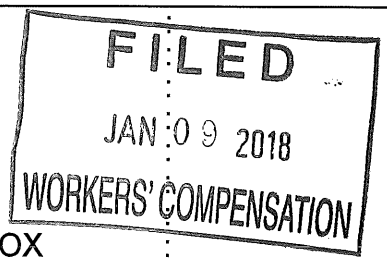
BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

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| RON M. DAVIS,<br><br>Claimant,<br><br>vs.<br><br>BED ROCK, INC., d/b/a WILCOX TRUCKING,<br><br>Employer,<br><br>and<br><br>NEW HAMPSHIRE INSURANCE COMPANY,<br><br>Insurance Carrier,<br>Defendants. | File No. 5054446<br><br>ARBITRATION DECISION<br><br>Head Note Nos.: 1106, 1108 |

## STATEMENT OF THE CASE

Ron Davis, claimant, filed a petition in arbitration seeking workers' compensation benefits against Bed Rock Inc., d/b/a Wilcox Trucking, employer, and New Hampshire Ins. Co., insurer, for an alleged work injury date of July 17, 2015.

This case was heard on September 27, 2017, in Des Moines, Iowa. The case was considered fully submitted on October 18, 2017, upon the simultaneous filing of briefs.

The record consists of Joint Exhibits 1-9; Claimant's Exhibits 1, 3-4; Defendants' Exhibits A-H, and the testimony of claimant.

## ISSUES

1. Whether claimant sustained an injury on July 17, 2015 which arose out of and in the course of employment;

2. Whether the alleged injury is a cause of temporary disability and, if so, the extent;

3. Whether the alleged injury is a cause of permanent disability and, if so,;

4. The extent of claimant's industrial disability;

5. Whether there is a causal connection between claimant's injury and the medical expenses claimed by claimant;

6. Whether claimant is entitled to reimbursement of a medical examination pursuant to section 85.39.

## STIPULATIONS OF FACT

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.

The parties stipulate claimant was an employee of defendant employer at all relevant times. They further agree that claimant has been off work from July 17, 2015, through December 27, 2016, and if defendants are found liable for the alleged injury, claimant would be entitled to temporary benefits during that period of time.

They agree that the commencement date for permanent partial disability benefits, if any are awarded, is December 28, 2016.

At all times material hereto, the parties agree claimant's gross earnings were $786.03 per week, that he was married and entitled to 2 exemptions. The weekly benefit rate is $512.09.

## FINDINGS OF FACT

Claimant was a 66-year-old person at the time of hearing. At all relevant times hereto, claimant was a married person with no other legal dependents. He received a Bachelor of Science degree in accounting in 1973.

His first employment was with Buena Vista Stationery & Printing, a family-owned business, as a printing supervisor. He moved on to Simonsen Manufacturing where he worked with print production and advertising.

After a move to Sioux City, he and his wife managed an apartment complex. He then moved on to Vista Data Systems where he and the owners attempted to sell a piece of machinery to insurance companies. When this was not successful, he moved on to The Printer Inc. working as an estimator. He then took a job with Kirk Van Orsdel to assist with a new venture with Lloyd's of London. The venture did not materialize and he took a new position with Benton Mortgage working on a new accounting system. This position lasted a year, after which he worked for Acme Printing as an estimator.

He went on to work for The Printer Inc. writing software systems. He was self-employed for approximately six years working on software systems with The Printer Inc. Owning his own business was stressful and bad for his health. He decided to make a career change.

In 2004, he took a job with Prairie Meadows as part of the security detail for the horses. He then did security work for another company until 2007. In 2007, he took a job driving trucks for two years. He returned to security work, part-time, from 2009-2010. In 2009, he began driving trucks for the defendant employer. On a daily basis, he would drive between Omaha and Des Moines, transporting empty mail boxes for direct mail and other mail products.

Physically, he would be required to conduct a pre-trip inspection which required opening the hood of his tractor as well as some manual exertion when hooking up the trailer.

Prior to his injury, he had no physical limitations which impacted his ability to work.

In 1977, claimant was in an auto accident that resulted in problems with his left shoulder, for which he underwent arthroscopic surgery. Claimant's testimony was a little uneven regarding the past shoulder pains. Medical records show that he had arthroscopic surgery and ongoing tendonitis which was sporadically treated with injections. (JE 3:1) He also complained of right hip and thigh pain. (JE 3:11)

The crux of the dispute is whether an injury occurred on July 17, 2015. Claimant, Ron Davis, has offered up multiple accounts of a dispute he had with a fellow co-worker the morning of July 17, 2015. During direct examination at the hearing, claimant testified that he confronted a co-worker over paperwork.

> I says, "Do you have my paperwork?" And he was — It was a strange conversation. He just kind of like cowered and was expletive, deleted words out of his mouth. And so I thought, whoa, you know, something.
>
> So I turned around then and went back up and got into my tractor, and he went back to unhook his trailer, and I'm sitting there just a few feet from my paperwork that's laying in his dash of his tractor, so I climbed back out of my tractor, walk maybe ten feet and step up on the outside steps of his tractor, and I grab the steering wheel with my — We're trained to when we get in and out of the tractor that you, if your feet should slip, that you're not going to fall.
>
> So I distinctly went up to the top step of his tractor. I was not in his tractor, but on the top step. I grabbed the steering wheel with my left hand, and I reached in with my right hand, took the paperwork off his dash, and

> as I came out with the paperwork I saw him running towards me from the rear of his tractor . . . .
>
> And then he came and he used this shoulder, and he just flung my feet right off the steps of that top step. And at that point I have no recollection what happened.
>
> The next thing I knew, I was standing on the ground, had the paperwork in my hand, and he had me by the throat and with his left hand, and he was ready to punch me. And—But he didn't. And I thought, Wow, you know, just—So I slowly just handed—I was like a rag doll. I don't know how to fight . . . .
>
> And I went like this with the paperwork, and he took the paperwork and then he let go of me. And I'm going, Well, you know, what do I do? And so I called the cops.

(Transcript pages 30-31)

In cross-examination, claimant reiterated that he "blanked out" and did not recollect having his shoulder jerk sharply with immediate pain. (Tran. p. 52, lines 21-25) When asked to further describe what it meant when the co-worker had claimant by the throat, claimant testified that "He would, like take your whole front end of your shirt and twist it." Claimant further testified on cross that the co-worker did not have his hands physically around claimant's neck. (Trans. p. 53, lns. 21-23)

When asked if claimant recalled hanging by the left arm from the steering wheel four or five feet off the ground, he testified that he did not. "No. I wish I could—I wish I did, but that's the truth." (Trans. p. 54, lns. 11-12)

During the interviews with the police officers, claimant maintained he was not injured. During cross-examination, claimant maintained that he was "traumatized when [the co-worker] grabbed me and he held me and he was going to hit me. Okay, because I was not—did not at that—you know, before then. Coming off the step was secondary to being assaulted." (Trans. p. 69, lns. 3-5)

When asked again on cross-examination about how the incident transpired, claimant testified:

> He came along and my—the last I recollect, my feet were up on the steps. And I was holding on to the steering wheel, and I had just pulled out the paperwork. And at that point I blanked out, and I have zero recollection until I am standing on the ground with my paperwork in my right hand and he's got me by the throat.

(Trans. p. 70, lns. 21-25; 71, lns. 1-2)

The police report, time-stamped 14:29-14:43, records the claimant's account as follows:

> Assaulted by the driver of another semi
>
> They are both in their own semi's at the moment.
>
> No medics needed.
>
> Suspect grabbed the caller by the throat.
>
> Both work for Wilcox trucking
>
> Other driver is new and caller doesn't know his name.
>
> . . . .
>
> Argument over paper work. Male grabbed RP and was cussing at him as the RP was grabbing for the paper work. RP did not want to press charges only that it was documented.

(JE 1:3)

He further clarified that he remembered hanging on to the wheel, followed by his co-worker's shoulder taking his feet off the top step and then coming to when he was standing on the ground. But stated he did not have a recollection of holding the steering wheel or his left shoulder jerked. He only assumed that this would be true given his past training. (Trans. pp. 76-77)

An incident report was filled out at 3:45 p.m., after the departure of the police. The description of the event reads as follows:

> An altercation about what load they were taking. Got into a physical contest. Ron said the other guy pulled his arm hurting his left shoulder. Police were called and they broke it up. No one was taken in. They were called by Davis.

(Ex. G:1)

On July 17, 2015, to Amanda Dyvig, PA-C, at Doctors Now, claimant described his pain in the left shoulder as suddenly onset when a "co-worker grabbed him whipping him around." (JE 2:1) He further stated he was unaware how he hurt his shoulder but was not able to lift his arm above 90 degrees. (JE 2:1)

On August 16, 2015, claimant was seen by Glenn E. Hockett, M.D. (JE 3:21) Dr. Hockett recorded the injury as follows:

> Ron presents to the office accompanied by his wife for evaluation of pain in the left posterior shoulder region. This has been present for over a month and occurred after there was a physical altercation at work. He was retrieving some of his papers from another driver's cab, and the other driver came up and with his body, pushed him to the ground and then grabbed him.

(JE 3:22)

On October 28, 2015, claimant consulted with Patrick Sullivan, M.D. (JE 5:4) Dr. Sullivan recorded the injury as follows:

> Ronny Davis is a 64 year old white male who states that he has had bilateral shoulder pain since an injury at work on 7/17/15. He was driving truck and another employee caused him to fall from a stair on his truck, and he has had shoulder pain since then.

(JE 5:4)

On November 16, 2015, Timothy Vinyard, M.D., describes the mechanism of injury as falling off the top step of a tractor. (JE 7:1) He expanded on that in an opinion letter describing the incident as claimant falling off the stairs and catching himself with his arms. (JE 7:47) Later, on December 27, 2016, Dr. Vinyard wrote, "[h]e did tell me today that his original injury occurred after an altercation where he was pushed off of his truck." (JE 7:38)

Officer Jake Cameron wrote out a statement on February 10, 2016, regarding the incident and placed Mr. Davis in his truck at the time of the alleged assault.

> Mr. Davis stated that he had been assaulted by the other male while he was sitting [sic] his truck. Mr. Davis stated that they had been arguing over paper work and that the male jumped into his truck and grabbed his throat. Mr. Davis declined having any injuries at the time of the incident and declined any medical assistance.

(Ex. F:1)

On May 12, 2017, Sunil Bansal M.D., the examiner hired by the claimant, documented the injury occurrence as follows:

> He arrived at a location to pick up a load, but the paperwork was unavailable. He felt that the paperwork had been inadvertently retrieved by another driver, and he called out to the other driver. They talked to each other through the windows of their trucks. The other driver looked at the paperwork, then placed it on the dashboard of his truck and told Mr. Davis he would not hand over the paperwork.

> The other driver parked his truck and began to unhook the trailer, and Mr. Davis began to climb into the other truck to retrieve the paperwork. As he climbed into the truck cab, he felt the other driver smash into him with his shoulder. His feet were pulled out from under him, and he hung onto the steering wheel with his left arm and hand. His arm was jerked sharply, and he had severe pain in his shoulder. At this point he was hanging four feet off the ground. The other driver grabbed him by his throat and shook him.
>
> He is unsure of the mechanism of injury of his right shoulder during the incident. He had intense pain, and was unsure of what he should do next. He called the police, but then declined filing a complaint against the other driver. However, he did report the incident to his employer.

(JE 8:7-8)

After police reports were made, claimant climbed into his own truck and set off on his work trip. When he went to shift gears and turn the steering wheel, claimant testified he noticed that his "shoulder wasn't working quite right." (Trans. p. 32: lns. 1-12)

Claimant's recollection of how the injury occurred varied a great deal. At the time of his hearing, he professed to have a specific memory of his co-worker using his shoulder to fling his feet off the top steps and then either holding claimant by the throat and/or fisting the collar of claimant's shirt tight. When pressed about his varying accounts to medical providers and police, claimant then retreated to an excuse of "blanking out" but maintained that because of his training, he must have held onto the wheel and must have hung off the step, thereby sustaining a shoulder injury.

Claimant's loss of memory was not recorded in any of the reports taken by the police or defendant employer or the PA-C from Doctors Now who saw claimant within hours of the alleged incident. He did not report this loss of consciousness to his own medical examiner, Dr. Bansal. Dr. Bansal had a three paragraph recitation of how the incident occurred including that the other driver smashed into claimant with his shoulder, swept his feet out from under him, grabbed him by the throat and shook him.

Claimant's uneven testimony renders him non credible. It is difficult to piece together exactly what happened given the varying accounts.

The only consistent thread is that claimant's paperwork was taken by another co-worker. This angered the claimant. He confronted the co-worker. The police were called. Claimant denied injury and the parties were released. These facts are deemed to be true for the purposes of this decision.

The other allegations of hanging by his arm, getting his feet swept out from under him, or being choked or dangled off his feet, are not credible. Claimant was shown on police body cameras to have no visible scratches, abrasions or even wrinkles around

his collar. Claimant's testimony that he blanked out despite sustaining no blow to his head and assuming he had dangled four feet off the ground and then somehow came to on the ground, standing completely upright is not believable. I decline to accept the multiple versions of the incident testified to by the claimant or reported to the various treaters.

Following the work incident, claimant maintained he suffered a left and right shoulder injury. He began a course of conservative care but as pain in his left shoulder persisted, he was referred to Dr. Sullivan for an orthopedic evaluation on October 28, 2015. (JE 5:4) Dr. Sullivan ordered an MRI which showed full-thickness tears of the supraspinatus and infraspinatus tendons along with muscle atrophy, a dislocated long head biceps tendon, an irregular tear of the labrum, and fluid in the shoulder joint. (JE 6:1) Care was then transferred to Dr. Vinyard who recommended surgical repair. (JE 7:3)

Claimant underwent surgery on December 30, 2015. (JE 7:4) Unfortunately, claimant's condition did not improve and on May 18, 2016, a repeat MRI was conducted. (JE 6:4) The repeat MRI revealed a recurrent tear and a lack of healing from the previous surgery. (JE 6:4) On July 13, 2016, claimant underwent a second surgery of his left shoulder. (JE 7:24)

He began to improve. By October 3, 2016, his pain was 4/10 on a 10 scale. (JE 7:33) During the November 14, 2016, visit, claimant reported his symptoms were mild and his pain was minimal. His strength was slowly returning. (JE 7:36) On December 27, 2016, Dr. Vinyard recorded claimant's pain as 1/10 on a 10 scale. (JE 7:38) "His range of motion and strength are much improved. He feels he is making progress. He complains of pain only with repeated activities. He denies any other local or systemic complaints." (JE 7:38) Claimant did not return for treatment after this visit with Dr. Vinyard.

In response to an inquiry from defendants, Dr. Vinyard authored an opinion letter dated May 10, 2017. In that letter, Dr. Vinyard stated that the tear of the rotator cuff resulted in "a slight temporary aggravation of a previous underlying condition. I do not think his shoulder condition was likely caused or materially aggravated by the incident." (JE 7:46) Dr. Vinyard believed that the no commercial driving work restriction was given to claimant at claimant's request. "It would be very unusual for me to place a patient similar to Mr. Davis on those restrictions," he wrote, "if they did not specifically request that themselves." (JE 7:47)

Dr. Bansal recorded claimant's current physical complaints as occasional aching pain in his left shoulder, with popping and cracking, intermittent sharp shooting pains when he reaches in particular positions, limited ability to raise his arm, rare numbness and tingling on the left, and occasional aches and pains in the right shoulder and arm. (JE 8:9)

Dr. Bansal found tenderness to palpation on the right shoulder and the left with some reduced range of motion on both sides, greater on the left. (JE 8:10) Dr. Bansal acknowledged claimant had a structural degeneration but believed claimant had sustained an acute injury leading to the rotator cuff tear. (JE 8:12) Dr. Bansal wrote, "[I]t is not medically plausible that he was walking around performing his routine truck driving duties with a massive rotator cuff tear prior to that injury." (JE 8:12)

It should be noted that claimant was observed on the police body cams showing claimant with his shirt tucked in, raising his arms above his head, grabbing his tractor bars and climbing in and out of the truck-essentially performing his routine truck driving duties.

Dr. Bansal assigned an eight percent impairment of the whole body and recommended work restrictions of no lifting greater than five pounds occasionally, no frequent lifting with the left arm, no frequent reach or rotational movements with his left arm, and no lifting above the shoulder level. (JE 8:12)

At the time of the hearing, claimant was not taking any pain medication but was self-limiting his activities. He testified that he can climb and grab things but does not have any strength to lift.

Claimant has not returned to work since the date of his injury. At hearing, he stated his goal was to return to the employ of defendant. He believes he could drive an automatic trailer and that he could do security work, but that his position as a driver for defendant employer would pay more.

He discounts his past tech and printing experience and believes those jobs are foreclosed to him based on the technological advancements.

## CONCLUSIONS OF LAW

The claimant has the burden of proving by a preponderance of the evidence that the alleged injury actually occurred and that it both arose out of and in the course of the employment. Quaker Oats Co. v. Ciha, 552 N.W.2d 143 (Iowa 1996); Miedema v. Dial Corp., 551 N.W.2d 309 (Iowa 1996). The words "arising out of" referred to the cause or source of the injury. The words "in the course of" refer to the time, place, and circumstances of the injury. 2800 Corp. v. Fernandez, 528 N.W.2d 124 (Iowa 1995). An injury arises out of the employment when a causal relationship exists between the injury and the employment. Miedema, 551 N.W.2d 309. The injury must be a rational consequence of a hazard connected with the employment and not merely incidental to the employment. Koehler 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).

A personal injury contemplated by the workers' compensation law means an injury, the impairment of health or a disease resulting from an injury which comes about, not through the natural building up and tearing down of the human body, but because of trauma. The injury must be something that acts extraneously to the natural processes of nature and thereby impairs the health, interrupts or otherwise destroys or damages a part or all of the body. Although many injuries have a traumatic onset, there is no requirement for a special incident or an unusual occurrence. Injuries which result from cumulative trauma are compensable. Increased disability from a prior injury, even if brought about by further work, does not constitute a new injury, however. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); Ellingson v. Fleetguard, Inc., 599 N.W.2d 440 (Iowa 1999); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995); McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985). An occupational disease covered by chapter 85A is specifically excluded from the definition of personal injury. Iowa Code section 85.61(4)(b); Iowa Code section 85A.8; Iowa Code section 85A.14.

Dr. Vinyard, an orthopedic surgeon chosen by the claimant, and Dr. Bansal, the IME doctor chosen by the claimant, give conflicting medical opinions. First, as to causation, Dr. Vinyard opined that the only injury claimant related was one that was self-inflicted. Claimant fell off the stairs and caught himself with his arms. Dr. Bansal adopted claimant's story that his feet were swept out from under him, resulting in claimant hanging off the ground only to be shaken by the co-worker. Dr. Bansal's recitation of the incident was previously found to be not credible given the claimant's ever-changing description. Instead, it was found that claimant was involved in an

argument with the co-worker and that he sustained no injury, as he described to the police. It is plausible that claimant fell off his own stairs, caught himself by the arms at some point after the police left because, as Dr. Bansal pointed out, it is not medically possible for claimant to do the regular activities of a truck driver with the kind of massive rotator cuff tear he was suffering from. The police video cams show claimant moving his arms and shoulders normally, reaching up above his head, gripping the grab bars, and levering himself in and out of the truck. Since those activities are not medically possible pursuant to the opinion of Dr. Bansal, claimant's rotator cuff tear must have occurred after the confrontation with his co-worker and after the police departed.

Thus it is determined claimant sustained no work injury.

Claimant also seeks reimbursement for an independent medical evaluation (IME). The Supreme Court has held that reimbursement for a medical examination under Iowa Code section 85.39 cannot be ordered until liability for an injury has been established. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181, 194 (Iowa 1980). However in a subsequent case, the Supreme Court noted that one of the purposes of an IME is to determine causation. "In fact, if the purpose of the IME is to assist in determining causation, an admission of liability should not be a prerequisite to such an examination." City of Davenport v. Newcomb, 820 N.W.2d 882 (Iowa App. 2012). One prerequisite, however, is that the defendant obtain an evaluation of permanent disability by a physician retained by the defendant employer that is deemed too low by the claimant. Iowa Code §85.39. In this case, there was no such trigger. Defendants obtained an opinion from the claimant's treating surgeon. Further, defendants denied liability early in the case and did not direct medical care.

Claimant is not entitled to reimbursement of the IME.

All other issues are deemed moot.

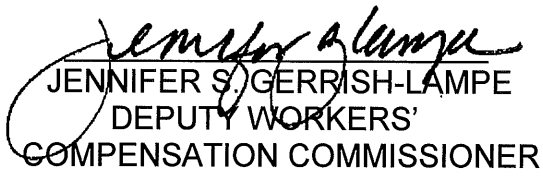
ORDER

THEREFORE, IT IS ORDERED:

Claimant shall take nothing.

Each party shall bear his or their own costs.

Signed and filed this 9th day of January, 2018.



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**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 in writing and received by the commissioner's office 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 a legal holiday. The notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 1000 E. Grand Avenue, Des Moines, Iowa 50319-0209.