

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JEREMY FULLER,

Claimant,

vs.

CITY OF DES MOINES, IOWA,

Employer,
Self-Insured,
Defendant.

File No. 1654454.01

ARBITRATION DECISION

Headnotes: 1402.40, 1803, 2907

Claimant Jeremy Fuller filed a petition in arbitration on December 10, 2019, alleging he sustained an injury to his shoulder while working for Defendant City of Des Moines ("City") on April 16, 2018. The City filed an answer on December 20, 2019, admitting Fuller sustained an injury.

An arbitration hearing was held *via* CourtCall video conference on June 29, 2021. Attorney John Lawyer represented Fuller. Fuller appeared and testified. Assistant City Attorney Molly Tracy represented the City. Joint Exhibits ("JE") 1 through 4 and Exhibits 1 through 3 and A and B were admitted into the record. The case was submitted on the record at the conclusion of the testimony.

The parties submitted a Hearing Report, listing stipulations and issues to be decided. The Hearing Report was approved at the conclusion of the hearing. The City waived all affirmative defenses.

STIPULATIONS

1. An employer-employee relationship existed between the City and Fuller at the time of the alleged injury.
2. Fuller sustained an injury, which arose out of and in the course of his employment with the City on April 16, 2018.
3. The alleged injury is a cause of temporary disability during a period of recovery.
4. Temporary benefits are no longer in dispute.
5. If the injury is found to be the cause of permanent disability, the disability is a scheduled member disability to the left shoulder.

6. The commencement date for permanent partial disability benefits, if any are awarded, is December 30, 2020.

7. At the time of the alleged injury Fuller's gross earnings were \$1,317.54 per week, he was married and entitled to four exemptions, and the parties believe the weekly rate is \$832.35.

8. Medical benefits are no longer in dispute.

9. Credits are no longer in dispute.

10. Costs have been paid.

ISSUES

1. Is the alleged injury a cause of permanent disability?
2. If the alleged injury is a cause of permanent disability, what is the extent of disability?
3. Should costs be assessed against either party?

FINDINGS OF FACT

Fuller has worked for the City since 2005. (Fuller Testimony) Fuller initially worked part-time and became a full-time employee in 2007. (Fuller Testimony) Fuller has worked as a senior refuse collector since he became a full-time employee. (Fuller Testimony) At the time of the hearing Fuller was working as a full-time senior refuse collector. (Fuller Testimony)

On April 16, 2018, Fuller reported he was experiencing problems with his left shoulder and upper extremity to the City. (Fuller Testimony) The City arranged an appointment for Fuller with occupational medicine. (Fuller Testimony)

The next day, on April 17, 2018, Fuller attended an appointment with Jon Yankey, M.D., an occupational medicine physician with Des Moines Occupational Medicine, complaining of left upper back, left shoulder, and left arm pain. (JE 1, page 1) Fuller relayed as a senior refuse collector he collects garbage and for the past several months he had been experiencing mild intermittent discomfort in his left upper back and shoulder area. (JE 1, p. 1) Fuller reported the day before when he was working he experienced sharp burning pain in his left upper back, left shoulder, and down his left upper arm into his elbow, and reported the pain was moderately severe and burning. (JE 1, p. 1)

Fuller told Dr. Yankey his left upper back and left shoulder pain had decreased some and that the pain was radiating into his left shoulder, but not into his upper arm or elbow. (JE 1, p. 1) Dr. Yankey noted Fuller had sustained an injury to his left elbow in April 2017 when lifting a large garbage tote, he was diagnosed with a torn distal left biceps tendon, he underwent surgical repair in May 2017 with physical therapy, and he eventually returned to full duty without restrictions. (JE 1, p. 1) Fuller relayed his left elbow had done well since surgery, but he continued to have some mild discomfort at times. (JE 1, p. 1) Fuller also told Dr. Yankey he had received treatment at a pain clinic

in February 2018 for pain in his left upper back, shoulder, and down his left arm, including multiple injections into his left shoulder that were somewhat helpful. (JE 1, p. 1)

Dr. Yankey examined Fuller, assessed him with left shoulder and arm pain, left trapezius muscle pain and upper back strain and spasm, and status post left distal biceps tendon repair in May 2017. (JE 1, p. 2) Dr. Yankey recommended conservative treatment and modified work duties and suggested modifications to Fuller's truck, including raising the seat and foot controls. (JE 1, p. 2)

On May 11, 2018, Fuller attended an appointment with Joseph Brunkhorst, D.O., an orthopedic surgeon, complaining of left shoulder pain. (JE 3, p. 4) Dr. Brunkhorst examined Fuller and noted he had undergone cortisone trigger point injections in the back of his left shoulder in March 2018, which helped for about a week. (JE 3, p. 4) Fuller reported most of his pain was on the lateral aspect of his arm, the pain was burning, and that it felt like someone had punched him. (JE 3, p. 4) Dr. Brunkhorst ordered x-rays, assessed Fuller with left shoulder pain, noted his exam was not indicative of a tear because he had excellent range of motion and strength, ordered magnetic resonance imaging, and imposed work restrictions. (JE 3, p. 5)

On May 23, 2018, Fuller returned to Dr. Brunkhorst after he received magnetic resonance imaging, reporting his pain was mildly better, but he had not been using his left arm. (JE 3, p. 6) Dr. Brunkhorst noted the magnetic resonance imaging showed a "labral tear from 5 o'clock to 9 o'clock position with a large paralabral cyst." (JE 3, p. 6) Dr. Brunkhorst assessed Fuller with a left shoulder labral tear, noted the tear did not seem to be the source of his symptoms given most of the pain was located over his deltoid and lateral shoulder, administered a glenohumeral steroid injection, imposed work restrictions, and ordered physical therapy. (JE 3, p. 6)

Fuller returned to Dr. Brunkhorst on July 2, 2018, reporting the injection helped quite a bit after the first day, but his pain had returned a day or two later, and noting he had been doing work conditioning in physical therapy that had helped, but he was experiencing chronic pain that was worse with certain movements. (JE 3, p. 7) Dr. Brunkhorst assessed Fuller with a left shoulder labral tear with paralabral cyst extending into the spinoglenoid notch, recommended left shoulder arthroscopy, and prescribed a sling to limit Fuller's motion postoperatively. (JE 3, p. 7)

On October 29, 2018, Fuller attended an appointment with Dr. Brunkhorst following left shoulder posterior and anterior labral repairs and cyst decompression performed on October 2, 2018. (JE 3, p. 8) Fuller had not begun physical therapy and reported he slipped and caught himself with his arm on the counter. (JE 3, p. 8) Dr. Brunkhorst ordered physical therapy, ordered Fuller to be nonweightbearing with his left arm, and prescribed physical therapy. (JE 3, p. 8)

Fuller attended a follow-up appointment with Dr. Brunkhorst on November 12, 2018, reporting he believed his left shoulder had re-torn, and complaining of significant pain in his deltoid area and a burning sensation that had not gone away. (JE 3, p. 9) Dr. Brunkhorst examined Fuller, ordered physical therapy, and prescribed gabapentin.

(JE 3, p. 9) During an appointment on December 10, 2018, Dr. Brunkhorst increased Fuller's gabapentin and administered an injection. (JE 3, pp. 9-11)

During an appointment on January 28, 2019, Dr. Brunkhorst noted Fuller's rehabilitation had been slow, ice was helping with his pain, and the injection he received in December had helped for two to three weeks. (JE 3, p. 12) Dr. Brunkhorst continued Fuller's physical therapy, imposed work restrictions, and performed another injection. (JE 3, p. 12)

On June 12, 2019, Dr. Brunkhorst provided an impairment rating for Fuller using the Guides to the Evaluation of Permanent Impairment (AMA Press, 5th Ed. 2001) ("AMA Guides"). (JE 3, p. 13) Dr. Brunkhorst noted on exam Fuller elevated to 170 degrees, he had external rotation to 80 degrees, internal rotation to 80 degrees, and 5/5 strength throughout, found Fuller had reached maximum medical improvement, recommended no additional care, released him to return to work without restrictions on June 24, 2019, and opined under chapter 16 of the AMA Guides, Fuller had not sustained a permanent impairment. (JE 3, pp. 13-14)

Fuller returned to Dr. Brunkhorst on February 17, 2020, complaining of left shoulder pain. (JE 3, p. 15) Dr. Brunkhorst noted magnetic resonance imaging showed a re-tear and recommended a labral repair with possible subpec biceps tenodesis. (JE 3, p. 15)

On September 2, 2020, Fuller attended an appointment with Dr. Brunkhorst. (JE 3, p. 17) Dr. Brunkhorst examined Fuller, noted he was attending physical therapy, and restricted him from working. (JE 3, p. 17)

Fuller attended a follow-up appointment with Dr. Brunkhorst on November 20, 2020, reporting he felt some catching, but his strength was "pretty good" and he believed he could return to work. (JE 3, p. 18) Dr. Brunkhorst continued his physical therapy and released him to return to work without restrictions on November 23, 2020. (JE 3, pp. 18-19) Fuller testified Dr. Brunkhorst administered a cortisone injection into this shoulder in November 2020. (Fuller Testimony) Following his appointment with Dr. Brunkhorst, Fuller returned to Des Moines Occupational Medicine and Judith Nayeri, D.O., an occupational medicine physician, examined him and released him to full duty without work restrictions on November 23, 2020. (JE 2, p. 3)

Fuller returned to Dr. Brunkhorst on December 30, 2020. (JE 3, p. 20) Dr. Brunkhorst noted on exam Fuller elevated to 180 degrees, he had passive rotation to 90 degrees, passive internal rotation to 80 degrees, and 5/5 strength with abduction, external rotation and internal rotation, but was tender to palpation over the bicipital groove. (JE 3, p. 20) Dr. Brunkhorst assessed Fuller with status post revision labral repair with biceps tenodesis, found he had reached maximum medical improvement, noted he had some residual soreness, and administered another injection. (JE 3, p. 20)

On February 16, 2021, Dr. Brunkhorst issued an impairment rating, noting Fuller had undergone a left shoulder arthroscopy on October 10, 2018, but he continued to have symptoms and he underwent a revision labral repair on July 10, 2020, with a subpectoral biceps tenodesis, he had undergone physical therapy, he had last seen him

on December 30, 2020, and he had some mild pain, but had full range of motion and strength and did not appear to have any decreased function. (JE 3, p. 22) Using the AMA Guides, chapter 16, Dr. Brunkhorst opined Fuller had not sustained a permanent impairment, released him without restrictions, and recommended no additional treatment. (JE 3, p. 22)

Sunil Bansal, M.D., an occupational medicine physician, conducted an independent medical examination for Fuller on April 29, 2021, and issued his report on May 24, 2021. (Ex. 1) Dr. Bansal reviewed Fuller's medical records and examined him. (Ex. 1) Dr. Bansal noted Fuller had tenderness to palpation, greatest anteriorly on the left shoulder, and no tenderness on the right shoulder. (Ex. 1, p. 6) For the left shoulder he noted a positive O'Brien's test, and negative Neer's, Speed's, impingement, and apprehension tests. (Ex. 1, p. 6) Dr. Bansal diagnosed Fuller with status post left shoulder arthroscopy with posterior labral repair, anterior labral repair, and open subpectoralis biceps tenodesis causally related to the work injury. (Ex. 1, p. 7)

Using Figures 16-40 through 16-46 of AMA Guides, and comparing to the right shoulder Dr. Bansal assigned Fuller the following impairment for his left shoulder:

	RANGE OF MOTION	% UE Impairment
Flexion:	143, 141, 142 degrees	3
Abduction:	138, 139, and 139 degrees	2
Adduction:	32, 30, and 28 degrees	1
External Rotation:	46, 45, and 46 degrees	1
Extension:	39, 41, and 37 degrees	1
Internal Rotation:	40, 38, and 42 degrees	3

Total is an 11% upper extremity impairment, or a 7% whole person impairment.

(Ex. 1, pp. 7-8) Dr. Bansal recommended restrictions of no lifting over twenty pounds with the left arm, and no lifting over shoulder level with the left arm. (Ex. 1, p. 8)

On June 17, 2021, Dr. Brunkhorst sent a letter to the City's representative, after receiving a copy of Dr. Bansal's report, to explain the difference in ratings, as follows:

I see that his impairment rating was due to range of motion deficits on his exam. Therefore, the difference was based on range of motion on my exam per his exam. In review of Dr. Bansal's [sic] note, Jeremy reports that his pain was no better than before surgery. This is different than what he explained to me. He did have some anterior pain at his final follow-up visit, but he did not complain about weakness or stiffness. Overall at that time, he was doing fairly well except for some mild chronic pain in the anterior aspect of his shoulder. All of the posterior pain he had previously was gone, but again the anterior pain was still better than before.

Based on our last exam and based on the type of injury and surgery he had, this typically does not require chronic or permanent work restrictions.

(Ex. B)

Dr. Bansal issued a supplemental report on June 23, 2021, after reviewing Dr. Brunkhorst's June 17, 2021 letter, as follows:

[i]n my medical opinion, the variance in measurements between Dr. Brunkhorst's measurements and those I obtained is partly explained by the fact that Dr. Brunkhorst's last shoulder measurements were taken in December 2020, in close proximity to a shoulder area steroid injection that was administered in November 2020. Steroid injections are usually transiently effective, wearing off within two to three months. I evaluated Mr. Fuller at the end of April 2021, well after the usual effective period.

(Ex. 3, p. 11)

Fuller testified he wakes up with pain in his left upper extremity and his shoulder is more sore after a full day of work. (Fuller Testimony) Fuller uses ice and his wife massages his shoulder to help with the pain. (Fuller Testimony) Since his second surgery Fuller has stopped exercising due to his pain. (Fuller Testimony) Fuller testified he has a difficult time lifting above his head since the work injury. (Fuller Testimony)

CONCLUSIONS OF LAW

I. Applicable Law

This case involves the issues of extent of disability and entitlement to costs under Iowa Code sections 85.34 and 86.40. In 2017, the Iowa Legislature enacted changes to Iowa Code chapters 85, 86, and 535 effecting workers' compensation cases. 2017 Iowa Acts chapter 23 (amending Iowa Code sections 85.16, 85.18, 85.23, 85.26, 85.33, 85.34, 85.39, 85.45, 85.70, 85.71, 86.26, 86.39, 86.42, and 535.3). Under 2017 Iowa Acts chapter 23 section 24, the changes to Iowa Code sections 85.16, 85.18, 85.23, 85.26, 85.33, 85.34, 85.39, 85.71, 86.26, 86.39, and 86.42 apply to injuries occurring on or after the effective date of the Act. This case involves an injury occurring after July 1, 2017, therefore, the provisions of the new statute involving extent of disability under Iowa Code section 85.34 apply to this case.

The calculation of interest is governed by Deciga-Sanchez v. Tyson Foods, File No. 5052008 (Ruling on Defendant's Motion to Enlarge, Reconsider, or Amend Appeal Decision Re: Interest Rate Issue), which holds interest for all weekly benefits payable and not paid when due which accrued before July 1, 2017, is payable at the rate of ten percent; all interest on past due weekly compensation benefits accruing on or after July 1, 2017, is payable 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. Again, given this case concerns an injury occurring after July 1, 2017, the new provision on interest applies to this case.

II. Permanent Impairment and Extent of Disability

Iowa Code section 85.34(2) governs compensation for permanent partial disabilities. The law distinguishes between scheduled and unscheduled disabilities. The Division of Workers Compensation evaluates disability using two methods, functional and industrial. Simbro v. Delong's Sportswear, 332 N.W.2d 886, 887 (Iowa 1983).

The Division applies the functional method for a scheduled injury to each part of the body listed in the statute, including: (1) a thumb; (2) a first finger; (3) a second finger; (4) a third finger; (5) a fourth finger; (6) a first or distal phalange of the thumb or any finger; (7) loss of more than one phalange of the thumb or a finger; (8) a great toe; (9) one of the toes other than the great toe; (10) a first phalange of any toe; (11) loss of more than one phalange of any toe; (12) a hand; (13) an arm; (14) a shoulder (added in 2017); (15) a foot; (16) a leg; (17) an eye; (18) "loss of an eye, the other eye having been lost prior to the injury;" (19) hearing, other than occupational loss; (20) occupational hearing loss; (21) "loss of both arms, or both hands, or both feet, or both legs, or both eyes, or any two thereof, caused by a single accident;" and (22) disfigurement of the face or head. Iowa Code § 85.34(a)-(u); Westling v. Hormel Foods Corp., 810 N.W.2d 247, 252 (Iowa 2012). Each of these subsections provides a maximum number of weeks of compensation for the complete loss of a scheduled member or body part.

Since 2017, 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 a percentage of impairment determined using the AMA Guides. Iowa Code § 85.34(2)(x). The statute also requires compensation be awarded for functional loss if an employee 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." Id. § 85.34(2). That provision does not apply in this case. The Division uses the industrial method for "all cases of permanent partial disability other than those" set forth in Iowa Code section 85.34(a) through (u). All other cases are classified as "unscheduled injuries." Westling, 810 N.W.2d at 252-53. Compensation for unscheduled injuries is determined examining the reduction of earning capacity. Id. at 53.

The parties stipulated Fuller sustained an injury to his left shoulder, a scheduled member. Fuller alleges he has sustained an eleven percent permanent partial impairment to his left shoulder. The City avers Fuller has not sustained a permanent impairment to his left shoulder.

When determining compensation for functional loss for a scheduled member disability, the extent of loss is to be determined "solely" by using the AMA Guides. Iowa Code § 85.34(2)(x). The statute provides "[l]ay testimony or agency expertise shall not be utilized in determining loss or percentage of permanent impairment pursuant to paragraphs "a" through "u", or paragraph "v" when determining functional disability and not loss of earning capacity. Id.

Dr. Brunkhorst opined Fuller did not sustain a permanent impairment, finding no range of motion deficits in December 2020. Dr. Bansal examined Fuller four months later, in April 2021, and determined he had range of motion deficits based on objective testing comparing the left to right upper extremities. Fuller testified he underwent injections into his shoulder in November and December 2020. He also testified he continues to be symptomatic at hearing. Dr. Bansal explained the effect injections can have on testing. The City did not request Dr. Brunkhorst re-evaluate Fuller after it received Dr. Bansal's report. Dr. Bansal examined Fuller later in time, four months after his last injection. I find Dr. Bansal's report most persuasive that Fuller sustained an eleven percent permanent impairment to his left upper extremity. I also adopt Dr. Bansal's restrictions as Fuller's permanent restrictions.

The statute provides a maximum of 400 weeks for loss of a shoulder. Id. § 85.34(2)(n). Under the statute, using the AMA Guides, Fuller is entitled to 44 weeks of permanent partial disability benefits, at the stipulated weekly rate of \$832.35, commencing on the stipulated commencement date of December 30, 2020.

III. Costs

Fuller seeks to recover the \$100.00 filing fee and \$6.80 for service. (Ex. 2) Iowa Code section 86.40, provides, "[a]ll costs incurred in the hearing before the commissioner shall be taxed in the discretion of the commissioner." Rule 876 Iowa Administrative Code 4.33, provides costs may be taxed by the deputy workers' compensation commissioner for: (1) the attendance of a certified shorthand reporter for hearings and depositions; (2) transcription costs; (3) the cost of service of the original notice and subpoenas; (4) witness fees and expenses; (5) the cost of deposition testimony of doctors and practitioners; (6) the reasonable cost of obtaining no more than two reports from doctors or practitioners; (7) filing fees; and (8) the cost of persons reviewing health service disputes. The administrative rule expressly allows for the recovery of the costs Fuller seeks in this case. The City is assessed the \$100.00 filing fee and \$6.80 service cost.

ORDER

IT IS THEREFORE ORDERED, THAT:

Defendant shall pay Claimant forty-four (44) weeks of permanent partial disability benefits, at the stipulated rate of eight hundred thirty-two and 35/100 dollars (\$832.35), commencing on the stipulated commencement date of December 30, 2020.


Defendant is entitled to a credit for the permanent partial disability benefits paid to date.

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.

Defendant shall reimburse Claimant one hundred and 00/100 dollars (\$100.00) for the filing fee, and six and 80/100 dollars (\$6.80) for the cost of the service.

Defendant shall file subsequent reports of injury as required by this agency pursuant to rules 876 IAC 3.1(2) and 876 IAC 11.7.

Signed and filed this 31st day of August, 2021.



HEATHER L. PALMER
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served as follows:

John Lawyer (via WCES)

Molly Tracy (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.