BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

YENNI MEJIA, Claimant, vs. COSTCO WHOLESALE CORP., Employer, and SAFETY NATIONAL CASUALTY CORP., Insurance Carrier, Defendants.	:	File No. 1655858.01 ARBITRATION DECISION Head Note Nos.: 1100, 1108, 1400, 1800, 1801, 1803, 2700

STATEMENT OF THE CASE

The claimant, Yenni Mejia, filed a petition for arbitration seeking workers' compensation benefits from employer Costco Wholesale Corporation ("Costco"), and their insurer, Safety National Corporation. Gabriela Navarro appeared on behalf of the claimant. Anita Dhar Miller appeared on behalf of the defendants.

The matter came on for hearing on August 29, 2022, before Deputy Workers' Compensation Commissioner Andrew M. Phillips. Pursuant to an order of the Iowa Workers' Compensation Commissioner, the hearing occurred electronically via Zoom. The hearing proceeded without significant difficulty.

The record in this case consists of Joint Exhibits 1-5, Claimant's Exhibit 1-6, and Defendant's Exhibits A-D. The exhibits were received into the record without objection.

The claimant testified on her own behalf with the assistance of interpreter Ernesto Nino-Murcia. Also present was employer representative Tyler O'Dwyer. SueAnn Jones was appointed the official reporter and custodian of the notes of the proceeding. The evidentiary record closed at the end of the hearing, and the matter was fully submitted on September 23, 2022, after briefing by the parties.

STIPULATIONS

Through the hearing report, as reviewed at the commencement of the hearing, the parties stipulated and/or established the following:

1. There was an employer-employee relationship at the time of the alleged injury.

2. That the claimant sustained an injury to her left upper extremity which arose out of, and in the course of employment on October 23, 2018.

3. That the alleged injury to the left upper extremity is a cause of temporary disability during a period of recovery.

4. That, if the injury is found to be a cause of permanent disability, the claimant sustained a scheduled member disability to the left upper extremity.

5. That the claimant is working for the employer earning greater wages than on the date of injury, and thus any permanent disability is to be evaluated based upon functional disability ratings.

6. That the claimant had gross weekly earnings of one thousand sixty-two and 96/100 dollars ($1,062.96) per week, was married, and was entitled to five exemptions at the time of the alleged injury. This provided a weekly compensation rate of seven hundred six and 75/100 dollars ($706.75).

7. That prior to the hearing, the claimant was paid 29.571 weeks of permanent partial disability benefits at the agreed upon weekly rate.

Entitlement to temporary disability and/or healing period benefits is no longer in dispute. The defendants waived some of their affirmative defenses.

The parties are now bound by their stipulations.

ISSUES

The parties submitted the following issues for determination:

1. Whether the claimant sustained an injury to her left shoulder and/or body as a whole on October 23, 2018, which arose out of and in the course of her employment.

2. Whether the alleged injury to the left shoulder and/or body as a whole is a cause of temporary disability during a period of recovery.

3. Whether the alleged injury is a cause of permanent disability.

4. The extent of permanent disability, if any is awarded.

5. The proper commencement date for permanent partial disability benefits, if any are awarded.

6. Whether the claimant is entitled to reimbursement for an independent medical examination ("IME") pursuant to Iowa Code section 85.39.

7. Whether the claimant is entitled to alternate care pursuant to Iowa Code section 85.27.

8. Whether the defendants established an affirmative defense of lack of timely notice pursuant to Iowa Code section 85.23.

FINDINGS OF FACT

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

Yenni Mejia, the claimant, was 43 years old at the time of the hearing. (Testimony). She resides in Cedar Rapids, Iowa, with her husband. (Testimony). Ms. Mejia was born in Honduras. (Joint Exhibit 5:104).

Ms. Mejia completed middle school in Honduras. (Testimony). She then came to United States of America in 1998. (Testimony; JE 5:105). She initially settled in Virginia. (JE 5:105). After arriving, she took some classes in English as a second language ("ESL") and English. (Testimony). Ms. Mejia speaks Spanish and some English. (Testimony). She speaks mostly Spanish at home because she wants her children to speak better Spanish. (Testimony). She testified with the assistance of an interpreter because she wanted to understand "things in a detailed fashion" since English is not her native language. (Testimony).

Upon moving to the United States of America, Ms. Mejia worked at McDonald's as a cook and lobby attendant. (Testimony). As a lobby attendant, she made sure that the dining area was in order and sometimes filled orders for pickup. (Testimony). She believed that she could still perform most aspects of this job at the time of the hearing. (Testimony).

In 1999, Ms. Mejia worked as a garden keeper for a business called Rock Garden. (JE 5:112-113). She took care of plants, and filled orders. (JE 5:112-113). She did not believe that she could still do this work after her injury, because the environment was very cold at Rock Garden. (JE 5:113).

In 2000, the claimant also worked two part-time jobs performing office cleaning work. (Testimony). This job included removing garbage from offices, mopping, and vacuuming. (Testimony). At the time of the hearing, she believed that she could perform office cleaning work. (Testimony). However, she expressed doubt as to whether or not she would be able to use her left arm for vacuuming. (Testimony).

Ms. Mejia began working for Costco in Virginia in April of 2000. (Testimony). In 2013, she moved to Iowa, where she continued working at Costco. (Testimony). She held positions at Costco, such as: cashier, cashier assistant, door greeter, and stocker. (JE 5:107). At the time of her injury, she was working as a stocker in the book department. (JE 5:108). She also floated to other stocking jobs, such as clothing, and snacks. (JE 5:108). She continued to work for Costco at the time of the hearing. (Testimony). She worked in the clothing department, and earned twenty-six and 75/100 dollars ($26.75) per hour. (Testimony). This is more than she earned at the time of her injury in October of 2018. (Testimony).

At some time prior to her injury in October of 2018, Ms. Mejia had carpal tunnel syndrome in her left wrist. (Testimony). She noted that the pain from that was in her wrist to her fingers. (Testimony). The claimant testified that she wears braces on her wrists when she sleeps. (Testimony). She was scheduled to have surgery for her bilateral carpal tunnel, but her work injury caused that to be rescheduled. (Testimony). At the time of the hearing, she had yet to set a new surgery date. (Testimony). She testified that due to her surgical experience from her work injury with Costco, she did not feel “up to” having additional surgeries. (Testimony).

She sought some medical care with Physicians’ Clinic of Iowa, P.C., on February 8, 2018. (JE 1:1-3). Ms. Mejia complained of bilateral hand numbness. (JE 1:1). She wore braces to help alleviate her symptoms. (JE 1:1). The provider offered injections or an EMG. (JE 1:3). She requested the injections, which were provided during the appointment. (JE 1:3).

Ms. Mejia returned to Physicians’ Clinic of Iowa, P.C., on July 18, 2018, due to her bilateral carpal tunnel complaints. (JE 1:4-6). An EMG was performed which showed severe left, and moderate right mononeuropathies across her wrists. (JE 1:4). The provider opined that this demonstrated a “high probability of carpal tunnel syndromes.” (JE 1:4).

On October 23, 2018, Ms. Mejia took her trash and cardboard to the back of the Costco store. (Testimony). She used a flatbed cart to move her refuse. (Testimony). As she was in line, the cardboard and trash on her flatbed began to shift and fall. (Testimony). She tried to catch them before they fell. (Testimony). She then turned, tripped on a tire of the flatbed and fell on her left arm. (Testimony). She looked at her arm after landing and immediately ascertained that it was broken. (Testimony). Another employee ran to her aid, and the manager and general manager came to help her. (Testimony).

A Johnson County Ambulance was called. (Testimony; JE 2:7-9). The EMS crew found Ms. Mejia to have fallen onto her left side. (JE 2:8). Upon examination, the EMS crew found her to have a closed deformity of her left forearm with possible crepitus. (JE 2:8). After splinting, the claimant continued to experience pain. (JE 2:8). She was transported to the University of Iowa Hospital. (JE 2:8; Testimony).

Upon arrival at the University of Iowa Hospital, David Walz, PA-C, examined the claimant for her left arm complaints. (JE 3:13-20). Ms. Mejia recounted slipping and falling on her left arm, and then experiencing immediate pain and swelling with a deformity. (JE 3:13). Ms. Mejia denied numbness or tingling, but did have pain and swelling in her mid-forearm. (JE 3:13). She also denied shoulder pain or limited range of motion. (JE 3:13). She was given pain medication and x-rays were done on her left wrist, forearm, and elbow. (JE 3:17). The x-rays showed a minimally displaced left ulnar styloid fracture, and a transverse fracture through the mid radial diaphysis with radial displacement of the distal fracture fragment. (JE 3:19-20).

Ms. Mejia was admitted to the hospital from the emergency department for additional treatment of her left midshaft ulna and radius fracture with displacement. (JE 3:17). There also was concern about an open fracture. (JE 3:17). Upon admission, Matthew Karam, M.D., of the orthopedic department examined her. (JE 3:10-12). Dr. Karam is board certified in orthopedic surgery. (Defendants' Exhibit B:3). He is also a professor of orthopedic surgery at the University of Iowa Medical School. (DE B:3-4). Dr. Karam observed a visible deformity in the left arm at the fracture site, along with moderate swelling. (JE 3:10). Dr. Karam also noted a "small poke hole" on the surface of the claimant's left forearm, which was consistent with an open fracture. (JE 3:10-11). The fractures were reduced in the emergency room under fluoroscopic guidance. (JE 3:12).

Dr. Karam saw the claimant again on October 25, 2018, for an open reduction and internal fixation of both the left forearm fracture, and an excisional debridement of the open fracture site. (JE 3:21-24). Dr. Karam used plates and screws in order to repair the fracture sites. (JE 3:21-24).

Ms. Mejia had an ultrasound to the right lower extremity due to a concern for deep venous thrombosis on December 3, 2018. (JE 4:85). This was a self-referral for symptomatic right lower extremity varicose veins. (JE 4:88). There was no venous thrombosis found. (JE 4:86). The ultrasound found that the right great saphenous vein was thrombosed "to within about 2.7 cm of the saphenofemoral junction." (JE 4:86).

On December 11, 2018, the claimant returned to Dr. Karam's office for a follow-up of her surgery. (JE 3:25-31). Dr. Karam observed that the claimant had a prominence on the dorsal aspect of her wrist, which was slightly tender. (JE 3:25). She remained in a splint, and had not had any formal physical therapy, yet. (JE 3:25). Dr. Karam ordered x-rays of the left wrist, and found that the fractures were healing with no hardware complication. (JE 3:26). Dr. Karam recommended that Ms. Mejia begin

physical or occupational therapy to work on range of motion and strengthening. (JE 3:26).

Ms. Mejia saw Dr. Karam again on January 22, 2019, for another post-surgical follow-up. (JE 3:32-36). She was doing well, but had some shoulder and forearm discomfort. (JE 3:32). She also made progress with therapy. (JE 3:32). Dr. Karam performed a physical examination, which showed a full shoulder range of motion. (JE 3:32). Ms. Mejia was allowed to return to work with no use of her left arm. (JE 3:34). Dr. Karam recommended that the claimant continue physical therapy, to include range of motion and strengthening of the left forearm and work hardening. (JE 3:34).

On March 5, 2019, Ms. Mejia returned to Dr. Karam's office for continued care of her left upper extremity. (JE 3:37-41). Ms. Mejia was doing "reasonably well," but had left shoulder discomfort. (JE 3:37). Her strength and range of motion improved through continued physical therapy. (JE 3:37). Dr. Karam ordered left shoulder and cervical spine imaging, so as to rule out additional injuries. (JE 3:38). The x-rays of the left shoulder showed grossly congruent glenohumeral and acromioclavicular joints with mild osteophytes in the acromioclavicular joint. (JE 3:41). He also allowed Ms. Mejia to return to work with restrictions of no overhead lifting and lifting up to 5 pounds with the left upper extremity. (JE 3:38). Dr. Karam also recommended that the claimant continue physical therapy. (JE 3:38).

Kimberly Leman, PA-C, examined the claimant for a follow-up on April 2, 2019. (JE 3:46-50). The visit was scheduled "at the behest of her [Ms. Mejia's] work comp [*sic*] case worker." (JE 3:46). Since the claimant was "working diligently with physical therapy on a work hardening program," the case worker was wondering if Ms. Mejia's restrictions could be adjusted. (JE 3:47). Ms. Mejia told Ms. Leman that she was doing well, overall, but had shoulder pain after therapy. (JE 3:47). She periodically lifted up to 10 pounds with her left arm, but did not feel ready to routinely do so. (JE 3:47). X-rays were done, which showed a healing fracture with no complication. (JE 3:48). Ms. Leman recommended that Ms. Mejia decrease her physical therapy visits in order to rest a bit between her visits. (JE 3:48).

X-rays performed on April 30, 2019, showed her arm as radiographically stable with anatomic alignment. (JE 3:46). There was no interval healing complication. (JE 3:46). Dr. Karam also examined her on this date. (JE 3:51-53). She continued her physical therapy, and working with a 15-pound lifting restriction. (JE 3:51). She did well with this restriction. (JE 3:51). Dr. Karam recommended that the claimant continue her work hardening and physical therapy with no lifting restriction during therapy. (JE 3:52). Dr. Karam also allowed her to return to work with a 15-pound lifting restriction, and return for re-evaluation in six to eight weeks. (JE 3:52).

On May 28, 2019, Ms. Mejia returned to Dr. Karam's office for additional follow-up. (JE 3:54-57). Ms. Mejia told Dr. Karam that she experienced pain in her left mid-forearm, and that she occasionally missed work due to her pain. (JE 3:54). She was told by her employer that she would need to be seen by an orthopedic clinic on days

which she missed work. (JE 3:54). Ms. Mejia was operating on a graduated return to work program, which provided her with breaks every two hours. (JE 3:54). Dr. Karam provided the claimant with a letter allowing her to take hourly breaks, as needed, on days where she experienced persistent pain. (JE 3:55). Dr. Karam also continued the 15-pound lifting restriction, and asked Ms. Mejia to return in 4 to 6 weeks. (JE 3:55). X-rays performed during this visit showed stable alignment and continued bony remodeling with no visible fracture lines. (JE 3:57).

Additional x-rays performed during a September 10, 2019, visit with Dr. Karam, showed the screw plate fixation, which was stable. (JE 3:58). Ms. Mejia told Dr. Karam that she had no new concerns and was "doing very well at this point in time." (JE 3:59-61). She worked full-time, but had some occasional left shoulder pain. (JE 3:59). She wanted physical therapy for this, but "was unable to do so due to it being a workers comp [*sic*] claim." (JE 3:59). The pain localized to her AC joint with "some radiation down her [b]iceps and is most exacerbated with overhead lifting." (JE 3:59). Ms. Mejia told Dr. Karam that her left shoulder issues were not present prior to her work incident. (JE 3:59). Since she was one-year post-accident, Dr. Karam allowed the claimant to resume full duty activities as she could tolerate. (JE 3:60). Dr. Karam placed the claimant at maximum medical improvement ("MMI"), though he noted that she could benefit from future physical therapy for the left arm and shoulder. (JE 3:60). Dr. Karam provided the claimant with a zero percent impairment pursuant to the AMA's Guides to the Evaluation of Permanent Impairment, Fifth Edition. (JE 3:60). He noted that "[t]here is no diagnosis-based impairment for this condition," as Ms. Mejia had full and normal ranges of motion and lacked any neurologic dysfunction. (JE 3:60).

Dr. Karam examined Ms. Mejia again on March 10, 2020. (JE 3:45). She presented with what Dr. Karam opined was a "soft tissue cyst of the distal aspect of her flexor carpi radialis." (JE 3:45). Dr. Karam opined that someone on "the hand team" should examine the claimant for cystic lesions on her forearm, and opined that "it appears to be remote from her previous incision although it may be related to her injury it is difficult to tell at this time." (JE 3:63). Dr. Karam allowed Ms. Mejia to continue her work. (JE 3:63). X-rays performed showed a healed fracture with no hardware complications. (JE 3:65).

On May 28, 2020, Joseph Buckwalter, M.D., examined Ms. Mejia at the request of Dr. Karam, for evaluation of a left volar wrist mass. (JE 3:66-68). Over the past few weeks, Ms. Mejia noticed that the masses have regressed to where she could no longer feel them. (JE 3:66). Dr. Buckwalter examined her wrist, and found no masses. (JE 3:67). Dr. Buckwalter examined the imaging also saw no abnormalities. (JE 3:67). Dr. Buckwalter opined that Ms. Mejia likely had a resolved volar ganglion cyst in her left wrist. (JE 3:67). Dr. Buckwalter told her that the cyst could "come and go," and that if it comes back and gives her "significant symptoms," she should return. (JE 3:67).

Dr. Karam saw Ms. Mejia again on August 25, 2020. (JE 3:69-72). Ms. Mejia complained of episodes of sharp pain in her forearm, and that she was concerned that something had "moved or shifted." (JE 3:69). Dr. Karam found her to have a full range

of motion in her left elbow and wrist with no obvious changes near her incisions or scars. (JE 3:70). Dr. Karam reviewed x-rays of the left arm, and reassured the claimant that there were no major changes to the x-rays. (JE 3:70). He also told her that she could continue her activities as tolerated. (JE 3:70). Dr. Karam requested that Ms. Mejia return in six months, and if nothing changed, a removal of the hardware would be considered. (JE 3:70).

On April 13, 2021, the claimant returned to Dr. Karam's office for continued follow-up care. (JE 3:73-74). Ms. Mejia continued to do well, but had significant pain with cold weather and when she "pushed it too hard' at work. (JE 3:73). Ms. Mejia was interested in pursuing hardware removal, as discussed during her August appointment. (JE 3:73). Dr. Karam indicated that they would plan to remove the hardware. (JE 3:74).

Ms. Mejia continued her care with Dr. Karam on June 17, 2021. (JE 3:75-78). Dr. Karam took her to the operating room and removed the hardware in her left radius and left ulna due to her ongoing pain. (JE 3:76). The hardware was removed with no issues. (JE 3:76).

Ms. Mejia returned to work at Costco in July of 2021, following her second surgery. (Testimony).

On November 16, 2021, the claimant followed-up with Dr. Karam for her fracture and subsequent hardware removal. (JE 3:80-81). She was in physical therapy at the time, and began using her left arm again. (JE 3:80). She had pain in her posterior left shoulder, and also had some pain along her left forearm when she carried heavy objects. (JE 3:80). Dr. Karam opined that her left arm was healing appropriately following the hardware removal. (JE 3:81). Dr. Karam recommended that she continue physical therapy, and noted she would be at MMI after six weeks of physical therapy. (JE 3:81).

Dr. Karam wrote a letter to defendants' counsel, dated December 6, 2021. (JE 3:83). He noted that Ms. Mejia remained at MMI, and that her impairment rating had not changed. (JE 3:83). He again noted that the claimant had a full and normal range of motion, and that Ms. Mejia had no neurologic dysfunction, instability, joint space narrowing, or any other permanent impairment from the injury. (JE 3:83).

On May 6, 2022, Ms. Mejia presented to Sunil Bansal, M.D., M.P.H., for an IME at the arrangement of claimant's counsel. (Claimant's Exhibit 2:8-24). Dr. Bansal is board certified in occupational medicine. (CE 3:26). Following the IME, Dr. Bansal issued a report on his findings on July 25, 2022. (CE 2:8-24). He began his report by reviewing the medical records pertaining to Ms. Mejia's medical treatment, and her deposition transcript. (CE 2:8-20). Ms. Mejia described residual pain and stiffness in her left arm mainly associated with using her left arm. (CE 2:20). She also had left shoulder pain, and struggled to lift her arm over her head. (CE 2:20). Dr. Bansal noted that Ms. Mejia could lift two gallons of milk with her left arm. (CE 2:20).

Upon examination, Dr. Bansal found that Ms. Mejia had tenderness to palpation in her left shoulder. (CE 2:21). Dr. Bansal found that Ms. Mejia had maximum documented range of motion in her left shoulder as follows: flexion: 173 degrees; abduction: 160 degrees; adduction: 44 degrees; external rotation: 48 degrees; extension: 42 degrees; and, internal rotation: 58 degrees. (CE 2:21). Ms. Mejia's left elbow had no tenderness to palpation and a full range of motion. (CE 2:22). Her left forearm showed signs of a well-healed surgical scarring. (CE 2:22). She also had tenderness to palpation over the radial and ulnar aspects of her left arm. (CE 2:22).

Dr. Bansal answered a series of questions posed by claimant's counsel. (CE 2:23-24). Dr. Bansal opined that Ms. Mejia fell, hit her left arm, and sustained a left forearm radius/ulna fracture on October 23, 2018. (CE 2:23). With regard to the claimant's left shoulder, Dr. Bansal opined that the claimant sustained an aggravation of left shoulder impingement, and that "[f]alling on to the left arm would send the vector of force to the shoulder, aggravating shoulder impingement." (CE 2:23). Dr. Bansal placed Ms. Mejia at MMI as of May 6, 2022; however, he noted that she may benefit from intermittent steroid injections into her left shoulder. (CE 2:23). Dr. Bansal provided the claimant with restrictions of no lifting greater than 15 pounds, and no lifting overhead with her left arm. (CE 2:23). Based upon issues with range of motion in the claimant's left wrist, Dr. Bansal opined that the claimant sustained a 5 percent left upper extremity impairment. (CE 2:24). Based upon the range of motion measurements found in his examination of her left shoulder, Dr. Bansal provided the claimant with a 3 percent impairment rating. (CE 2:24).

Ms. Mejia testified that Dr. Bansal examined her for about 45 minutes. (Testimony). He also spoke with her on the phone for about 30 minutes ahead of the appointment. (Testimony). She noted that Dr. Bansal recommended injections for her shoulder and that she would pursue these injections if they were authorized, as she wished to try to improve her pain and symptoms. (Testimony).

Joseph Chen, M.D., performed an IME on Ms. Mejia on August 22, 2022, at the arrangement of the defendants. (DE D:1-10). Dr. Chen is board certified in physical medicine and rehabilitation and spinal cord injury medicine. (DE D:10; DE C:31). He issued a report on the same day. (DE D:1-10). Dr. Chen indicated that he spent one hour examining Ms. Mejia. (DE D:9). Dr. Chen reviewed Ms. Mejia's medical history. (DE D:1-3). Ms. Mejia told Dr. Chen that she continued to worry about her shoulder and "whether she will have any permanent problems with her shoulder." (DE D:3). She was upset that there was a long period where she was not allowed to attend physical therapy for her shoulder, and felt that neither Dr. Karam nor her physical therapist adequately addressed her questions. (DE D:3). She showed Dr. Chen some of the exercises she was taught for her left shoulder at physical therapy. (DE D:3). The claimant told Dr. Chen that she had no interest in attending further physical therapy. (DE D:3). Her left shoulder pain was mostly located "over the trapezius/angle of her shoulder" and not in her neck. (DE D:4). With regard to her left wrist, she reported pain with forceful gripping, opening a jar, cooking, and cleaning. (DE D:4). She treated this

with ibuprofen, heat, and ice, and also had improvement with soft tissue massage while in physical therapy. (DE D:4).

Upon physical examination, Dr. Chen found the claimant to have tenderness over her left trapezius muscle. (DE D:4). When she performed a right lateral tilt, she described a "pulling sensation" along her left trapezius muscle. (DE D:4). Dr. Chen found her to have normal muscle stretch reflexes and normal muscle strength in her left arm. (DE D:4). Upon examining her shoulders, Dr. Chen noted that they were both normal. (DE D:4). She could raise her arms overhead to her ears, which indicated to him that she had forward flexion and abduction to 180 degrees in both shoulders. (DE D:4). Dr. Chen found her to have normal range of motion in all shoulder planes of motion. (DE D:5). She had no tenderness to palpation over the muscles of the rotator cuff. (DE D:4-5).

Her left elbow had a normal examination with normal range of motion. (DE D:5). Her bilateral wrists were normal, and had normal flexion, extension, radial deviation, and ulnar deviation. (DE D:5). Dr. Chen noted that these were "in excess of those [ranges of motion] recorded in Dr. Bansal's report of May 6, 2022." (DE D:5). Ms. Mejia had slight tenderness to light palpation of the healed incision sites. (DE D:5). She rated her pain an average of 5.5 out of 10. (DE D:5). After performing a brief pain inventory, Dr. Chen opined that the difference between the pain severity and pain interference was abnormal and suggestive of pain or symptom magnification. (DE D:5).

Dr. Chen then endeavored to answer various questions posed by defendants' counsel. (DE D:5-9). As noted above, Dr. Chen documented that Ms. Mejia felt that her left shoulder was not adequately treated, and that she worried that "she will have permanent problems with her shoulder." (DE D:6). Dr. Chen indicated that he told Ms. Mejia that her left shoulder had not been damaged "in any way" by her forearm fracture. (DE D:6). He continued, "[i]t is my medical opinion Ms. Mejia has no diagnosable shoulder condition as related to her work at Costco on October 23, 2018." (DE D:6). He opined that Ms. Mejia's pain in her left trapezius region while performing overhead activities was consistent with trapezius myofascial pain. (DE D:6). Dr. Chen also opined that Ms. Mejia's employment at Costco did not cause or materially aggravate "any" left shoulder condition. (DE D:6). Dr. Chen explained, "Ms. Mejia points to pain along the middle of her left trapezius muscle that occurs when she tilts her head/neck to the right. This is [*sic*] reproducible mechanism of pain is consistent with myofascial pain in the trapezius muscle." (DE D:6). This pain, in Dr. Chen's medical opinion, "is unrelated to any shoulder pathology and unrelated to her work injury of October 2018." (DE D:6). Dr. Chen also opined that the left trapezius pain was unrelated to "any 'consequence that naturally and proximately flow [*sic*] from the accident.'" (DE D:6). Dr. Chen told Ms. Mejia that trapezius myofascial pain "occurs frequently and idiopathically in working adults of any age and can occur even in individuals who have not sustained a forearm fracture." (DE D:6). A forearm fracture is not an increased risk for development of this kind of pain, according to Dr. Chen. (DE D:6). Dr. Chen encouraged the claimant to work on gentle stretching for her neck and trapezius muscles. (DE D:6).

Dr. Chen then wrote about his disagreement with Dr. Bansal's opinion that the forearm fracture would lead to a "force vector causing direct shoulder trauma." (DE D:7). Had Ms. Mejia sustained a shoulder injury as the result of her forearm fracture, Dr. Chen would expect it to be in an immediate emergency room note, orthopedic clinic note, or physical therapy records. (DE D:7). Dr. Chen noted that the records indicated that Ms. Mejia did not report any shoulder complaints until January 28, 2019, and "mainly reported shoulder pain when she returned to her work duties stocking shelves at Costco." (DE D:7). Dr. Chen opined that Ms. Mejia's left trapezius myofascial pain occurred idiopathically. (DE D:7). Dr. Chen continued by concluding that Ms. Mejia achieved MMI for any left shoulder condition after completing physical therapy on September 10, 2019, and her release by Dr. Karam. (DE D:7). While Dr. Chen agreed that Dr. Bansal found lower ranges of motion, he noted that he found the claimant to have "essentially normal" ranges of motion that were not ratable according to the Guides. (DE D:8). Dr. Chen also found Ms. Mejia to have no reproduction of pain with "any shoulder provocative measures." (DE D:8). Dr. Chen then noted discrepancies between Dr. Bansal's range of motion measurements during Ms. Mejia's examination and those used to provide a left shoulder impairment rating. (DE D:8). He pointed out that the ratings used by Dr. Bansal were different in several areas by several degrees. (DE D:8).

With regard to Ms. Mejia's left wrist range of motion, Dr. Chen noted that he found her to have improved range of motion. (DE D:8). For example, Dr. Chen found the claimant to have flexion of nearly 60 degrees, extension of 70 degrees, 20 degrees of radial deviation, and 30 degrees of ulnar deviation. (DE D:8). Dr. Chen noted that these were the same for the right wrist. (DE D:8). Dr. Chen agreed with Dr. Karam that Ms. Mejia had no ratable permanent impairment from her left arm fractures. (DE D:9).

Dr. Chen opined that Ms. Mejia required no permanent work restrictions as a result of her October 23, 2018, injury. (DE D:9). Dr. Chen felt that Ms. Mejia may benefit from a trial of over-the-counter topical ointments or creams for the pain in her forearm. (DE D:9). This could include something like Ben-Gay or topical patches like Salon-Pas. (DE D:9). Dr. Chen also encouraged Ms. Mejia to perform some soft-tissue massage on her left forearm in order to desensitize nerve and scar tissue in her left arm. (DE D:9).

The claimant testified that she began noticing symptoms in her left shoulder after her first surgery, when she could begin moving her left arm. (Testimony). She began experiencing pain, soreness, and difficulty moving her left shoulder. (Testimony). She testified that she could not do anything, such as bathing or "whatever [she] needed to do." (Testimony).

After having surgery, Ms. Mejia was off work for a time. (Testimony). She participated in a graduated return-to-work program with Costco, and she returned to work at Costco in April of 2019. (Testimony).

Ms. Mejia testified that she experienced a terrible pain, especially with cold temperatures. (Testimony). She could not walk outside when it was cold without wrapping her arm in numerous bandages. (Testimony). It was determined that this was caused by the metal inside of her arm. (Testimony). The metal was then removed from her arm in a second surgical procedure in an attempt to alleviate her pain. (Testimony). This helped to resolve the pain stemming from her hardware; however, at the hearing, she testified that she continued to have left shoulder pain. (Testimony).

Ms. Mejia is working with no restrictions at Costco. (Testimony). She has received no criticism of her job performance since her injury. (JE 5:111). Ms. Mejia testified that when she works in certain other areas of Costco, her left arm becomes very sore. (Testimony). Specifically, when she lifts heavy items to her shoulder or above her shoulder height, she experienced increased pain in her left arm. (Testimony). When she returns home after work on these days, she places her left arm on a pillow and cannot do anything else for the remainder of the day. (Testimony). She also takes ibuprofen to alleviate any especially intense pain. (Testimony). At the time of the hearing, she had no additional medical treatment planned. (Testimony).

CONCLUSIONS OF LAW

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

Affirmative Defense Pursuant to Iowa Code section 85.23

The defendants assert an affirmative defense pursuant to Iowa Code section 85.23. Before engaging in any analysis as to any of the disputed issues in this case regarding the alleged injuries to the claimant's left shoulder, it is important to determine whether or not the claim regarding her left shoulder can even stand based upon an analysis of the facts and applicable law. Therefore, I begin my review of this case with an analysis of the defendants' first asserted affirmative defense.

Failure to give notice is an affirmative defense which the employer must prove by a preponderance of the evidence. DeLong v. Highway Commission, 229 Iowa 700, 295 N.W. 91 (1940).

Iowa Code section 85.23 states:

> Unless the employer or the employer's representative shall have actual knowledge of the occurrence of an injury received within ninety days from the date of the occurrence of the injury, or unless the employee or someone on the employee's behalf or a dependent or someone on the dependent's behalf shall give notice thereof to the employer within ninety days from the date of the occurrence of the injury, no compensation shall be allowed. *For the purposes of this section, "date of the occurrence of*

> *the injury" means the date that the employee knew or should have known that the injury was work-related.*

(Emphasis added). The purpose of the 90-day notice or actual knowledge requirement is to give the employer an opportunity to timely investigate the facts surrounding the injury. The actual knowledge alternative to notice is met when the employer, as a reasonably conscientious manager, is alerted to the possibility of a potential compensation claim through information which makes the employer aware that the injury occurred, and that it may be work related. Dillinger v. City of Sioux City, 368 N.W.2d 176 (Iowa 1985); Robinson v. Dept. of Transp., 296 N.W.2d 809 (Iowa 1980).

"[T]he date that the employee knew or should have known that the injury was work related" is a more stringent standard than that employed prior to the 2017 changes to the Iowa Code. Iowa Code section 85.23. Courts have yet to interpret this new portion of the statute; however, previous arbitration decisions of this agency have addressed this change. In Stiles v. Annett Holdings, Inc., d/b/a TMC Transportation, File No. 5064673 (Arb. Nov. 15, 2019), the deputy commissioner indicated that "[t]he new statutory provisions for notice and statute of limitations are consistent with the discovery rule that has been followed in workers' compensation cases in Iowa for many years." Under the discovery rule, the period "does not begin to run until the claimant knows or in the exercise of reasonable diligence should know 'the nature seriousness and probably compensable character' of his or her injury." Baker v. Bridgestone/Firestone, 872 N.W.2d 672, 685 (Iowa 2015). The claimant must have actual or imputed knowledge of all three elements before the statute begins to run. Swartzendruber v. Schimmel, 613 N.W.2d 646, 650-651 (Iowa 2000); See also Carter v. Bridgestone Americas, Inc., File No. 1649560.01 (App. July 8, 2021).

In this case, the claimant fell on October 23, 2018. She immediately had pain to her left upper extremity. This was due to her fractured left arm. She had a surgery to insert a plate to help in healing her left arm fractures. Costco was aware of her left arm injury, as her supervisor was present at the time of the injury. The question is whether the claimant provided adequate notice to the defendants of her alleged left shoulder injury.

The claimant filed an original notice and petition on May 18, 2021, alleging an injury to her left upper extremity on October 23, 2018. Clearly, based on the evidence, Costco was on notice of the left upper extremity injury.

During her initial visit to the University of Iowa Hospital, Ms. Mejia denied any injury to her shoulder. She denied pain or limited range of motion in her left shoulder. Ms. Mejia treated on a number of occasions with Dr. Karam regarding her left upper extremity, and made no mention of her left shoulder pain. Ms. Mejia testified that she began to notice symptoms in her left shoulder after her first surgery, when she was allowed to begin moving her left arm again. She first made a complaint to Dr. Karam of pain to her left shoulder on January 22, 2019, during a post-surgical follow-up visit. Dr.

Karam examined her shoulder and found that she had full range of motion in her left shoulder. He recommended that the claimant continue physical therapy at that time.

The claimant continued to complain of left shoulder pain during her March 5, 2019, visit with Dr. Karam. At that time, Dr. Karam ordered x-rays of the claimant's left shoulder. The x-rays showed grossly congruent glenohumeral and acromioclavicular joints with mild osteophytes in the acromioclavicular joint. During a visit with Ms. Leman on April 2, 2019, Ms. Mejia continued to complain of shoulder pain after her therapy visits.

By September of 2019, Ms. Mejia worked full-time with occasional left shoulder pain. Dr. Karam found the pain to be localized to the AC joint with radiation down the biceps with overhead lifting. Ms. Mejia told Dr. Karam that this was not present prior to her work incident. Dr. Karam placed the claimant at MMI at this visit, but felt that she could benefit from future physical therapy for her left arm and shoulder. He made no mention of whether the left shoulder injury was work related.

Ms. Mejia complained of posterior left shoulder pain again in November of 2021, when she visited Dr. Karam. When she had her IME with Dr. Bansal, Ms. Mejia complained again of left shoulder pain, along with struggles lifting her arm over her head. Dr. Bansal found tenderness to palpation of the left shoulder. Dr. Bansal opined that the claimant falling on her left arm would send the vector of force to the shoulder, which aggravated her left shoulder impingement.

The claimant filed a motion to amend and an amended petition on June 30, 2022, alleging injuries to her left upper extremity, left shoulder, and body as a whole.

During her examination with Dr. Chen on August 22, 2022, Ms. Mejia expressed frustration regarding her shoulder and whether she could have any permanent problems with her shoulder. Dr. Chen found that the claimant had tenderness over the left trapezius.

In 2017, the Iowa legislature amended Iowa Code section 85.34 to include the shoulder as a distinct scheduled member. The arm is a separate scheduled member under Iowa Code section 85.34. The Commissioner, and the Iowa Supreme Court have outlined the factors considered when assessing a scheduled member injury to the shoulder versus the upper extremity versus the body as a whole.

The question first is whether Costco had actual knowledge of Ms. Mejia's left shoulder injury. That is, as a reasonably conscientious manager, was Costco alerted to the possibility of a potential compensation claim through information which made them aware that the injury occurred, and that it may be work related. Costco was aware that the claimant fell on October 23, 2018, on her left side. They were aware that the claimant injured her left arm, and specifically fractured her left forearm. Costco provided for treatment for the claimant's left arm.

Iowa Code section 85.24 provides for the sufficient form of notice. The statute notes that "[n]o particular form of notice shall be required…" Iowa Code section 85.24(1). It also provides an example of an appropriate notice. Id. The statute also provides, "[n]o variation from this form of notice shall be material if the notice is sufficient to advise the employer that a certain employee, by name, received *an injury in the course of employment on or about a specified time*, at or near a certain place." Iowa Code section 85.24(2)(emphasis added). Iowa Courts have held that a claimant is not required to state the precise nature of the injuries sustained. Alm v. Morris Barick Cattle Co., 240 Iowa 1174, 1177, 38 N.W.2d 161, 163 (1949).

There is no indication in the record that the claimant provided the defendants with a specific written notice; however, the defendants were aware that the claimant suffered an injury to her left upper extremity. Based upon the language of the statute, specifically that the notice is sufficient to advise the employer that a certain employee "received an injury in the course of employment," the actual notice provided by the claimant's supervisor(s) witnessing her condition immediately after the fall is sufficient to provide notice to the defendants' pursuant to Iowa Code section 85.23.

There is no reason to perform an analysis under the discovery rule, as the defendants have failed to prove, by a preponderance of the evidence, that the claimant failed to give notice pursuant to Iowa Code section 85.23.

Arising out of and in the Course of Employment

Having considered the defendants' affirmative defense pursuant to Iowa Code section 85.23, the next question is whether the claimant's left shoulder and/or body as a whole injury arose out of, and in the course of her employment with the defendants.

To receive workers' compensation benefits, an injured employee must prove, by a preponderance of the evidence, that the employee's injuries arose out of, and in the course of the employee's employment with the employer. 2800 Corp. v. Fernandez, 528 N.W.2d 124, 128 (Iowa 1995). 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. Id. An injury arises out of employment when a causal relationship exists between the employment and the injury. Quaker Oats v. Ciha, 552 N.W.2d 143, 151 (Iowa 1996). 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, 3 (Iowa 2000). The Iowa Supreme Court has held that an injury occurs "in the course of employment" when:

> it is within the period of employment at a place where the employee reasonably may be in performing his duties, and while he is fulfilling those duties or engaged in doing something incidental thereto. An injury in the course of employment embraces all injuries received while employed in furthering the employer's business and injuries received on the employer's premises, provided that the employee's presence must ordinarily be

> required at the place of the injury, or, if not so required, employee's departure from the usual place of employment must not amount to an abandonment of employment or be an act wholly foreign to his usual work. An employee does not cease to be in the course of his employment merely because he is not actually engaged in doing some specifically prescribed task, if, in the course of his employment, he does some act which he deems necessary for the benefit or interest of his employer.

Farmers Elevator Co. v. Manning, 286 N.W.2d 174, 177 (Iowa 1979)(citation omitted).

The question of medical causation is "essentially within the domain of expert testimony." Cedar Rapids Cmty. Sch. Dist. v. Pease, 807 N.W.2d 839, 844-45 (Iowa 2011). The commissioner, as the trier of fact, must "weigh the evidence and measure the credibility of witnesses." Id. The trier of fact may accept or reject expert testimony, even if uncontroverted, in whole or in part. Frye v. Smith-Doyle Contractors, 569 N.W.2d 154 (Iowa App. 1997). When considering the weight of an expert opinion, the fact-finder may consider whether the examination occurred shortly after the claimant was injured, the compensation arrangement, the nature and extent of the examination, the expert's education, experience, training, and practice, and "all other factors which bear upon the weight and value" of the opinion. Rockwell Graphic Sys., Inc. v. Prince, 366 N.W.2d 187, 192 (Iowa 1985). Unrebutted expert medical testimony cannot be summarily rejected. Poula v. Siouxland Wall & Ceiling, Inc., 516 N.W.2d 910 (Iowa App. 1994). Supportive lay testimony may be used to buttress expert testimony, and therefore is also relevant and material to the causation question.

While a claimant is not entitled to compensation for the results of a preexisting disease, its mere existence at the time of a subsequent injury is not a defense. Rose v. John Deere Ottumwa Works, 247 Iowa 900, 76 N.W.2d 756 (1956). It is well established in workers' compensation that "if a claimant had a preexisting condition or disability, aggravated, accelerated, worsened, or 'lighted up' by an injury which arose out of and in the course of employment resulting in a disability found to exist," the claimant is entitled to compensation. Iowa Dep't of Transp. v. Van Cannon, 459 N.W.2d 900, 904 (Iowa 1990). The Iowa Supreme Court has held,

> a disease which under any rational work is likely to progress so as to finally disable an employee does not become a "personal injury" under our Workmen's Compensation Act merely because it reaches a point of disablement while work for an employer is being pursued. It is only when there is a direct causal connection between exertion of the employment and the injury that a compensation award can be made. The question is whether the diseased condition was the cause, or whether the employment was a proximate contributing cause.

Musselman v. Cent. Tel. Co., 261 Iowa 352, 359-60, 154 N.W.2d 128, 132 (1967).

Ms. Mejia fell on her left side when she was working at Costco on October 23, 2018. At the hearing, she described putting her left arm out when she fell, but she did not specify as to whether that meant straight in front of her or off to her side or rear. She testified:

> My cardboard and trash were starting to fall off, and so I tried to catch them and place them again, and then when I turned to go the other way, there was another flatbed behind me, and I tripped on that flatbed's tire, and I was falling. I put out my left am, and then I looked around me. I looked from side to side because that was my instinct.
>
> I did not look at my arm, and when I looked at my arm, I saw that it was broken. And then I – I looked at my broken arm, and someone else ran to help me, Jake, the manager, and called somebody, and then my general manager Tyler, came to help me while the paramedics came.

(Testimony). In her deposition, she testified:

> I moved my body sideways because my carton was shaking, moving. I was going to fall. So when I turned around to go facing forward, there was there [*sic*] a flatbed that I tripped with my feet.
>
> So I was going to – I was going to fall, and I hold [*sic*] my left arm in the middle part of that flatbed.
>
> …
>
> I hold [*sic*] myself there with my arm. After I – after I hold on with my arm, I got up. I start looking around to see if there was some people there looking. I never thought it was something serious.
>
> So after that I look again at my arm, and it was, like, broken. You know, my arm is like this, but it was like this.

(JE 5:123-124).

Upon reporting to the emergency room at the University of Iowa Hospital, Ms. Mejia complained of pain to her left arm. Of note, she made no complaints of pain or limited range of motion with her left shoulder. She had a deformity in her left arm, along with swelling in her mid-forearm. After x-rays were performed on her left wrist, forearm, and elbow, Ms. Mejia was diagnosed with a minimally displaced left ulnar styloid fracture, and a transverse fracture through the mid radial diaphysis with radial displacement of the distal fracture fragment. Ms. Mejia was admitted to the hospital, and the fractures were repaired by placing a plate and screws into the bones.

After she was discharged from the hospital, Ms. Mejia returned for follow-up care with Dr. Karam on several occasions. She made no mention of left shoulder pain during this time. It was not until January 22, 2019, that Ms. Mejia, after being allowed to move her arm and pursue physical therapy, began to complain of left shoulder pain. The claimant testified that she did not have any issues with her left shoulder until after she was allowed to move her arm after her surgery.

Dr. Karam ordered x-rays of the left shoulder. The x-rays showed grossly congruent glenohumeral and acromioclavicular joints with mild osteophytes in the acromioclavicular joint. Dr. Karam found that the claimant had a full range of motion in her left shoulder.

By September of 2019, Ms. Mejia continued to complain of "occasional left shoulder pain," which was localized to her AC joint with radiation down her biceps. Overhead lifting exacerbated her shoulder pain. During this visit, Ms. Mejia told Dr. Karam that her shoulder issues were not present prior to her work incident. During this visit, Dr. Karam placed the claimant at MMI and noted that she could benefit from future physical therapy for her left arm and shoulder.

The claimant continued to complain of left shoulder pain in her posterior left shoulder through November of 2021.

Dr. Bansal examined the claimant in May of 2022. Dr. Bansal is board certified in occupational medicine. At that time, Ms. Mejia complained of pain in her left shoulder and difficulties with lifting her left arm over her head. Dr. Bansal found tenderness to palpation in the claimant's left shoulder when he examined her. He also reviewed her ranges of motion in her left shoulder. He opined that falling onto her left arm "would send the vector of the force to the shoulder, aggravating shoulder impingement." (CE 2:23). It is unclear how Dr. Bansal came to the opinion that the claimant had shoulder impingement that pre-existed her work incident. Dr. Bansal opined that the claimant's fall at work caused her left shoulder injury.

Ms. Mejia was later examined by Dr. Chen. Dr. Chen is board certified in physical medicine and rehabilitation, as well as spinal cord injury medicine. Ms. Mejia expressed concern to Dr. Chen about her ongoing shoulder complaints. She was concerned that she would have permanent issues with her left shoulder. Dr. Chen opined that the claimant's pain was located over her trapezius or angle of her left shoulder and not in her neck. According to Dr. Chen, when Ms. Mejia performed a right lateral tilt with her neck, she described a pulling sensation along her left trapezius muscle. Dr. Chen found the claimant to have no tenderness to palpation over the muscles of her rotator cuff, and that she had no problems raising her arms over her head. Dr. Chen opined that the claimant had no diagnosable shoulder condition related to her work injury at Costco on October 23, 2018, and that she did not aggravate any left shoulder condition. Dr. Chen opined that the claimant had pain along the middle of her left trapezius muscle which occurred when she tilted her head to the right. This was characterized by Dr. Chen as myofascial pain, which occurred frequently and

idiopathically among working adults of all ages. Dr. Chen continued by noting that, if Ms. Mejia's left forearm fracture were the result of a force vector causing direct shoulder trauma, he would have expected her to complain of pain in the emergency room or immediate follow-up visits. Ms. Mejia did not report this until she returned to work activities following her surgery.

The claimant injured her left upper extremity at work. The issue is whether the injuries alleged to her left shoulder arose out of, and in the course of, her employment with Costco. Based upon the information in the record, the injuries to the claimant's left shoulder arose out of and in the course of her employment with Costco. The claimant fell on her left arm. She did not have pain in her left shoulder until after she fell on her left side. While she did not immediately report pain, she noted in her testimony that she was in shock at the time of the injury, and had an open fracture in her left arm.

Causation

Having determined that the claimant's left shoulder injury arose out of, and in the course of her employment, at Costco, we next turn to the question of whether the claimant's left shoulder injury was a cause of temporary disability during a period of recovery, and whether the alleged shoulder injury and left upper extremity injury are causes of permanent disability.

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 medical causation is "essentially within the domain of expert testimony." Cedar Rapids Cmty. Sch. Dist. v. Pease, 807 N.W.2d 839, 844-45 (Iowa 2011). The commissioner, as the trier of fact, must "weigh the evidence and measure the credibility of witnesses." Id. The trier of fact may accept or reject expert testimony, even if uncontroverted, in whole or in part. Frye, 569 N.W.2d at 156. When considering the weight of an expert opinion, the fact-finder may consider whether the examination occurred shortly after the claimant was injured, the compensation arrangement, the nature and extent of the examination, the expert's education, experience, training, and practice, and "all other factors which bear upon the weight and value" of the opinion. Rockwell Graphic Sys., Inc. v. Prince, 366 N.W.2d 187, 192 (Iowa 1985). Unrebutted expert medical testimony cannot be summarily rejected. Poula v. Siouxland Wall & Ceiling, Inc., 516 N.W.2d 910 (Iowa App. 1994). Supportive lay testimony may be used to buttress expert testimony, and therefore is also relevant and material to the causation question.

Iowa employers take an employee subject to any active or dormant health problems, and must exercise care to avoid injury to both the weak and infirm and the strong and healthy. Hanson v. Dickinson, 188 Iowa 728, 176 N.W. 823 (1920). While a claimant must show that the injury proximately caused the medical condition sought to be compensable, it is well established that a cause is "proximate" when it is a substantial factor, or even the primary or most substantial cause to be compensable under the Iowa workers' compensation system. Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417 (Iowa 1994); Blacksmith v. All-American, Inc., 290 N.W.2d 348 (Iowa 1980).

Ms. Mejia suffered a minimally displaced left ulnar styloid fracture, and a transverse fracture through her mid-radial diaphysis with radial displacement of the distal fracture fragment. Ms. Mejia treated with Dr. Karam. Dr. Karam is board certified in orthopedic surgery, and is a professor of orthopedic surgery at the University of Iowa Medical School. Dr. Karam performed surgery on Ms. Mejia's left forearm and placed hardware to repair her fracture. She underwent physical therapy, and a gradual return to work program. Part of this return-to-work program included working with restrictions provided by Dr. Karam.

Eventually, Ms. Mejia returned to work full time at Costco. In September of 2019, Dr. Karam released Ms. Mejia to resume full duty activities as she could tolerate. He placed her at MMI on September 10, 2019, and opined that she had a zero percent permanent impairment for her left upper extremity. This was because, in Dr. Karam's opinion, "[t]here is no diagnosis-based impairment for this condition," as the claimant had full and normal ranges of motion with no neurologic dysfunction.

Ms. Mejia then began complaining of increased pain in her forearm. She expressed a fear that something moved or shifted with the hardware in her arm. Ms. Mejia was interested in a hardware removal, which was done in November of 2021. While she had pain, her left arm continued to heal appropriately. At that time, Dr. Karam felt that Ms. Mejia would achieve MMI at six weeks following her subsequent surgery. Dr. Karam wrote a letter to defendants' counsel on December 6, 2021, in which he opined that the claimant had a full and normal range of motion in her left arm, with no neurologic dysfunction, instability, joint space narrowing, or any other permanent impairment from the injury. He also opined that his previously provided impairment rating had not changed. Dr. Karam did not express an opinion as to causation of temporary or permanent disability to the claimant's left shoulder.

Dr. Bansal then examined Ms. Mejia at the behest of claimant's counsel. Dr. Bansal is board certified in occupational medicine. Ms. Mejia testified that Dr. Bansal met with her for 45 minutes and spoke to her ahead of the examination for 30 minutes. As noted herein, Dr. Bansal opined that the claimant injured her left shoulder as a result of the force vectors from her fall onto her left side. He further opined that the fall aggravated the claimant's shoulder impingement. Dr. Bansal performed range of motion measurements to the claimant's left shoulder and left forearm. Based upon issues with range of motion in the left wrist, Dr. Bansal opined that the claimant suffered

a 5 percent left upper extremity impairment. Dr. Bansal also opined that the claimant suffered a 3 percent impairment due to her left shoulder range of motion issues.

Dr. Bansal recommended certain permanent restrictions for Ms. Mejia. These included no lifting greater than 15 pounds, and no lifting overhead with her left arm. Dr. Bansal also opined that the claimant achieved MMI with her left upper extremity as of May 6, 2022. He recommended future medical treatment including intermittent steroid injections into the left shoulder.

There were inconsistencies in Dr. Bansal's report that are unexplained. For example, Dr. Bansal found the following ranges of motion to the left shoulder:

Flexion:	171, 171, and 173 degrees
Abduction:	156, 158, and 160 degrees
Adduction:	44, 42, and 42 degrees
External Rotation:	48, 46, and 45 degrees
Extension:	42, 40, and 42 degrees
Internal Rotation:	56, 58, and 55 degrees

(CE 2:21). However, when he provided an impairment rating, he used the following measurements:

Flexion:	170 degrees
Abduction:	162 degrees
Adduction:	47 degrees
External Rotation:	83 degrees
Extension:	49 degrees
Internal Rotation:	73 degrees

(CE 2:24). The measurements used to provide the impairment rating measurements are significantly different than those performed in the physical examination.

Dr. Chen also performed an IME, at the arrangement of defendants' counsel. Dr. Chen is board certified in physical medicine and rehabilitation and spinal cord injury medicine. Ms. Mejia told Dr. Chen that she had pain with forceful gripping, opening of a jar, cooking and cleaning. She also reported pain over the trapezius or angle of her shoulder. Dr. Chen found the claimant to have normal ranges of motion in her left and

right shoulders. He also found her to have no tenderness to palpation over the muscles of the rotator cuff.

Dr. Chen examined the claimant's left elbow and found her to have a normal range of motion. She had normal range of motion in her bilateral wrists, with normal flexion, extension, radial deviation, and ulnar deviation. Dr. Chen noted that the ranges of motion that he found were in excess of those found by Dr. Bansal. He also observed that Ms. Mejia had slight tenderness to light palpation of the healed incision sites. Based upon his examination, Dr. Chen opined that the claimant had no diagnosable condition related to her work at Costco, and that she suffered from trapezius myofascial pain. Dr. Chen also opined that Ms. Mejia had no ratable permanent impairment from her left arm fractures, and required no permanent work restrictions as a result of her left arm fracture.

Ms. Mejia testified that she had left forearm pain when working in certain areas of Costco. Prior to her hardware removal, her pain was greatly increased when she worked in cold areas. She especially has pain when she lifts heavy items at her shoulder or above shoulder height. She testified that she has to place her left arm on a pillow and that she cannot do anything with her left arm for the remainder of that day. It is difficult to determine whether this means that she rests her arm due to pain in her shoulder or pain in her forearm. Ms. Mejia also took ibuprofen to alleviate any especially intense pain.

Ms. Mejia continues to work at Costco with no physical limitations. She has not received any negative feedback on her performance from Costco as to her work. She works in various departments. She is also working under no restrictions from a doctor.

Dr. Karam opined that the claimant's fractured left arm caused her no permanent impairment. He made no opinion as to impairment to the claimant's left shoulder. Dr. Chen agreed with the opinions of Dr. Karam with regard to the claimant's left arm. He also noted that the claimant had no impairment to her left shoulder. Dr. Bansal noted that the claimant has permanent impairment to her left upper extremity and her left shoulder.

Based upon the information in the record, I find that the claimant has sustained no permanent impairment to her left upper extremity. Dr. Karam is the most qualified to opine as to the claimant's left upper extremity issues. I find his opinions to be most persuasive. He is a board certified orthopedic surgeon and professor of orthopedic surgery at the University of Iowa. He was also the claimant's treating physician. Dr. Chen's opinions bolster those of Dr. Karam. Therefore, based upon the information in the record, I find that the claimant did not prove, by a preponderance of the evidence, that she suffered a permanent impairment to her left upper extremity due to her fractures.

I also find that the claimant sustained no temporary or permanent disability to her left shoulder. Dr. Bansal's opinion with regard to the shoulder issues has inconsistencies that lead me to question its accuracy. Dr. Bansal also comments on the issues with the claimant's left shoulder being an aggravation of her left shoulder impingement. There does not seem to be any information in the record indicating that the claimant suffered from impingement prior to her work injury. It is also unclear exactly how the claimant fell, and how that could be a force vector for an injury to her left shoulder that resulted in permanency.

Additionally, Dr. Karam performed x-rays of the claimant's left shoulder, which showed grossly congruent glenohumeral and acromioclavicular joints with mild osteophytes in the acromioclavicular joint. Dr. Karam noted that Ms. Mejia's pain was localized to the AC joint, and radiated down her biceps. This contradicts the observations of Dr. Chen, who noted that the claimant had pain in the area of her right trapezius when she moved her neck.

Based upon the foregoing, I find that the claimant has not proven by a preponderance of the evidence that her left upper extremity and left shoulder injuries were a cause of a temporary or permanent disability to her left shoulder or left upper extremity. Since the injury is not a cause of temporary or permanent disability, determining the extent of disability and/or commencement date for benefits is moot.

IME Reimbursement Pursuant to Iowa Code section 85.39

Iowa Code 85.39(2) states:

> If an evaluation of permanent disability has been made by a physician retained by the employer and the employee believes this evaluation to be too low, the employee shall, upon application to the commissioner and upon delivery of a copy of the application to the employer and its insurance carrier, be reimbursed by the employer the reasonable fee for a subsequent examination by a physician of the employee's own choice, and reasonably necessary transportation expenses incurred for the examination. . . . An employer is only liable to reimburse an employee for the cost of an examination conducted pursuant to this subsection if the injury for which the employee is being examined is determined to be compensable under this chapter or chapter 85A or 85B. An employer is not liable for the cost of such an examination if the injury for which the employee is being examined is determined not to be a compensable injury. A determination of the reasonableness of a fee for an examination made pursuant to this subsection shall be based on the typical fee charged by a medical provider to perform an impairment rating in the local area where the examination is conducted.

Iowa Code section 85.39(2).

Defendants are responsible only for reasonable fees associated with claimant's IME. The claimant has the burden of proving the reasonableness of the expenses incurred for the examination. See Schintgen v. Economy Fire & Casualty Co., File No. 855298 (App. April 26, 1991). An opinion finding a lack of causation is tantamount to a zero percent impairment rating. Kern v. Fenchel, Doster & Buck, P.L.C., 2021 WL 3890603 (Iowa App. 2021).

The claimant seeks reimbursement for an IME performed by Dr. Bansal. Dr. Karam provided an opinion as to the permanent disability related to Ms. Mejia's left upper extremity. He made no opinion as to Ms. Mejia's shoulder. Ms. Mejia then had an examination with Dr. Bansal, and requests reimbursement for the same. The defendants then had Dr. Chen examine the claimant.

The claimant presents an invoice from Dr. Bansal for three thousand three hundred seventy and 00/100 dollars ($3,370.00) for the IME conducted on May 6, 2022. The defendants are only responsible for the reasonable fees associated with the IME. The invoice does not break down which part of Dr. Bansal's opinions and time are related to the left arm and what was related to the left shoulder. The defendants would normally be required to reimburse the claimant for the examination of the left upper extremity, and not the left shoulder since no opinion was provided by any physician retained by the defendants as to the left shoulder prior to Dr. Bansal's examination. Based upon the foregoing, and the information in the record, the claimant has not proven the reasonableness of the expenses, specifically as they relate to the left upper extremity examination.

Alternate Care pursuant to Iowa Code section 85.27

Iowa Code 85.27(4) provides, in relevant part:

> For purposes of this section, the employer is obligated to furnish reasonable services and supplies to treat an injured employee, and has the right to choose the care…. The treatment must be offered promptly and be reasonably suited to treat the injury without undue inconvenience to the employee. If the employee has reason to be dissatisfied with the care offered, the employee should communicate the basis of such dissatisfaction to the employer, in writing if requested, following which the employer and the employee may agree to alternate care reasonably suited to treat the injury. If the employer and employee cannot agree on such alternate care, the commissioner may, upon application and reasonable proofs of the necessity therefor, allow and order other care.

Iowa Code 85.27(4). See Pirelli-Armstrong Tire Co. v. Reynolds, 562 N.W.2d 433 (Iowa 1997).

"Iowa Code section 85.27(4) affords an employer who does not contest the compensability of a workplace injury a qualified statutory right to control the medical

care provided to an injured employee." Ramirez-Trujillo v. Quality Egg, L.L.C., 878 N.W.2d 759, 769 (Iowa 2016) (citing R.R. Donnelly & Sons v. Barnett, 670 N.W.2d 190, 195, 197 (Iowa 2003)). "In enacting the right-to-choose provision in section 85.27(4), our legislature sought to balance the interests of injured employees against the competing interests of their employers." Ramirez, 878 N.W.2d at 770-71 (citing Bell Bros., 779 N.W.2d at 202, 207; IBP, Inc. v. Harker, 633 N.W.2d 322, 326-27 (Iowa 2001)).

The employer has the right to choose the provider of care, except where the employer has denied liability for the injury. Iowa Code 85.27. Holbert v. Townsend Engineering Co., Thirty-second Biennial Report of the Industrial Commissioner 78 (Review-Reopening, October 16, 1975). An employer's right to select the provider of medical treatment to an injured worker does not include the right to determine how an injured worker should be diagnosed, evaluated, treated, or other matters of professional medical judgment. Assmann v. Blue Star Foods, File No. 866389 (Declaratory Ruling, May 18, 1988). Reasonable care includes care necessary to diagnose the condition, and defendants are not entitled to interfere with the medical judgment of its own treating physician. Pote v. Mickow Corp., File No. 694639 (Review-Reopening Decision, June 17, 1986).

The employer must furnish "reasonable medical services and supplies *and* reasonable and necessary appliances to treat an injured employee." Stone Container Corp. v. Castle, 657 N.W.2d 485, 490 (Iowa 2003)(emphasis in original). Such employer-provided care "must be offered promptly and be reasonably suited to treat the injury without undue inconvenience to the employee." Iowa Code section 85.27(4).

By challenging the employer's choice of treatment - and seeking alternate care – claimant assumes the burden of proving the authorized care is unreasonable. See e.g. Iowa R. App. P. 14(f)(5); Bell Bros. Heating and Air Conditioning v. Gwinn, 779 N.W.2d 193, 209 (Iowa 2010); Long v. Roberts Dairy Co., 528 N.W.2d 122 (Iowa 1995). An injured employee dissatisfied with the employer-furnished care (or lack thereof) may share the employee's discontent with the employer and if the parties cannot reach an agreement on alternate care, "the commissioner may, upon application and reasonable proofs of the necessity therefor, allow and order the care." Id. "Determining what care is reasonable under the statute is a question of fact." Long, 528 N.W.2d at 123; Pirelli-Armstrong Tire Co., 562 N.W.2d at 436. As the party seeking relief in the form of alternate care, the employee bears the burden of proving that the authorized care is unreasonable. Id. at 124; Gwinn, 779 N.W.2d at 209; Pirelli-Armstrong Tire Co., 562 N.W.2d at 436. Because "the employer's obligation under the statute turns on the question of reasonable necessity, not desirability," an injured employee's dissatisfaction with employer-provided care, standing alone, is not enough to find such care unreasonable. Id.

The Iowa Supreme Court has held that, "when evidence is presented to the commissioner that the employer-authorized medical care has not been effective and that such care is 'inferior or less extensive' than other available care requested by the

employee, . . . the commissioner is justified by section 85.27 to order the alternate care." Pirelli-Armstrong Tire Co., 562 N.W.2d at 437.

The claimant requested alternate care in their brief via ordering the defendants to authorize Dr. Karam as an authorized treating physician, and authorize injections to the left shoulder as recommended by Dr. Bansal. I previously found the opinions of Dr. Bansal in this matter to be less persuasive than other providers. The defendants have provided reasonable care to date. The claimant has not proven that alternate care is appropriate.

Costs

The claimant did not check the box on the hearing report indicating that she sought an award of costs. However, Ms. Mejia included an outline of costs in Claimant's Exhibit 6. Costs are to be assessed at the discretion of the deputy commissioner hearing the case. See 876 Iowa Administrative Code 4.33; Iowa Code section 86.40. 876 Iowa Administrative Code 4.33(6) provides:

> [c]osts 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.

Pursuant to the holding in Des Moines Area Regional Transit v. Young, 867 N.W.2d 839 (Iowa 2015), only the report of an IME physician, and not the examination itself, can be taxed as a cost according to 876 IAC 4.33(6). The Iowa Supreme Court reasoned, "a physician's report becomes a cost incurred in a hearing because it is used as evidence in lieu of the doctor's testimony," while "[t]he underlying medical expenses associated with the examination do not become costs of a report needed for a hearing, just as they do not become costs of the testimony or deposition." Id. (nothing additionally that "[i]n the context of the assessment of costs, the expenses of the underlying medical treatment and examination are not part of the costs of the report or deposition"). The commissioner has found this rationale applicable to expenses incurred by vocational experts. See Kirkendall v. Cargill Meat Solutions Corp., File No. 5055494 (App. Dec., December 17, 2018); Voshell v. Compass Group, USA, Inc., File No. 5056587 (App. Dec., September 27, 2019).

The claimant requests reimbursement of costs as follows:

• Filing Fee	$100.00
• Certified Mail	$13.34
• IME Report of Dr. Bansal	$2,808.00
• Deposition Transcript	$216.15
• Hearing Transcript	Left Blank
Total:	$1,113.34

In my discretion, I decline to award the claimant costs in this matter.

ORDER

THEREFORE, IT IS ORDERED:

That the claimant shall take nothing further.

That the defendant shall file subsequent reports of injury (SROI) as required by this agency pursuant to 876 Iowa Administrative Code 3.1(2) and 876 Iowa Administrative Code 11.7.

Signed and filed this _7th_ day of November, 2022.

ANDREW M. PHILLIPS
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Anita Dhar Miller (via WCES)

Gabriela Navarro (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.