BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JOHNNIE VANCE, Claimant, vs. DELANEY CONCRETE CONSTRUCTION COMPANY, INC., Employer, CONTINENTAL WESTERN GROUP, Insurance Carrier, Defendants.	File No. 19004997.01 ARBITRATION DECISION Head Notes: 1108.50; 1402.02; 1803.1; 3001; 3003

Johnnie Vance, claimant, filed a petition in arbitration seeking workers' compensation benefits from Delaney Concrete Construction Company, Inc., employer, and Continental Western Group, insurance carrier, as defendants. The hearing was held on November 3, 2022. Pursuant to an order from the Iowa Workers' Compensation Commissioner, this case was heard via videoconference using Zoom 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 various stipulations. Those stipulations were accepted and are hereby incorporated into this arbitration decision and no factual issues relative to the parties' stipulations will be raised or discussed in this decision. The parties are now bound by their stipulations.

Johnnie Vance was the only witness to testify live at trial. The evidentiary record also includes joint exhibits 1-7, claimant's exhibits 1-10, and defendants' amended exhibits A – G. All exhibits were received into the record without objection.

The parties submitted post-hearing briefs on December 20, 2022, at which time the case was fully submitted to the undersigned.

ISSUES

The parties identified the following disputed issues on the hearing report:

1. The nature and extent of claimant's entitlement to permanent disability benefits.

2. The commencement date for permanent partial disability benefits.

3. Claimant's average weekly wage and weekly rate.
4. Whether the claimant is entitled to additional temporary disability or healing period benefits due to an underpayment.
5. Whether claimant is entitled to payment of the medical expenses in claimant's exhibit 10.
6. Whether claimant is entitled to alternate medical care.
7. Whether claimant is entitled to recover the cost of an independent medical examination pursuant to Iowa Code section 85.39.
8. Assessment of costs.

FINDINGS OF FACT

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

At the time of the hearing the claimant, Johnnie Vance (hereinafter "Vance") was 50 years old. (Hearing Tr., p. 14). Vance lives with his wife and teenage son in Cedar Rapids, Iowa. (Id. at 15-18). Vance attended high school through the ninth grade in Mississippi. (Id. at 21). At the hearing, Vance testified he quit school because he had a child and needed to work to support his family. (Id.). Vance worked as a farmhand at Bee Lake & Partners. (Id. at 22, 57). He drove tractors to plow fields and plant cotton, as well as a combine to harvest the crops. (Id. at 22, 57-59). He also fixed equipment and pulled weeds. (Id.). Vance testified he worked at Bee Lake & Partners farm for 14 years. (Id. at 59). In 2003, Vance and his family moved to Iowa. (Id. at 62). He got a job as a laborer at TJ Construction. (Id. at 62-63). After a while, he obtained his CDL and drove a dump truck, boom truck, and ran the Telebelt. (Id. at 63). He also bailed hay for the owner. (Id. at 63-64). Vance worked there for ten years. (Id. at 63).

In 2013, Delaney Concrete Construction Company (hereinafter "Delaney"), the defendant employer in this action, hired Vance as a general laborer. (Tr., pp. 64-65). As a general laborer, Vance drove dump trucks, concrete trucks, boom trucks, skid loaders, mini hoes, and the Telebelt. (Id. at 65-66). He also set walls and footings and helped to do flat work. (Id.).

The parties agree that Vance sustained injuries to his bilateral shoulders while working for Delaney on May 29, 2019. (See Hearing Report). At the hearing, Vance testified he was walking around a truck while setting up a job site, when he tripped and started to fall forward, catching himself in a "push-up position." (Tr., p. 23). He testified he felt immediate pain in his right shoulder. (Id.). There were no witnesses to the fall. (Id. at 24). Vance informed Todd, the wall foreman of the incident. (Id. at 23). He then finished his shift and returned to Delaney's shop. (Id. at 25). There he informed Brad,

the office supervisor, of the incident. (Id.). Following that he went home, took a shower, and had his wife drive him to the doctor. (Id.).

According to the medical records, Vance was evaluated later that day by Ignatius Brady, M.D., at the Work Well Clinic. (JE 1, pp. 1-9). Dr. Brady's assessment was fall to the right shoulder; internal derangement suspected. (Id. at 6). He ordered x-rays, which showed no abnormalities. (Id.). He also recommended Vance wear a sling and provided work restrictions of no use of the right arm. (Id. at 7). Vance had a follow-up visit with Dr. Brady on June 3, 2019. (Id. at 8). Dr. Brady recommended physical therapy and pain medication. (Id.). Vance returned to Dr. Brady on June 14, 2019. (Id. at 9). He continued to complain of pain and reduced range of motion. (Id.). Dr. Brady ordered an MRI. (Id.). The MRI was performed on June 26, 2019. (JE 2, p. 11). It showed a massive full-thickness superior rotator cuff insertional tear and mild AC joint degeneration. (Id.). Dr. Brady referred Vance to an orthopedic surgeon. (JE 1, p. 10).

On July 8, 2019, Vance was evaluated by Matthew Bollier, M.D. at the University of Iowa Hospitals and Clinics (UIHC). (JE 3, p. 13). Dr. Bollier diagnosed him with a complete traumatic tear of the right rotator cuff. (Id. at 16). He causally related the rotator cuff tear to Vance's fall on May 29, 2019, and recommended surgery. (Id. at 15). At the appointment, Vance also informed Dr. Bollier that his left arm was sore. (JE 3, p. 13). On July 31, 2019, Dr. Bollier performed a right shoulder arthroscopy, massive rotator cuff repair, superior capsule repair and biceps tenodesis. (Id. at 20-24).

Vance received follow-up treatment from Dr. Bollier. (See JE 3, pp. 25-31). He also attended physical therapy. (Id.). After surgery, he continued to complain of right forearm numbness, as well as shoulder pain and stiffness. (Id. at 28, 31). Dr. Bollier recommended an ultrasound guided steroid injection. (Id. at 33-34). This was performed on November 5, 2019. (Id. at 36-39). It did not improve his symptoms. (Id. at 40). Dr. Bollier diagnosed him with a frozen shoulder and recommended additional surgery. (Id. at 45). On January 15, 2020, Dr. Bollier performed a right shoulder arthroscopy, capsular release, and manipulation. (Id. at 49-52).

Once again, Vance received follow-up care from Dr. Bollier after the surgery and attended physical therapy. (JE 3, pp. 53-57). On February 21, 2020, Dr. Bollier placed him at maximum medical improvement (MMI) for the right shoulder condition. (Id. at 59). He assigned him 10 percent impairment of the right upper extremity for loss of range of motion in the shoulder joint, citing to Figures 16-40, 16-43, and 16-46 of the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition. (Id.).

Dr. Bollier also ordered a functional capacity evaluation (FCE) to determine whether Vance required any permanent work restrictions. (JE 3, pp. 58-59). The FCE took place on March 13, 2020, at Athletico Physical Therapy. (JE 4, p. 102). It was performed by Cassandra Wagner, PT. (Id.). Following the FCE, Wagner recommended Vance work in the medium physical demand level, lifting up to 30 pounds. (Id.).

Wagner's report indicates Vance gave a consistent effort during the evaluation. (Id.). The report, however, states he only met 68.75 percent of the job demands required to perform as a Telebelt Driver Operator at Delaney. (Id.). On March 26, 2020, Dr. Bollier reviewed Wagner's FCE report. (JE 3, p. 67). He then issued Vance permanent work restrictions of no lifting, pushing, or pulling more than 50 pounds below shoulder height and no lifting more than 15 pounds above shoulder height due to the right shoulder injury. (Id.).

On March 9, 2020, Vance presented to Dr. Bollier complaining of left shoulder pain.[1] (JE 3, p. 61). He told Dr. Bollier the pain started when he fell on May 29, 2019. (Id.). Dr. Bollier's treatment note mentions a prior work injury to his left shoulder, but states it improved. (Id.). Dr. Bollier diagnosed him with left shoulder pain which he causally related to the work fall on May 29, 2019. (Id. at 65). He ordered pain medication, work restrictions, and an MRI. (Id.). The MRI took place on March 12, 2020. (JE 2, p. 12). It revealed a full-thickness anterior supraspinatus insertional tear and mild tendinopathy of the long head of the biceps brachii along the bicipital groove. (Id.). Dr. Bollier recommended surgery to repair the tear. (JE 3, p. 68). On May 15, 2020, Dr. Bollier performed a left shoulder arthroscopy rotator cuff repair, capsular release, debridement, biceps tenodesis, subacromial decompression and distal clavicle excision. (Id. at 69-72).

Once again, Vance received follow-up care from Dr. Bollier and attended physical therapy. (See JE 3, p. 73-88). Dr. Bollier indicated he was at MMI for the left shoulder injury on October 28, 2020.[2] (Id. at 89). He assigned Vance 4 percent impairment of the left upper extremity for loss of range of motion in the shoulder joint, citing to Figures 16-40, 16-43, and 16-46 of the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition. (Id.). Dr. Bollier did not provide Vance any permanent work restrictions for the left shoulder, nor did he order an FCE. (Id. at 89-90).

On January 11, 2021, Vance returned to Dr. Bollier, complaining of pain in his left shoulder and expressing concern about re-injuring his left shoulder at work. (JE 3, p. 91). Dr. Bollier recommended an ultrasound guided steroid injection for his left shoulder complaints and returned him back to work without restrictions. (JE 3, pp. 94-98). The injection was performed on February 19, 2021. (Id. at 99-101). This is the last treatment note from the University of Iowa in the hearing record. (Id. at 101). At the hearing, Vance testified he still experiences symptoms in his bilateral shoulders, but Dr. Bollier has no further treatment to offer. (Tr., p. 38).

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[1] On February 3, 2020, Vance presented to Qadnana Anwar, M.D., his family provider, complaining of left shoulder pain of six-month duration. (JE 5, p. 113). Dr. Anwar recommended an MRI and orthopedic consult. (Id.).

[2] The appointment actually took place on September 28, 2020. (JE 3, p. 91).

At the hearing, Vance also testified that after his bilateral shoulder surgeries, his back started to hurt, and his left leg went numb. (Tr., p. 38). He believed the symptoms were caused by his shoulder injuries and sleeping "in a recliner for almost three years." (Id.). On June 24, 2020, Vance saw Qadnana Anwar, M.D., his family physician, for numbness and tingling starting at his buttocks and going down his left leg. (JE 5, p. 117). Dr. Anwar diagnosed him with sciatic leg pain possibly from a pinched nerve. (Id. at 119). She prescribed a muscle relaxant and ordered EMG testing. (Id.). The EMG testing took place on July 16, 2020. (Id. at 120). It was normal, it did not reveal any signs of neuropathy, radiculopathy, plexopathy, or myopathy. (Id. at 121). Vance followed up with Dr. Anwar on August 5, 2020. (Id. at 123-125). She switched his pain medication to nabumetone and encouraged him to stay active and lose weight. (Id. at 125).

Dr. Anwar referred Vance to Physicians Clinic of Iowa (PCI) for further evaluation of his back complaints. (See JE 6, p. 128). Vance saw Amber Arthurs, ARNP, at PCI on September 1, 2020. (Id.). Arthurs diagnosed him with paresthesia and radicular pain of the left lower extremity. (Id.). She referred him to the physical medicine and rehabilitation department for further care. (Id.). Vance's next appointment at PCI was on September 21, 2020, with Justin Gilbert, M.D. (Id. at 131). Dr. Gilbert ordered an x-ray of Vance's lumbar spine. (Id.). It showed mild degenerative changes. (Id.). Dr. Gilbert diagnosed him with low back pain unspecified and referred him to physical therapy. (Id. at 132). Vance attended Rock Valley Physical Therapy for his back complaints from September 29, 2020, through October 28, 2020. (See JE 7, pp. 155-178).

Vance had a follow-up appointment with Dr. Gilbert on November 16, 2020. (JE 6, p. 135). Physical therapy had not improved his symptoms. (Id. at 136). Dr. Gilbert ordered an MRI of his lumbar spine. (Id.). The MRI was performed on December 1, 2021. (Id. at 137-138). Dr. Gilbert read the MRI as showing some narrowing around the left L5 nerve root, but otherwise it was normal. (Id. at 140). Dr. Gilbert offered Vance an epidural injection. (Id.). He declined. (Id.). Vance did not see Dr. Gilbert again until January 24, 2022. (Id. at 143). He reported no change or improvement in his back complaints/leg symptoms. (Id.). Dr. Gilbert decided to proceed with left L5-S1 epidural steroid injection. (Id. at 144). The was performed on February 1, 2021. (JE 6, p. 145-48). Vance reported minimal improvement in his symptoms after the injection. (Id. at 149). Dr. Gilbert prescribed Valium and indicated he would like to refer Vance to Dr. Barber for further evaluation. (JE 6, p. 150). This is the last treatment note from Dr. Gilbert in the hearing record. (Id.).

In April 2022, claimant's counsel sent Vance for an independent medical examination (IME) with Mark Taylor, M.D. (Cl. Ex. 1). Dr. Taylor diagnosed him with a massive right-sided rotator cuff tear of the supraspinatus and subscapularis tendons post arthroscopic repair and arthroscopic capsular release surgery, with persistent right

shoulder pain and decreased range of motion. (Id. at 9). He also diagnosed him with a left-sided rotator cuff tear, biceps tendinopathy, and AC joint arthropathy post arthroscopic repair, as well as intermittent low back pain and left lower extremity paresthesias. (Id.). Dr. Taylor agreed that the fall on May 29, 2019, was a substantial contributing factor in his bilateral shoulder conditions and need for all three surgeries. (Id. at 9-10). He also opined it appeared "more likely than not that [the] intermittent low back discomfort and left leg numbness is positional in nature, and in particular when he is sleeping on his back." (Id. at 10). The bilateral shoulder injuries forced him to sleep on his back, thus Dr. Taylor determined his low back and left leg symptoms are causally related to the May 29, 2019, date of injury as a sequela. (Id.). Dr. Taylor placed Vance at MMI for the right shoulder on February 21, 2020; the left shoulder on February 19, 2021; and the low back and left leg conditions on May 5, 2021. (Id. at 11). He assigned 11 percent permanent impairment to the right upper extremity and 8 percent permanent impairment to the left upper extremity due to loss of range of motion in the shoulder joints, citing to Figures 16-40, 16-43, and 16-46 of the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition. (Id. at 10). He also assigned 10 percent permanent impairment to the left upper extremity for the distal clavicle resection, citing to Table 16-27 of the AMA Guides. (Id.). For the low back and left leg conditions, Dr. Taylor assigned 2 percent permanent impairment to whole person, citing to Table 15-3 of the AMA Guides. (Id.). All combined, he assigned 18 percent whole person impairment. (Id. at 11). Dr. Taylor adopted the FCE restrictions for the bilateral shoulders. (Id.). For Vance's back and leg conditions, Dr. Taylor recommended restrictions of alternate sitting, standing, and walking as needed for comfort. (Id. at 12). He also indicated Vance would benefit from having the ability to stop and stretch while traveling in a vehicle. (Id.).

At the request of defendants, Vance underwent a second IME with Cassim Igram, M.D., on September 28, 2022. (Ex. A). Dr. Igram was only asked to address Vance's low back and leg complaints. (Id.). Dr. Igram diagnosed him with chronic midline low back pain, unspecified whether sciatica present, and numbness and tingling of the left leg. (Id. at 8). Dr. Igram could not state within a reasonable degree of medical certainty that Vance's ongoing back complaints were causally related to the fall on May 29, 2019. (Id. at 10). Dr. Igram placed him at MMI for his alleged back injury and indicated Vance had 0 percent permanent impairment to his back. (Id.). Dr. Igram did not provide any permanent work restrictions for Vance's back and did not recommend any further treatment for his back. (Id.). Dr. Igram's report declares "it is of my opinion that there is no documentable injury and that his back complaints are not a result of the injury of May of 2019." (Ex. A, p. 10).

At the time of the hearing, Vance was still working full time for Delaney. (See Tr., p. 78). Vance testified he still drives construction vehicles, such as the boom truck, dump truck, and the newer Telebelt. (Id. at 76-77). According to Vance, prior to the work injury, if he got done early taking loads with the vehicles, he would finish out the

workday by helping with other tasks on the job site. (Id. at 74-75). However, his shoulder injuries and permanent work restrictions now prevent him from setting walls, pounding stakes, doing flatwork, and shoveling rock out of the dump truck. (Id. at 69, 75). It was not clear from Vance's testimony whether he works less hours now than he did on the date of injury. At one point, Vance indicated he works less because there are fewer tasks he is physically able to do, so he gets sent home earlier. (Id. at 78). However, at another point in his testimony, he indicated he now works more hours than he did in 2019 because there are fewer drivers to operate the Telebelt. (Id.). At the hearing, both parties introduced evidence of Vance's earnings from 2019 through 2021. (See Ex. C; Cl. Exs. 6 and 7). Those figures do not match. According to defendants, Vance earned the following amounts from Delaney:

2019
$34,387.36

2020
$34,367.09

2021
$42,976.85

(Ex. C, pp. 27-35). Vance introduced copies of tax documents with his exhibits. (Cl. Ex. 6). According to his W-2s, Vance earned the following amounts:

2018
$41,199.02- Gross

2019
$29,773.59- Gross

2020
$30,342.48- Gross

2021
$36,567.03- Gross

(Id. at 25-28). Vance also introduced a summary of the hours he worked at Delaney. According to that summary, Vance worked 1612.5 hours in 2018, 1227 hours in 2019, 1197.5 hours in 2020 and 1440 hours in 2021.[3] (Cl. Ex. 7, p. 32). The chart does not include hours for 2022. (Id.). At the hearing, Vance testified he worked more hours in 2022 because they were short staffed. (Tr., p. 78).

[3] During cross-examination Vance testified this spreadsheet might not be accurate. (Tr., p. 121).

Vance testified his symptoms and pain level increase with some of his job tasks at Delaney. (Tr., p. 81). He is concerned about being able to perform his work in the future. (Id.). However, Vance likes his job and plans to keep working at Delaney. (Id. at 83). Vance earned $26.75 an hour at the time of the injury; as of April 2022, he was earning $28.93 an hour. (Ex. D, p. 36; Ex. B, p. 16).

The record contains two opinions addressing permanent impairment to Vance's bilateral shoulders—one from Dr. Bollier and one from Dr. Taylor. Of these, I find Dr. Taylor's opinion to be the most accurate. While both doctors assign impairment for loss of range of motion in the shoulder joints, only Dr. Taylor assigns additional impairment for the distal clavicle resection on the left side. The distal clavicle resection was a documented part of Vance's left shoulder surgery. It is rational that there would be some impairment from that procedure. Additionally, while the impairment ratings provided for Vance's right shoulder are fairly similar, Dr. Taylor's rating for his left shoulder is double that given by Dr. Bollier. In reviewing Dr. Taylor's report, it appears the additional impairment was for increased loss of abduction, flexion, and internal rotation in the shoulder joint. (Cl Ex. 1, p. 8). Dr. Bollier's measurements were taken in September 2020. (See JE 3, p. 89). Vance continued to experience left shoulder symptoms and pain after this date and underwent additional treatment including a steroid injection. (Id. at 99-101). In contrast, Dr. Taylor's measurements were taken in April 2022. (See Cl Ex. 1). It is reasonable to conclude that Vance's ongoing symptoms translated into increased motion loss. Given this, the undersigned adopts Dr. Taylor's permanent impairment ratings for Vance's bilateral shoulder injuries, with some modifications which will be explained below. The commencement date for these benefits is February 19, 2021, the date Dr. Taylor placed him at MMI for the left shoulder condition. (Id. at 11).

While I accept Dr. Taylor's opinions concerning Vance's bilateral shoulders, I cannot find support in the record for his causation opinion on Vance's alleged back and leg injuries. In his report, Dr. Taylor determines that Vance's alleged injuries are positional in nature and were caused by sleeping on his back. (Cl. Ex. 1, p. 10). Dr. Taylor reasons that the shoulder surgeries required Vance to sleep on his back, causing the back and leg symptoms, and therefore they are sequelae of the original injury date. (Id.). However, at another point in his report, Dr. Taylor admits,

> The exact etiology [of the back and leg symptoms] has not yet been identified, at least based on current available information. He received an injection, but it was not helpful. He also attended therapy, which was not helpful. An EMG was negative, and his MRI was generally unrevealing, and the most significant findings were associated with the right side as opposed to the left side.

(Cl Ex. 1, p. 10). These statements are supported by the treatment notes in the hearing record. (See JE 6, pp. 128-150). X-rays taken by Dr. Gilbert at PCI, showed only mild

degenerative changes in his lumbar spine. (Id. at 131). Dr. Gilbert's diagnosis was low back pain unspecified. (Id. at 132). Dr. Gilbert ordered an MRI. (Id. at 136). It was unremarkable. (Id.). Previous EMG testing done by Dr. Anwar was also unremarkable. (JE 5, p. 121). In short, there is evidence of vague complaints but no diagnosed injury. Additionally, a review of both IME reports shows that Vance was previously treated for similar symptoms in his low back and left leg. (See Cl Ex. 1, p. 2; Ex. A, p. 5). In 2011, he was treated for low back pain without a diagnosed injury. (Ex. A, p. 5). In 2013, he was seen for left leg numbness and tingling without a known cause. (Id.). Finally, from October 2017, through October 2019, he treated with a chiropractor for lumbar and pelvic pain. (Id.). These treatment dates begin before the 2019 date of injury and continue after it. Given this, and Dr. Taylor's inability to pinpoint the cause of Vance's back and leg symptoms, I find that substantial evidence does not support a finding that Vance sustained sequela injuries to his back and left leg as a result of the May 29, 2019, date of injury.

The parties have a rate disagreement. They agree the claimant was married at the time of the injury but disagree about his correct average weekly earnings and entitlement to exemptions. Vance contends his average weekly wage is $1,228.83. (Cl Ex. 4, p. 20). Defendants claim his average weekly wage is $1,206.72. (Ex. D, p. 36). The difference in the amounts alleged comes down to one week of earnings, which Vance contends is non-representative and should be excluded. The week in question is April 17, 2019, through April 23, 2019. (Cl Ex. 4, p. 20). The parties' documents show he worked 38.5 hours that week. (Id.). This is the only week listed when Vance worked less than 40 hours. (Id.). At the hearing, Vance testified that during construction season, a standard work week at Delaney was 40 hours with some overtime. (Tr., pp. 103-104; 121-122). On cross-examination, defendants pointed out that his own exhibit, Claimant's Exhibit 7, appears to contradict that statement. (Id. at 121). This Exhibit contains a spreadsheet of Vance's average hours worked each year. (Cl Ex. 7, p. 32). It also includes the average hours worked by all other employees at Delaney. (Id.). The undersigned does not find this spreadsheet particularly helpful on the issue of customary hours/earnings because it only lists total hours worked—it does not divide out customary hours for employees by season. (Id.). Vance testified his work hours varied depending on the time of the year. (Tr., pp. 104-105). During the winter he worked less hours. (Id.). During the summer and with good weather he worked more. (Id.). There is no evidence in the hearing record contradicting this statement. Given this, I accept Vance's testimony that he generally worked at least 40 hours per week during good weather and adopt his proposed average weekly wage of $1,228.83.

The next factual issue to be addressed is Vance's entitlement to tax exemptions. On the hearing report, he claimed entitlement to five exemptions. (Hearing Report). Defendants, however, contend he is only entitled to three exemptions. (Id.). Neither party introduced Vance's full tax returns into evidence. Vance has six children, who ranged in age from six to twenty-seven on the date of injury. (Tr., pp. 16-20). Both parties agree that Vance may claim his fifteen-year-old son as an exemption. He was still in high school at the time of the injury, living in Vance's home, and clearly claimed as an exemption on his father's 2019 tax returns. (Id. at 18). Rather, the parties'

dispute involves two of Vance's other children—his six-year-old son, who lives with his mother, and his twenty-year-old-son, who was away at college on a full football scholarship. (Id.). At the hearing, Vance admitted that he did not claim either child as exemptions on his 2019 taxes. (Id. at 20; 84). Vance testified that the six-year-old's mother claimed him on her taxes in 2019. (Id. at 83). It is not clear whether anyone claimed the twenty-year old on their taxes in 2019.

Vance testified that the twenty-year-old had a full ride to college—so he did not pay for his tuition or room and board. (Tr., p. 17). He, however, indicated he supported him financially and had purchased his car. (Id.). Vance testified the six-year-old lives with his mother, but he sees him twice a week and pays child support. (Id. at 19). He also indicated that he supported him financially by buying him clothes, shoes, and toys, and had once taken him on vacation. (Id. at 20). There is insufficient evidence in the record to find Vance is entitled to two additional exemptions for his six and twenty-year-old sons. Given this record, the undersigned finds Vance is entitled to three exemptions.

Based on the findings above, Vance's average weekly wage is $1,228.83. He was married and entitled to three exemptions. Vance's weekly rate for the May 29, 2019 date of injury is $788.86. Vance also alleges entitlement to additional healing period benefits due to an underpayment. (See Hearing Report). According to the hearing report, Vance was paid healing period benefits from May 30, 2019, through July 14, 2020, at the rate of $783.61. (Id.). This is an underpayment of $5.25 per week. Vance is entitled to an additional $105.75 in healing period benefits.

CONCLUSIONS OF LAW

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

The claimant has the burden of proving by a preponderance of the evidence that the alleged injury 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 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).

When an expert's opinion is based upon an incomplete or incorrect history, it is not necessarily binding on the commissioner or the court. It is then to be weighed, together with other facts and circumstances, the ultimate conclusion being for the finder of the fact. Musselman v. Central Telephone Company, 154 N.W.2d 128 (Iowa 1967); Bodish v. Fischer, Inc., 257 Iowa 516, 133 N.W.2d 867 (1965). The commissioner as trier of fact has the duty to determine the credibility of the witnesses and to weigh the evidence, together with the other disclosed facts and circumstances, and then to accept or reject the opinion. Dunlavey, 526 N.W.2d 845.

Based on the above findings of fact, I conclude that Vance failed to prove he sustained sequela injuries to his back and left leg as a result of the May 29, 2019, date of injury. Vance relied upon the opinion of Dr. Taylor to prove his back and leg symptoms were causally related to the accepted date of injury. However, as explained above, Dr. Taylor was unable to ascertain the cause of Vance's symptoms. This finding is supported by the treatment records, which document vague complaints, but a series of normal tests results, and no diagnosed injury.

The next issue that must be addressed is permanent impairment to Vance's bilateral shoulders. Prior to the hearing in this matter, both parties stipulated that this claim should be determined under Iowa Code section 85.34(2)(u)[4] but disagreed on whether Vance should be compensated functionally or industrially. Vance argues he should be compensated industrially. Defendants claim he must be compensated functionally. Iowa Code section 85.34(2)(u) states as follows:

[4]On the hearing report, the parties actually have this Code section listed as Iowa Code 85.34(2)(v). (See Hearing Report). However, in May 2019, the language the parties are referring to was contained in Iowa Code section 85.34(2)(u), so that is the section this decision references.

> In all cases of permanent partial disability other than those hereinabove described or referred to in paragraphs "a" through "t" 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. 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.

In McCoy v. Menard, File No. 1651840.01 (App., April 9, 2021), the Commissioner determined that the use of the word "receive" in Code section 85.34(3)(v) implies a comparison of what the claimant was actually paid or offered to be paid both before and after the injury. This means the "claimant's hourly wage must also be considered in tandem with the actual hours worked by that claimant or offered by the employer when comparing pre- and post-injury wages and earnings under section 85.34(2)(v)." Vogt v. XPO Logistics, File No. 5064694.01 (App., June 11, 2021).

At the time of the injury, Vance was earning $26.75 an hour. (Ex. D, p. 36). As of April 2022, his hourly wage had increased to $28.93. (Ex. B, p. 16). At the hearing, Vance introduced a summary of the hours he worked at Delaney. According to that summary, Vance worked less hours in 2021 than he did in 2018. (Cl Ex. 7, p. 32). However, the chart does not include any hours for 2022, and during cross-examination Vance testified the chart may not be accurate. (Tr., p. 121). Given this, the undersigned declines to rely upon it in making the determination of whether Vance received the same or greater salary, wages, or earnings after the 2019 date of injury.

Both parties introduced evidence of Vance's earnings on the date of the injury and after. (See Ex. C; Cl. Exs. 6 and 7). Defendants, however, did not introduce any evidence showing what Vance made in 2018, the last full year of wages before the May 29, 2019 date of injury. (See Ex. C). For this reason, I accept Vance's evidence showing that he made $41,199.02 in 2018 as accurate. (Ex. 6, p. 25). The essential

question then is how much Vance made in 2021, the last full year for which there are records prior to the hearing in this matter. Both parties submitted evidence of Vance's earnings in 2021. As stated above, those figures do not match. According to the check registry submitted by the defendants, Vance was paid $42,976.85 in 2021. (Ex. C, pp. 33-34). According to the W-2 submitted by Vance, he was paid $36,567.03 in 2021. (Cl Ex. 6, p. 28). Neither party provides an explanation for this discrepancy. Under the law, the party who would suffer loss if an issue were not established bears the burden of proving that issue by a preponderance of the evidence. Iowa R. App. P. 6.904(3)(e). Accordingly, I accept defendants' evidence that Vance earned $42,976.85 from working at Delaney in 2021. Vance is receiving the same or greater salary, wages, or earnings than he did at the time of the injury. Vance is not entitled to be compensated industrially under Iowa Code section 85.34(2)(u); his permanent impairment will be calculated functionally.

Compensation or functional loss for scheduled injuries is determined by taking the number of weeks allowed for a complete loss of the body part or scheduled member, multiplied by the extent or percentage of impairment determined using the AMA Guides. Iowa Code § 85.34(2)(x). The Workers' Compensation Commissioner has adopted the AMA Guides 5th Edition for evaluating permanent impairment. 876 IAC 2.4.

I have adopted Dr. Taylor's permanent impairment ratings for Vance's bilateral shoulders. He assigned 11 percent permanent impairment to Vance's right upper extremity and 8 percent permanent impairment to the left upper extremity due to loss of range of motion in the shoulder joints, citing to Figures 16-40, 16-43, and 16-46 of the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition. (Cl Ex. 1, p. 10). He also assigned 10 percent permanent impairment to the left upper extremity for the distal clavicle resection, citing to Table 16-27 of the AMA Guides. (Id.). However, in a recent appeal decision, the Commissioner reiterated that under the AMA Guides, Fifth Edition, a rating physician must apply the 25 percent multiplier contained in Table 16-18 to any rating for a distal clavicle resection. Jay v. Archer Skid Loader Service, File No. 19003586.01 (App., Aug. 23, 2022). The Commissioner stated,

> Table 16-27 of the AMA Guides governs impairment of the upper extremities after arthroplasty of specific bones and joints. Under Table 16-27, a distal clavicle excision is assigned ten percent impairment.
>
> Page 498 of the AMA Guides directs the examining physician as follows:
>
> > Conditions not previously described that can contribute to impairments of the hand and upper extremity include bone and joint disorders (Section 16.7a), presence of resection or implant arthroplasty (Section 16.7b), musculotendinous disorders (Section 16.7c) and tendinitis (Section 16.7d), and loss of strength (Section 16.8). The severity of the impairment due to these disorders is rated separately according to Tables 16-19 through 16-30 and then multiplied by the relative maximum value of the unit involved as

> specified in Table 16-18 ....
>
> Under Table 16-18, the appropriate multiplier for the acromioclavicular joint is 25 percent.
>
> Claimant underwent a distal clavicle excision. The AMA Guides direct the physician to assign a rating for a distal clavicle excision, contrary to Dr. Vincent's opinion. The AMA Guides also require application of a 25 percent multiplier. This results in a 2.5 percent impairment for a distal clavicle excision under the plain text of the AMA Guides.

Id. pp. 7-8; but see Iowa Code § 85.34(2)(x) (stating the extent of functional loss shall be determined solely by utilizing the AMA Guides; lay testimony and agency expertise shall not be utilized). Applying the 25 percent multiplier as directed in Jay, results in a rating of 2.5 percent for Vance's distal clavicle excision. Using the combined values chart at page 604 of the AMA Guides, under Dr. Taylor's ratings, Vance has sustained 14 percent whole body permanent impairment, and is entitled to 70 weeks of permanent partial disability benefits, commencing on February 19, 2021, at the rate of is $788.86. The parties stipulated that Vance was already paid 40 weeks of permanent partial disability benefits at the rate of $738.61. Defendants are entitled to credit for the prior paid benefits.

The parties have a dispute about Vance's correct weekly rate. This disagreement originates from differences of opinion about Vance's average weekly earnings and his entitlement to tax exemptions. The language of Iowa Code section 85.36(6) states,

> The basis of compensation shall be the weekly earnings of the injured employee at the time of the injury. Weekly earnings means gross salary, wages, or earnings of an employee to which such employee would have been entitled had the employee worked the customary hours for the full pay period in which the employee was injured, as regularly required by the employee's employer for the work . . . computed or determined as follows and then rounded to the nearest dollar:
>
> . . .
>
> (6) In the case of an employee who is paid on a daily or hourly basis . . . the weekly earnings shall be computed by dividing by thirteen the earnings . . . the employee earned in the employ of the employer in the last completed period of thirteen consecutive calendar weeks immediately preceding the injury. If the employee was absent from employment for reasons personal to the employee during part of the thirteen calendar weeks preceding the injury, the employee's weekly earnings shall be the amount the employee would have earned had the employee worked when work was available to other employees of the employer in a similar occupation. A week which does not fairly reflect the employee's customary earnings shall be replaced

> by the closest previous week with earnings that fairly represent the employee's customary earnings.

Id. (emphasis added).

Vance contends his average weekly wage is $1,228.83. (Cl Ex. 4, p. 20). Defendants claim his average weekly wage is $1,206.72. (Ex. D, p. 36). The difference in the amounts alleged comes down to one week of earnings, which Vance contends is non-representative and should be excluded as directed by the Iowa Code. The week in question is April 17, 2019, through April 23, 2019. (Cl Ex. 4, p. 20). The parties' documents show he worked 38.5 hours that week. (Id.). This is the only week listed when Vance worked less than 40 hours. (Id.). At the hearing, Vance testified that during construction season, a standard work week at Delaney was 40 hours with some overtime. (Tr., pp. 103-104; 121-122). I accepted Vance's testimony that he generally worked at least 40 hours per week during good weather. Based on the evidence presented, during construction season, a 40-hour work week was customary for Vance; any weeks with less hours are not representative and should be excluded. Griffin Pipe Products Co. v. Guarino, 663 N.W.2d 862 (Iowa 2003); Weishaar v. Snap-On Tools, 582 N.W.2d 177 (Iowa 1998). Vance's average weekly wage is $1,228.83.

The next issue to be addressed is Vance's entitlement to tax exemptions. Vance alleges he is entitled to five exemptions. Defendants contend he is only entitled to three exemptions. The agency has long established precedent that the actual exemptions claimed on the income tax return controls when determining how many exemptions a claimant is entitled to claim for purposes of the weekly compensation rate. Webber v. West Side Transport, Inc., 1278549 (App. December 20, 2002); DeRaad v. Fred's Plumbing and Heating, No. 1134532 (App. January 16, 2002), Rhoades v. Torgerson Construction Co., No. 1012085 (App. January 31, 1995), Keeling v. Cedar Rapids Community Schools, No. 891809 (App. February 26, 1993). The number of exemptions claimed is based upon tax law because tax law is what is utilized to calculate the claimant's spendable weekly earnings. See Iowa Code § 85.61(6)(a)(b) and (9). This presumption is rebuttable. However, the party seeking to overcome the presumption must present sufficient evidence at hearing to rebut the presumption. Thus, it is Vance's burden to show that he could have legally claimed his six-year-old and twenty-year-old sons on his 2019 tax returns.

At the hearing, Vance testified that the six-year-old's mother claimed him on her taxes in 2019. According to legal authority cited by defendants, both Vance and the child's mother could not simultaneously claim him as a dependent in the same tax year.[5] See (U.S. Department of the Treasury. Internal Revenue Service. (2019). *Publication 501: Dependents, Standard Deduction, and Filing Information* (Cat. No.

[5] In his brief, Vance argues he should be entitled to an exemption for his six-year-old because the six-year-old's mother could have filed an IRS Form 8332, allowing him to claim the child as a dependent on his taxes in 2019. (Claimant's Post-Hearing Brief, p. 24). This argument misses the point. It is not evidence that the child's mother in fact filed such a form or even evidence that the child's mother could have legally filed the form and still simultaneously claimed the child on her taxes. It does not rebut the presumption.

15000U). Retrieved from https://www.irs.gov/pub/irs-prior/p501--2019.pdf). Under the law, Vance is not entitled to claim an exemption for his six-year-old son.

The record is silent on who claimed the twenty-year-old son for the 2019 tax year. According to IRS rules cited in defendants' post-hearing brief, in order for the son to qualify as a dependent for tax purposes, Vance must show the following: (1) the son was a student under twenty-four years of age, (2) he lived with Vance for more than half the year, (3) the son did not provide more than half his own support for the year, and (4) the son did not file a joint tax return for the year. See (U.S. Department of the Treasury. Internal Revenue Service. (2019). *Publication 501: Dependents, Standard Deduction, and Filing Information* (Cat. No. 15000U). Retrieved from https://www.irs.gov/pub/irs-prior/p501--2019.pdf). While Vance clearly met the first element, there is not sufficient evidence in the record for me to find that the other three elements required by the IRS rule have been met. Vance has not met his burden to prove he is entitled to an exemption for his twenty-year-old son. Vance is entitled to three exemptions and his weekly rate is $788.86.

Vance seeks payment of the medical expenses listed in claimant's exhibit 10. Exhibit 10 shows Vance made several payments to UP Clinic Family Medicine, PCI, and Rock Valley Physical Therapy, for treatment he received from June 24, 2020, through September 21, 2022. (Cl Ex. 10, p. 41). According to the medical records, this treatment was for Vance's lumbar spine, sciatic leg pain, and radiculopathy. (Id.; see also JE 5, 6, and 7). I found Vance failed to prove he sustained sequela injuries to his back and leg as a result of the work injury on May 29, 2019. Because Vance failed to meet his burden of proof on causation, he is not entitled to payment of the medical expenses listed in claimant's exhibit 10. Vance is also not entitled to alternate medical care for his back and left leg conditions.[6]

Vance also requests reimbursement for the IME performed by Dr. Taylor. Iowa Code section 85.39 permits an employee to be reimbursed for a subsequent examination by a physician of the employee's choice where an employer-retained physician 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. In their post-hearing brief, defendants do not allege Dr. Taylor's fees are unreasonable, therefore the undersigned makes no findings on that issue.

Regarding the IME, the Iowa Supreme Court has provided a literal interpretation of the plain language of Iowa Code section 85.39, stating that section 85.39 only allows

[6] On the hearing report, Vance also requested alternate medical care for his bilateral shoulders. However, this issue was not included in his post-hearing brief. Given this, the undersigned finds this claim has been waived and will make no factual findings on the issue.

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 (Iowa 2015). Under Young, 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. Dr. Bollier, the authorized treating physician, rated Vance's right shoulder impairment in February 2020, and his left shoulder impairment in October 2020. Given this, Vance is entitled to reimbursement for the cost of Dr. Taylor's April 2022 IME report in the amount of $4,312.50. (Cl Ex. 9, pp. 39-40).

Vance also seeks an award of the costs outlined in claimant's exhibit 9. Costs are to be assessed at the discretion of the deputy commissioner hearing the case. See 876 IAC 4.33; Iowa § Code 86.40. Administrative Rule 4.33 provides as follows:

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

876 IAC 4.33.

Vance incurred costs for the filing fee for his petition and service of that petition upon defendants. (Cl Ex. 9, p. 37). Vance was successful in this action—he received additional permanent impairment for his bilateral shoulders. Therefore, I conclude that it is reasonable to assess his filing fee and service costs pursuant to 876 IAC 4.33(3) and 876 IAC 4.33(7). I assess costs totaling $103.00.

ORDER

THEREFORE, IT IS ORDERED:

Defendants shall pay Vance seventy (70) weeks of permanent partial disability benefits at the rate of seven hundred eighty-eight and 86/100 dollars ($788.86) per week commencing on February 19, 2021. Defendants are entitled to a credit for the forty (40) weeks of permanent partial disability benefits already paid at the rate of seven hundred thirty-eight and 61/100 dollars ($738.61) prior to hearing.

Defendants shall pay Vance one hundred and five and 75/100 dollars ($105.75) for underpaid healing period benefits from May 30, 2019, through July 14, 2020.

Defendants 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.

Defendants shall reimburse claimant for the IME conducted by Dr. Taylor in April 2022 in the amount of four thousand three hundred twelve and 50/100 dollars ($4,312.50).

Defendants shall pay costs of one hundred and three dollars ($103.00).

Defendants 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 May 2023.

Amanda Rutherford

AMANDA R. RUTHERFORD
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Dillon Besser (via WCES)

Christine Westberg Dorn (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.