BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

MARK SWANSON, Claimant, vs. PELLA CORPORATION, Employer, Self-Insured, Defendant.	:	File No. 19700687.01 ARBITRATION DECISION Headnotes: 1402.30, 1703, 1802, 1803, 2501, 2502, 2701, 2907

STATEMENT OF THE CASE

Claimant, Mark Swanson, filed a petition in arbitration seeking workers' compensation benefits from Pella Corporation (Pella), self-insured employer. This matter was heard on September 28, 2021, with a final submission date of October 26, 2021.

The record in this case consists of Joint Exhibits 1 through 8, Claimant's Exhibits 1 through 3 and 5 through 15, Defendant's Exhibits A through I and L through M, and the testimony of claimant and Brandon Ryerson.

Some of the Joint Exhibits in this case were out of chronological order and difficult to track and understand (e.g., Joint Exhibit 4). It appears that claimant's counsel organized these exhibits. Claimant's counsel is respectively requested to chronologically organize medical records so they can be better understood in the future.

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

ISSUES

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

2. Whether the injury resulted in a temporary disability.

3. Whether the injury resulted in a permanent disability; and if so,

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

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

6. Whether claimant is entitled to reimbursement for an independent medical evaluation (IME).

7. Whether claimant is entitled to alternate medical care under Iowa Code section 85.27.

8. Whether apportionment under Iowa Code section 85.34(7) is applicable.

FINDINGS OF FACTS

Claimant was 57 years old at the time of hearing. Claimant graduated from high school.

Claimant testified he had been working for Pella for approximately 32 years. Claimant also worked a part-time job for a hardware store called Theisen's for 12 years. (Hearing transcript pp. 11-12)

In June of 2019 claimant was an operator in the slab cell at Pella. Claimant said his area involved making doors. (TR p. 12) Claimant said he worked approximately 58 hours per week. (TR p. 13)

Claimant's prior medical history is relevant. Claimant testified in hearing that in 2015 he tore the labrum in his right shoulder at work. (TR p. 14) In June of 2016 claimant had a right shoulder surgery to repair that tear. (Joint Exhibit 2, p. 4) Claimant was found to have a 13 percent permanent impairment to the right upper extremity as a result of the 2015 injury. (JE 2, p. 7) Claimant was ultimately awarded a 20 percent industrial disability in a 2017 arbitration decision. Swanson v. Pella Corp., File No. 5055114 (Arbitration Decision August 23, 2017)

Claimant received a subacromial injection in the right shoulder in February of 2017. (JE 2, p. 8)

In June of 2018, claimant was evaluated for right shoulder pain and received an AC joint injection. (JE 4, pp. 2-3)

In October of 2018, claimant underwent arthroscopic surgery consisting of removal of a bone spur in the right distal clavicle and a distal clavicle excision. (JE 4, pp. 46-47)

On June 11, 2019, claimant reached out to catch some wood falling from a cart. Claimant said he hurt his right shoulder by catching the wood. He said the wood weighed approximately 20-30 pounds. (TR pp. 15-17)

On the same date, claimant was evaluated by a nurse at Pella. Claimant complained of pain in the right shoulder. (TR p. 17; JE 5, p. 3)

On July 16, 2019, claimant was evaluated by Steven Aviles, M.D., for right shoulder pain. Dr. Aviles' notes indicate claimant's injury occurred while he was lifting at work. Dr. Aviles found claimant's shoulder exam benign. He did not believe claimant's pain was due to his shoulder and recommended claimant see a cervical specialist. (JE 3, pp. 1-3)

On September 3, 2019, claimant was evaluated by Trevor Schmitz, M.D. Claimant reported neck pain for 3 months. Dr. Schmitz recommended a cervical MRI and an EMG to determine if claimant's symptoms were caused by a neck condition. (JE 3, pp. 8-12)

Claimant underwent a cervical MRI on September 19, 2019. It showed multilevel degenerative changes, but no significant disc herniation. (JE 1, pp. 2-3)

EMG/nerve conduction velocity testing was done on October 7, 2019. Testing did not show evidence of a cervical radiculopathy, but did show a right median neuropathy at the right wrist. (JE 3, p. 14)

Claimant returned to Dr. Schmitz on October 8, 2019. Diagnostic testing was discussed. Dr. Schmitz did not believe claimant required further treatment for his cervical spine. He recommended claimant see a physician regarding his carpal tunnel syndrome. Dr. Schmitz also gave claimant an intra-articular right shoulder injection. He released claimant to return to work without restrictions. (JE 3, pp. 17-18)

In a November 11, 2019 letter, Dr. Schmitz indicated he did not believe claimant's pain was caused by his neck. He indicated claimant had EMG proven carpal tunnel syndrome, not caused by work. Dr. Schmitz indicated claimant did get good relief from his symptoms from the right shoulder injection. (Defendant's Exhibit D)

On November 18, 2019, in response to a letter written by defendant's counsel, Dr. Aviles indicated he did not believe claimant's right shoulder symptoms were caused by the June 11, 2019, work injury. He did not believe claimant's pain was shoulder related. (Ex. C)

On June 15, 2020, claimant was evaluated by Brian Crites, M.D., with complaints of pain in the right shoulder. Claimant was assessed as having a possible rotator cuff tear on the right. Dr. Crites recommended a right shoulder MRI and physical therapy. (JE 4, pp. 14-15)

An MRI performed on June 22, 2020, showed fraying of the superior labrum. (JE 1, p. 6; JE 4, p. 13)

Claimant returned to Dr. Crites in follow up on July 22, 2020. Dr. Crites recommended right shoulder surgery. (JE 4, p. 12)

On August 24, 2020, in response to a letter written by claimant's attorney, Dr. Crites recommended claimant undergo a right shoulder surgery. He also indicated claimant's work at Pella was a substantial contributing factor to claimant's right shoulder injury. (Ex. 2, pp. 1-2)

On September 1, 2020, claimant underwent right shoulder surgery consisting of a labral and a SLAP repair on the right. Surgery was performed by Dr. Crites. (JE 4, pp. 48-49)

On December 15, 2020, claimant underwent a right carpal tunnel release performed by Greg Yanish, M.D. (JE 4, pp. 54-55)

Claimant returned to Dr. Yanish in follow up on December 23, 2020. Claimant was released to return to work without restrictions. (JE 4, p. 56)

On February 24, 2021, claimant was evaluated by Dr. Crites. Claimant had intermittent discomfort in the anterior aspect of his right shoulder. Claimant had good range of motion and strength. Dr. Crites released claimant to return to work without restrictions. (JE 4, pp. 23-28)

Claimant returned to Dr. Crites on March 24, 2021, with complaints of right shoulder pain. Claimant had normal strength and range of motion. Claimant was given a cortisone injection in the right shoulder. (JE 4, pp. 33-34)

Claimant saw Dr. Crites on April 21, 2021, with continuing complaints of right shoulder pain. A repeat MRI was recommended. (JE 4, pp. 40-41) A second MRI was negative for a labrum tear or re-tear. Dr. Crites indicated claimant did not need further surgery. Claimant was given an injection in the glenohumeral joint. (JE 4, p. 45)

In an August 9, 2021 report, Jacqueline Stoken, D.O., gave her opinions of claimant's condition following an IME. Claimant had right shoulder and arm pain. Dr. Stoken opined that claimant had an 8 percent permanent impairment to his right upper extremity, converting to a 5 percent permanent impairment to the body as a whole. She found claimant's shoulder injury was causally connected to the June 11, 2019 work injury. She found claimant reached maximum medical improvement (MMI) as of April 14, 2021. Dr. Stoken limited claimant's lifting up to 25 pounds frequently and 35 pounds occasionally. (Ex. 3, pp. 14-17)

In an August 9, 2021 report, John Kuhnlein, D.O., gave his opinions of claimant's condition following an IME. Claimant complained of constant right shoulder pain

radiating to the scapular and trapezius area. Claimant said pain also radiated into the right arm, biceps and medial elbow. (Ex. A, p. 16)

Dr. Kuhnlein could not state within a reasonable degree of medical certainty that claimant's labral and subscapularis tear, for which Dr. Crites performed surgery, was work related. This was primarily because there was a one-year lapse between the June 11, 2019 incident and when claimant finally had an MRI on June 22, 2020. (Ex. A, p. 21)

Dr. Kuhnlein noted:

> Based on the currently available medical record, it can be stated that something acute happened, but it cannot be determined what specifically was caused by the acute injury because the only diagnostic procedure performed until the June 22, 2020, MRI scan was the October 8, 2019, intra-articular injection. Given the symptoms Mr. Swanson presented with initially, and the work-up, along with the delay to the MR arthrogram, along with the fact that Mr. Swanson continued to work without restrictions but with the previous accommodations during the time frame from at least September 2019 through the later evaluation in June 2020, a specific diagnosis related to the June 11, 2019 injury cannot be made.

(Ex. A, p. 21)

CONCLUSION OF LAW

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

The party who would suffer loss if an issue were not established has the burden of proving that issue by a preponderance of the evidence. Iowa R. App. P. 6.904(3).

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

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

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

The record indicates that on June 11, 2019, claimant injured his right shoulder while trying to catch a section of wood weighing approximately 20-30 pounds. (JE 5, p. 3; JE 4, pp. 14-15; Ex. 3, pp. 14-17; Ex. A, p. 21) A review of the record indicates that the issue to be determined is whether claimant's labrum tear and subsequent need for surgery was caused by the June 11, 2019, work accident.

Four experts have opined regarding the causal connection between claimant's June 11, 2019 work injury and the labral tear and claimant's need for surgery.

Dr. Crites treated claimant for an extended period of time and performed surgery on claimant. He opined claimant's accident at work was a substantial contributing factor to claimant's right shoulder injury. (Ex. 2, pp. 1-2)

Dr. Stoken also opined that claimant's right shoulder injury was caused by the June of 2019 work injury. (Ex. 3, pp. 14-17)

Dr. Aviles saw claimant on one occasion. He opined he did not believe claimant's work injury of June 2019 caused claimant's shoulder injury and that claimant's pain was not shoulder related. (Ex. C) Dr. Aviles' opinion is problematic for several reasons. First, his opinion appears to be based on an understanding that claimant injured his right shoulder while "lifting" at work. (JE 3, p. 1) Claimant did not injure his shoulder lifting at work, but injured his shoulder while trying to catch a section of wood weighing between 20-30 pounds. Dr. Aviles also opined he did not believe the source of claimant's pain was caused by the shoulder. This is contrary to findings of the

diagnostic injection in claimant's right shoulder, which provided relief, on October 8, 2019. (JE 3, pp, 17-18; Ex. D) Given these problems with Dr. Aviles' assessment, it is found that his opinions regarding causation are not convincing.

Dr. Kuhnlein evaluated claimant once for an IME. He could not state within a reasonable degree of medical certainty that the June of 2019 accident caused claimant's shoulder injury. Dr. Kuhnlein agreed that claimant did have an "acute" incident on June 11, 2019. (Ex. A, p. 21) However, Dr. Kuhnlein's opinion is based, in part, on the fact that defendant's failed to have an MRI of claimant's shoulder and that claimant did not have a right shoulder MR arthrogram until June 22, 2020. (Ex. A, p. 21) I respect the opinions of Dr. Kuhnlein. However, the record indicates that claimant had shoulder pain on June 11, 2019 after the work accident. An intra-articular injection on October 8, 2019, provided pain relief. Dr. Kuhnlein's causation opinion appears to be based, in part, on the premise that since defendant failed to perform more detailed diagnostic testing on claimant's shoulder after the accident, a causation link could not be found between the June 11, 2019 work injury and the June 2020 MRI showing a labral tear. Because defendant neglected to authorize proper testing on claimant, this should not be used against claimant in proving causation. Given this record, it is found that the opinions of Dr. Kuhnlein regarding causation are not convincing.

Claimant had a shoulder injury after the June 11, 2019, work accident. Dr. Crites treated claimant for an extended period of time and performed surgery on claimant. As a factual matter, Dr. Crites has far more experience with claimant's medical history and his presentation than does any other expert in this case. Dr. Crites opined that claimant's June 11, 2019 injury at work was a substantial contributing factor for his need for surgery. This causation opinion is corroborated by Dr. Stoken's opinion. The causation opinions of Dr. Aviles and Dr. Kuhnlein are found not convincing. Given this record, claimant has carried his burden of proof his right shoulder injury and need for surgery arose out of and in the course of employment.

Regarding claimant's right carpal tunnel surgery, no expert has opined claimant's right carpal tunnel surgery was caused by his June of 2019 work injury. Claimant has failed to carry his burden of proof his carpal tunnel syndrome and subsequent surgery arose out of and in the course of employment.

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

When an injured worker has been unable to work during a period of recuperation from an injury that did not produce permanent disability, the worker is entitled to temporary total disability benefits during the time the worker is disabled by the injury. Those benefits are payable until the employee has returned to work, or is medically capable of returning to work substantially similar to the work performed at the time of injury. Section 85.33(1).

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

The record indicates claimant was off September 1, 2020, through September 10, 2020, for the right shoulder surgery. Claimant is due temporary benefits for this period of time.

The next issue to be determined is whether claimant's injury resulted in a permanent disability.

The record indicates that claimant underwent right shoulder surgery with Dr. Crites on September 1, 2020. Dr. Stoken opined that claimant has a permanent impairment regarding the right shoulder. Claimant credibly testified that he continues to have pain and discomfort in the right shoulder over two years after the work injury. Given this record, claimant has carried his burden of proof his injury resulted in a permanent disability.

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

In 2017 the Iowa Legislature amended Iowa Code section 85.34. Before the 2017 changes, shoulder injuries were considered proximal to the arm and compensated as a body as a whole injury, under Iowa Code section 85.34(2)(u). Prior to the 2017 changes to Iowa Code section 85.34, a shoulder injury was compensated as an unscheduled injury, and based on industrial disability. See Alm v. Morris Barick Cattle Co., 240 Iowa 1174, 38 N.W.2d 161(1949).

One of the changes made to Iowa Code section 85.34 in 2017, dealt with the shoulder. Through the change, the legislature added the shoulder to the list of scheduled members. Iowa Code section 85.34(2)(n) states: "[f]or the loss of a shoulder, weekly compensation during four hundred weeks." Iowa Code section 85.34(2)(n)(2018). This amendment went into effect on July 1, 2018. It should be noted the legislature did not define the term "shoulder."

The Iowa Supreme Court has said that this agency does not have the authority to interpret worker's compensation statutes. See Ramirez-Trujillo v. Quality Egg, LLC, 878

N.W.2d 759, 770 (Iowa 2016). However, the agency is the front-line in interpreting recently amended statutes. The Iowa Workers' Compensation Commissioner has issued several decisions regarding the amended Iowa Code section 85.34(2)(n) which provide agency precedent for the shoulder amendment. See Deng v. Farmland Foods, Inc., File No. 5061883 (App. September 29, 2020); Chavez v. MS Technology, LLC, File No. 5066270 (App. September 30, 2020); Smidt v. JKB Restaurants, LC, File No. 5067766 (App. December 11, 2020).

The commissioner determined that under Iowa Code section 85.34(n), the "shoulder" is not limited to the glenohumeral joint. The commissioner also determined that the muscles that make up the rotator cuff are considered part of the "shoulder." Deng v. Farmland Foods, Inc., File No. 5061883 (App. September. 29, 2020).

In Deng, the Commissioner determined the muscles that make up the rotator cuff are included within the definition of "shoulder" under section 85.34(2)(n). In Chavez, the Commissioner determined both the labrum and the acromion are likewise included in the definition.

Claimant's right shoulder surgery was a labral repair and a SLAP repair. The commissioner's appeal decisions in Deng, Chavez, and Smidt, have all held that these conditions are parts of the shoulder covered by Iowa Code section 85.34(2)(n). As a result, claimant's right shoulder injury is a scheduled shoulder injury and is limited to the functional impairment, as per Iowa Code section 85.34(2)(n).

Dr. Stoken found that claimant had an 8 percent permanent impairment to the right shoulder. Under Iowa Code section 85.34(2)(n), claimant is due 32 weeks of permanent partial disability benefits (8 percent x 400 weeks). Dr. Stoken found claimant was at MMI as of April 14, 2021. Permanent partial disability benefits shall begin on that date.

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

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

As noted, it is found that claimant's June 11, 2019, work injury arose out of and in the course of his employment. There is no proof that the expenses listed in Exhibit 1 are not related to claimant's June 11, 2019, work injury. There is no evidence that the expenses are not fair and reasonable. Given this record, defendant is liable for the medical expenses detailed in Exhibit 1.

The next issue to be determined is whether claimant is entitled to reimbursement of costs associated with Dr. Stoken's IME under Iowa Code section 85.39.

Section 85.39 permits an employee to be reimbursed for subsequent examination by a physician of the employee's choice where an employer-retained physician has previously evaluated "permanent disability" and the employee believes that the initial evaluation is too low. The section also permits reimbursement for reasonably necessary transportation expenses incurred and for any wage loss occasioned by the employee attending the subsequent examination.

Defendants are responsible only for reasonable fees associated with claimant's independent medical examination. Claimant has the burden of proving the reasonableness of the expenses incurred for the examination. See Schintgen v. Economy Fire & Casualty Co., File No. 855298 (App. April 26, 1991). Claimant need not ultimately prove the injury arose out of and in the course of employment to qualify for reimbursement under section 85.39. See Dodd v. Fleetguard, Inc., 759 N.W.2d 133, 140 (Iowa App. 2008).

Regarding the IME, the Iowa Supreme Court provided a literal interpretation of the plain language of Iowa Code section 85.39, stating that section 85.39 only allows the employee to obtain an independent medical evaluation at the employer's expense if dissatisfied with the evaluation arranged by the employer. Des Moines Area Reg'l Transit Auth. v. Young, 867 N.W.2d 839, 847 (Iowa 2015).

Under the Young decision, an employee can only obtain an IME at the employer's expense if an evaluation of permanent disability has been made by an employer-retained physician.

Iowa Code section 85.39 limits an injured worker to one IME. Larson Mfg. Co., Inc. v. Thorson, 763 N.W.2d 842 (Iowa 2009).

The Supreme Court, in Young noted that in cases where Iowa Code section 85.39 is not triggered to allow for reimbursement of an independent medical examination (IME), a claimant can still be reimbursed at hearing the costs associated with the preparation of the written report as a cost under rule 876 IAC 4.33. Young at 846-847.

Dr. Stoken, the employee-retained expert, issued her IME report on August 9, 2021. (Ex. 3, p. 7) Dr. Kuhnlein, the employer-retained expert, issued his IME report also on August 9, 2021. (Ex. A, p. 21) As both reports were issued on the same date, claimant is not due reimbursement for Dr. Stoken's IME under Iowa Code section 85.39.

Dr. Stoken did indicate in her billing that she charged $2,000.00 for preparation of the report. (Ex. 3, p. 33) Costs are assessed at the discretion of this agency. Claimant has prevailed on the issue of permanency in this case. The $2,000.00 charge

for the preparation of Dr. Stoken's IME report is to be reimbursed to claimant as a cost under Rule 876 IAC 4.33(6)

The next issue to be determined is whether claimant is entitled to alternate medical care under Iowa Code section 85.27.

Iowa Code section 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.

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 the care was unduly inconvenient for the claimant. Long v. Roberts Dairy Co., 528 N.W.2d 122 (Iowa 1995)

There is no evidence in the record that claimant communicated a dissatisfaction of his care to employer. There is no evidence what alternate medical care claimant actually seeks. Given this record, claimant has failed to carry his burden of proof he is entitled to alternate medical care.

The next issue to be determined is whether apportionment is appropriate under Iowa Code section 85.34(7)

Prior to the legislature's amendments in 2017, Iowa Code section 85.34(7) stated, in relevant part:

> 7. SUCCESSIVE DISABILITIES.
>
> a. An employer is fully liable for compensating all of an employee's disability that arises out of and in the course of the employee's employment with the employer. An employer is not liable for compensating an employee's preexisting disability that arose out of and in the course of employment with a different employer or from causes unrelated to employment.

> b. (1) If an injured employee has a preexisting disability that was caused by a prior injury arising out of and in the course of employment with the same employer, and the preexisting disability was compensable under the same paragraph of subsection 2 as the employee's present injury, the employer is liable for the combined disability that is caused by the injuries, measured in relation to the employee's condition immediately prior to the first injury. In this instance, the employer's liability for the combined disability shall be considered to be already partially satisfied to the extent of the percentage of disability for which the employee was previously compensated by the employer.
>
> (2) If, however, an employer is liable to an employee for a combined disability that is payable under subsection 2, paragraph "u", and the employee has a preexisting disability that causes the employee's earnings to be less at the time of the present injury than if the prior injury had not occurred, the employer's liability for the combined disability shall be considered to be already partially satisfied to the extent of the percentage of disability for which the employee was previously compensated by the employer minus the percentage that the employee's earnings are less at the time of the present injury than if the prior injury had not occurred.
>
> c. A successor employer shall be considered to be the same employer if the employee became part of the successor employer's workforce through a merger, purchase, or other transaction that assumes the employee into the successor employer's workforce without substantially changing the nature of the employee's employment.

Iowa Code section 85.34(7) currently reads:

> 7. Successive disabilities.
>
> An employer is liable for compensating only that portion of an employee's disability that arises out of and in the course of the employee's employment with the employer and that relates to the injury that serves as the basis for the employee's claim for compensation under this chapter, or chapter 85A, 85B, or 86. An employer is not liable for compensating an employee's preexisting disability that arose out of and in the course of employment from a prior injury with the employer, to the extent that the employee's preexisting disability has already been compensated under this chapter, or chapter 85A, 85B, or 86. An employer is not liable for compensating an employee's preexisting disability that arose out of and in the course of employment with a different employer or from causes unrelated to employment.

When comparing the two versions, the 2017 amendments revised subpart (a), and removed subparts (b) and (c) from Iowa Code section 85.34(7).

When interpreting statutory provisions, our goal is to determine and effectuate the legislature's intent. Auen v. Alcoholic Beverages Div., Iowa Dept. of Commerce, 679 N.W.2d 586, 590 (Iowa 2004) To determine legislative intent, we look to the language chosen by the legislature and not what the legislature might have said. Absent a statutory definition, we consider statutory terms in the context in which they appear and give each its ordinary and common meaning. Ramirez-Trujillo v. Quality Egg, L.L.C., 878 N.W.2d 759, 770 (Iowa 2016) We "may not extend, enlarge or otherwise change the meaning of a statute" under the guise of construction. Auen, 679 N.W.2d at 590. In interpreting statutes, we generally "give weight to explanations attached to bills as indications of legislative intent." Homan v. Branstad, 887 N.W.2d 153, 166 (Iowa 2016).

Unlike when the initial successive disabilities statute was adopted in 2004, the general assembly did not include a statement of intent within the 2017 amendments. Thus, this Agency does not have a clear directive from the legislature regarding its intent in amending Iowa Code section 85.34(7). As such, this Agency must rely on the plain language and legislative history of the statute for guidance.

I recognize that the 2017 revisions to Iowa Code section 85.34(7) do not have a statement of intent within the 2017 amendments.

Iowa Code section 85.34(7) does indicate that the ". . . employer is liable for compensating only that portion of an employee's disability . . . that relates to the injury that serves as a basis for the employee's claim for compensation . . ." Iowa Code section 85.34(7). In short, the plain language meaning of the statute indicates that an employer is only liable for compensation of the disabilities relating to the injury that is being litigated.

When Iowa Code section 85.34(7) was adopted in 2004, the legislature included an "intent" provision, in section 20 of that bill, that states:

> LEGISLATIVE INTENT. It is the intent of the general assembly that this division of this Act will **prevent all double recoveries and all double reductions** in workers' compensation benefits for permanent partial disability. This division modifies the fresh start and full responsibility rules of law announced by the Iowa supreme court in a series of judicial precedents.

(H.F. 2581)(Emphasis added.)

Based on the plain language meaning of the statute, it does not appear that the intent of Iowa Code section 85.34(7) (2017) has changed to suddenly allow double recoveries. Based on this, it is found that apportionment under Iowa Code section 85.34(7) may be applicable in this case. Wilkie v Kelly Services, File No 5064366 (App. Dec. September 2, 2020)

Claimant was awarded 100 weeks of permanent partial disability benefits regarding the 2015 shoulder injury. Dr. Stoken found that claimant had an 8 percent

permanent impairment to the right upper extremity, converting to a 5 percent permanent impairment to the body as a whole. The combined disabilities of the 2015 and 2019 injury resulted in claimant having a 25 percent industrial disability. Claimant is only due benefits for the 2019 injury. As noted in the record, a 5 percent permanent impairment to the body as a whole results in an 8 percent permanent impairment to the upper extremity. Claimant is due 32 weeks of benefits for the 2019 injury (132 weeks – 100 weeks). See Ditsworth v. ICON, File No. 5054080 (App. Dec. November 5, 2018); Knaeble v. John Deere Dubuque Works, File Nos. 5066463 and 5066464 (App. Dec. May 10, 2021)

ORDER

THEREFORE IT IS ORDERED:

That defendant shall pay claimant healing period benefits from September 1, 2020 through September 10, 2020, at the rate of six hundred seven and 33/100 dollars ($607.33) per week.

That defendant shall pay claimant thirty-two (32) weeks of permanent partial disability benefits at the rate of six hundred seven and 33/100 dollars ($607.33) per week commencing on April 14, 2021.

That defendant shall pay accrued weekly benefits in a lump sum together with interest at an annual rate equal to the one-year treasury constant maturity published by the federal reserve in the most recent H15 report settled as of the date of injury, plus two percent.

That defendant shall be given credit for benefits previously paid under Iowa Code section 85.38(2).

That defendant shall pay claimant's medical expenses as detailed above.

That defendant shall pay costs, including the costs of the preparation of Dr. Stoken's report and Dr. Crites' report.

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

Signed and filed this 10th day of February, 2022.

JAMES F. CHRISTENSON
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Erik Luthens (via WCES)

Matthew Phillips (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.