extremity impairment or 5 percent of the whole person.

For the right shoulder, Dr. Jacobson opined claimant had only a temporary aggravation based on the previous surgery to claimant's right shoulder and that the new MRI showed no changes. (Ex A:5) The temporary aggravation returned to baseline on or around February 1, 2019, which is the typical timeframe it takes for one to recover from a temporary aggravation of this type of condition in the right shoulder. (Ex A:6)

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 R. App. P. 6.14(6).

The claimant has the burden of proving by a preponderance of the evidence that the alleged injury actually occurred and that it both arose out of and in the course of the employment. Quaker Oats Co. v. Ciha, 552 N.W.2d 143 (Iowa 1996); Miedema v. Dial Corp., 551 N.W.2d 309 (Iowa 1996). The words "arising out of" referred to the cause or source of the injury. The words "in the course of" refer to the time, place, and circumstances of the injury. 2800 Corp. v. Fernandez, 528 N.W.2d 124 (Iowa 1995). An injury arises out of the employment when a causal relationship exists between the injury and the employment. Miedema, 551 N.W.2d 309. The injury must be a rational consequence of a hazard connected with the employment and not merely incidental to the employment. Koehler Electric v. Wills, 608 N.W.2d 1 (Iowa 2000); Miedema, 551 N.W.2d 309. An injury occurs "in the course of" employment when it happens within a period of employment at a place where the employee reasonably may be when performing employment duties and while the employee is fulfilling those duties or doing an activity incidental to them. Ciha, 552 N.W.2d 143.

The claimant has the burden of proving by a preponderance of the evidence that the injury is a proximate cause of the disability on which the claim is based. A cause is proximate if it is a substantial factor in bringing about the result; it need not be the only cause. A preponderance of the evidence exists when the causal connection is probable rather than merely possible. George A. Hormel & Co. v. Jordan, 569 N.W.2d 148 (Iowa

1997); Frye v. Smith-Doyle Contractors, 569 N.W.2d 154 (Iowa App. 1997); Sanchez v. Blue Bird Midwest, 554 N.W.2d 283 (Iowa App. 1996).

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

File No. 5068460 (Left shoulder):

The general consensus of most of the experts in this case is that claimant's left shoulder condition was materially aggravated by his work. Dr. Greenwald, claimant's treating surgeon opined that claimant's left shoulder was aggravated by lifting boxes at or above shoulder height. Dr. Kirkland, the IME doctor selected by claimant, also opined that the repetitive lifting at shoulder height or above aggravated claimant's osteoarthritis. Dr. Jacobson opined provisionally that if claimant's description of his job regarding lifting heavy boxes "multiple times per day for multiple hours a day for five to six days a week" then the work materially aggravated claimant's condition. While on cross examination, claimant admitted that the lifting was only a portion of his work duties, he did testify unrebutted that he lifted approximately three hours a day every work day. This would satisfy Dr. Jacob's requirements. Only Dr. Vinyard, the treating orthopaedic doctor chosen by the defendants, disagreed with this assessment. Dr. Vinyard agreed that work of claimant's type could result in structural problems in the shoulder but because claimant did not respond to conservative treatment to the shoulder in the form of therapy or injections, the claimant's condition was not work related. Dr. Vinyard's conclusion was confusing as he appeared to be saying that an aggravation of an underlying condition had to respond to conservative treatment in order for it to be considered arising out of and in the course of employment. Thus, the greater weight of the evidence is that claimant's work of lifting 30 to 50-pound boxes at shoulder height or above approximately three hours a day, five days a week, materially aggravated an underlying degenerative condition in his shoulder.

Claimant would be entitled to future medical care, reimbursement of past medical expenses, and the IME fee. The parties also agreed that if the injury was deemed to arise out of and in the course of his employment, claimant would be entitled to temporary benefits from February 15, 2019, through August 15, 2019.

File No. 5068459 (Right shoulder):

Claimant testified that he sustained a traumatic injury to his right shoulder on November 1, 2018. The expert opinions on the right shoulder are largely in agreement that claimant suffered an aggravation of a degenerative condition but Dr. Jacobson opined it was solely a temporary aggravation. Dr. Jacobson's opinion is given less weight as claimant's condition, timing, and type of work is more consistent with a work-related injury than a non-work aggravation. Thus, it is found that claimant suffered a work related injury to his right shoulder.

Claimant is entitled to future medical care, reimbursement of past medical expenses and the IME fee.

As for both shoulders, there is a dispute as to whether the claimant sustained an industrial or scheduled member loss. This is not fully briefed but there was no evidence presented at hearing that the claimant's condition migrated into his back or neck. The claimant was diagnosed and treated for shoulder injuries.

Both injuries occurred in 2018 and thus are subject to the modifications to Iowa Code section 85.34. Under the 2017 change, shoulder injuries are considered scheduled member in nature and compensated on a functional basis rather than an industrial basis. Iowa Code section 85.34(2)(b) (2017). The new subsection states, in its entirety: "For the loss of a shoulder, weekly compensation is paid based on four hundred weeks." Iowa Code § 85.34(2)(n). Because the left shoulder and right shoulder were not caused by a single accident, claimant is not entitled to compensation under 85.34(2)(t). The left shoulder was the result of cumulative work and the right shoulder was the result of a traumatic incident several months later.

Under the Iowa Workers' Compensation Act, permanent partial disability is compensated either for a loss or loss of use of a scheduled member under Iowa Code section 85.34(2)(a)-(t) or for loss of earning capacity under section 85.34(2)(u). The extent of scheduled member disability benefits to which an injured worker is entitled is determined by using the functional method. Functional disability is "limited to the loss of the physiological capacity of the body or body part." Mortimer v. Fruehauf Corp., 502 N.W.2d 12, 15 (Iowa 1993); Sherman v. Pella Corp., 576 N.W.2d 312 (Iowa 1998).

As to whether claimant sustained a permanent partial disability, claimant was released without restrictions and is back to work full duty. When he was released by Dr. Greenwald, claimant had near full range of motion and strength. Claimant testified that his current work does not require him lift but that he still suffers from weakness and some pain. Dr. Kirkland assessed a 17 percent impairment of the left upper extremity due to reduced range of motion and Dr. Jacobson opined claimant suffered a 9 percent loss. Because the contemporaneous reports given by the claimant are given more weight as found previously, Dr. Jacobson's opinion is closest to the condition that claimant reported to Dr. Greenwald on the day of his release. Dr. Greenwald released claimant with no restrictions. Further, despite the percentage impairment assigned due to loss of range of motion, Dr. Kirkland assigned no restrictions. Based on his last

appointment with Dr. Greenwald and the opinion of Dr. Jacobson, it is found claimant has a 9 percent left upper extremity loss.

For the right shoulder, Dr. Kirkland assigned 15 percent impairment of the right upper extremity. Dr. Jacobson opined that claimant suffered only a temporary aggravation given that the claimant's MRI showed no changes from the previous right shoulder surgery. Dr. Vinyard assigned a 1 percent right upper extremity rating. On the day of his release, claimant described his pain level at 3 on a 10-scale and continued to complain of weakness and pain. For the right shoulder, Dr. Kirkland's assessment is closer to the condition of the claimant at the time of his release of care from Dr. Vinyard than the assessment of Dr. Jacobson. Dr. Vinyard's 1 percent impairment does not match up with the claimant's symptoms at the time of the release. Thus, it is found that claimant sustained a 15 percent impairment to the right upper extremity.

ORDER

THEREFORE, it is ordered:

For File No. 5068459 (Right Shoulder, Date of injury: November 1, 2018):

That defendants employer and insurer are to pay unto claimant sixty (60) weeks of permanent partial disability benefits at the rate of four hundred fifty-eight and 76/100 dollars (\$458.76) per week from June 3, 2019.

That claimant is entitled to future medical care.

That defendants shall reimburse claimant for the IME pursuant to Iowa Code Section 85.39.

That defendants shall pay accrued weekly benefits in a lump sum.

That defendants shall pay interest on unpaid weekly benefits awarded herein as set forth in Iowa Code section 85.30.

That defendants are entitled to a credit of three point two four seven (3.247) weeks of compensation paid at the rate of four hundred fifty-eight and 76/100 dollars (\$458.76).

That defendants shall pay the costs of this matter pursuant to rule 876 IAC 4.33.

For File No. 5068460, (Left Shoulder, Date of Injury: January 16, 2018):

That defendants employer and insurer are to pay unto claimant thirty-six (36) weeks of permanent partial disability benefits at the rate of four hundred fifty-eight and 76/100 dollars (\$458.76) per week from August 16, 2019.

That defendants shall pay temporary benefits from February 15, 2019, through August 15, 2019, at the at the rate of four hundred ninety-two and 42/100 dollars (\$492.42) as agreed upon by the parties in the hearing report.

That defendants shall reimburse the medical expenses.

That claimant is entitled to future medical care.

That defendants shall reimburse claimant for the IME pursuant to Iowa Code Section 85.39.


That defendants shall pay accrued weekly benefits in a lump sum.

That defendants shall pay interest on unpaid weekly benefits awarded herein as set forth in Iowa Code section 85.30.

That defendants are entitled to a credit of eight thousand one hundred fifty-eight and 19/100 dollars (\$8,158.19) paid for in the form of sick pay and/or disability income.

That defendants shall pay the costs of this matter pursuant to rule 876 IAC 4.33.

Signed and filed this 28th day of December, 2020.


JENNIFER S. GERRISH-LAMPE
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

James Ballard (via WCES)

Robert Gainer (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.