BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

KEVIN CARTE, Claimant, vs. WHIRLPOOL, Employer, and OLD REPUBLIC INSURANCE CO., Insurance Carrier, SECOND INJURY FUND OF IOWA, Defendants.	File Nos. 1643167.01 1656980.01 ARBITRATION DECISION Head Note Nos.: 1803.1, 3000, 3200
KEVIN CARTE, Claimant, vs. WHIRLPOOL, Employer, and OLD REPUBLIC INSURANCE CO., Insurance Carrier, Defendants.	File No. 19700417.01 ARBITRATION DECISION Head Note Nos.: 1803, 4000.2

STATEMENT OF THE CASE

The claimant, Kevin Carte, filed three petitions for arbitration and seeks workers' compensation benefits from Whirlpool, employer, and Old Republic Insurance Company, insurance carrier. Two of the petitions also make claims against the Second Injury Fund of Iowa. The claimant was represented by Gary Nelson. The defendants were represented by Kayli Paul. The Fund was represented by Jonathan Bergman.

The matter came on for hearing on April 19, 2021, before Deputy Workers' Compensation Commissioner Joe Walsh in Des Moines, Iowa, via Court Call

videoconferencing system. The combined record in the case consists of Joint Exhibits 1 through 8; Claimant's Exhibits 1 through 6; and Defense Exhibits A through Q and Fund Exhibits AA through EE. The claimant testified at hearing. Sonya Wright served as court reporter for the proceeding. The matter was fully submitted on May 24, 2021, after helpful briefing by the parties.

The parties submitted a Hearing Report for each individual file, outlining issues and stipulations in each case.

ISSUES & STIPULATIONS

File No. 1643167.01 (Date of injury, January 11, 2018):

Claimant alleges he sustained an injury to his left shoulder and left arm on or about January 11, 2018. This is listed as disputed on the hearing report, however, it is apparent that the employer accepted the claim in some manner as it is stipulated that claimant sustained some level of temporary and permanent disability as a result of an injury. Claimant is not seeking additional temporary benefits, however, alleges the temporary and permanent benefits he was paid was at an artificially low rate. The parties dispute the nature and extent of permanent disability. The claimant has alleged the disability is unscheduled (industrial) and alternatively, has alleged application of the Second Injury Fund for prior disabilities to his bilateral knees. The Fund disputes any liability, as well as the amount of credit. All issues regarding permanency are disputed. The parties dispute the gross wages. Affirmative defenses have been waived. Medical expenses are not in dispute. Claimant seeks reimbursement for an IME and penalty for late benefits.

File No. 1656980.01 (Date of injury, October 12, 2018):

Claimant alleges he sustained an injury to his right shoulder and right arm on or about October 12, 2018. This is listed as disputed on the hearing report, however, it is apparent that the employer accepted the claim in some manner as it is stipulated that claimant sustained some level of temporary and permanent disability as a result of an injury. Claimant is not seeking additional temporary benefits, however, alleges the temporary and permanent benefits he was paid was at an artificially low rate. The parties dispute the nature and extent of permanent disability. The claimant has alleged the disability is unscheduled (industrial) and alternatively, has alleged application of the Second Injury Fund for prior disabilities to his bilateral knees. The Fund disputes any liability, as well as the amount of credit. All issues regarding permanency are disputed. The parties dispute the gross wages. Affirmative defenses have been waived. Medical expenses are not in dispute. Claimant seeks reimbursement for an IME and penalty for late benefits.

File No. 19700417.01 (Date of injury, May 1, 2019):

The parties have stipulated that claimant sustained an injury which arose out of and in the course of employment which manifested on May 1, 2019. The parties have further stipulated that this injury is a cause of both temporary and permanent disability. Temporary benefits are not in dispute. The primary issue is the nature and extent of

permanent disability. The parties have stipulated that the appropriate commencement date for permanency benefits is May 1, 2019. Affirmative defenses have been waived. Claimant seeks reimbursement for an IME and penalty for late benefits.

FINDINGS OF FACT

Claimant Kevin Carte was born in 1958. He resides in Williamsburg, Iowa. He did not complete high school. He worked for Whirlpool since 1977 and voluntarily retired on May 1, 2019. He primarily worked on the assembly line, but also worked as a spot welder and fork truck driver.

Mr. Carte testified live and under oath in the video hearing. His testimony is highly credible. It was consistent with the remainder of the record and there was nothing about his demeanor which caused any concern for his truthfulness.

Mr. Carte's health has been generally good. In 2008, he underwent bilateral knee replacement surgeries which were non-work related. (Joint Exhibit 4, pages 14-17) He returned to work without restrictions following these surgeries and worked successfully without restrictions.

In 2018, Mr. Carte was working as a "door hanger." In 2017, he earned $19.89 per hour which increased in October 2017 to $20.19 per hour. (Defendants' Exhibit D, page 9) He usually worked more than 40 hours per week and was paid bi-weekly. He generally received paid-time-off when he was not working. The parties have submitted competing wage calculations for the two injuries. (Compare Def. Exs. D and E with Cl. Ex.3, pp. 109-110) Having reviewed these exhibits, as well as Defendants' Exhibit G, I find claimant's calculations to be the most accurate, best representative assessment of his gross earnings in the record.

The employer has stipulated Mr. Carte sustained an injury which arose out of and in the course of his employment on January 11, 2018, to his left shoulder area. The employer accepted the claim and directed medical treatment. Matthew Bollier, M.D., provided care and ultimately performed surgery in April 2018. The surgery was described as left rotator cuff repair, biceps tenotomy, distal clavicle excision and capsular release. (Jt. Ex. 7, pp. 83-86) He had a relatively normal post-surgical recovery and was released without any restrictions on August 23, 2018. (Jt. Ex. 7, pp. 62-63)

On October 12, 2018, Mr. Carte sustained a second injury, this time to his right shoulder area. The employer also concedes this injury arose out of and in the course of his employment and directed appropriate medical care. He returned to see Dr. Bollier, who again examined Mr. Carte and quickly recommended surgery. Surgery was performed on January 4, 2019, described as right shoulder arthroscopy with biceps tenotomy, distal clavicle excision, capsular release, extensive debridement, and subacromial decompression. (Jt. Ex. 7, pp. 87-90) He again had a normal recuperation, ultimately being released from care on March 29, 2019 without any restrictions. (Jt. Ex. 7, pp. 78-81) At the time of his last visit with Dr. Bollier, Mr. Carte had not worked for two weeks because he had decided to retire. While his retirement

date was formally set for May 1, 2019, he took accumulated paid time off until his retirement date. No physician recommended he retire when he did. "My body was telling me it was time to go." (Tr., p. 24) Following his retirement, Mr. Carte did work part-time for a grocery store, performing general retail work and helping out as needed. He was able to perform this work. He has testified that generally, his overall condition has worsened, particularly in his right shoulder.

With regard to both injuries, Mr. Carte testified that his symptoms were limited to his shoulders and did not extend into his arms in any meaningful way. (Tr., pp. 47-48) He did testify that he has intermittent cramping in his right bicep if he does heavy lifting. (Tr., p. 25) He testified that his right shoulder area is actually more symptomatic than his left side. (Tr., p. 24) Mr. Carte has not returned to any physician for treatment since being released for his right shoulder.

Three physicians have provided expert medical opinions regarding Mr. Carte's left and right shoulder area conditions. Dr. Bollier assigned a 16 percent disability rating pursuant to the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, for the left shoulder condition. (Jt. Ex. 7, p. 60) This impairment rating consisted of the following analysis: 1 percent for loss of active forward flexion, 2 percent for loss of active forward extension, 1 percent for loss of active abduction and 1 percent for loss of active adduction, 2 percent for loss of internal rotation and 10 percent for distal clavicle resection. (Jt. Ex. 7, pp. 62-63) Dr. Bollier assigned a 6 percent rating for the right shoulder, rating claimant's loss of range of motion, however, assigning no rating for the distal clavicle excision. (Jt. Ex. 7, p. 80) Dr. Bollier released him to his regular job with no restrictions for either shoulder.

Mark Taylor, M.D., performed an independent medical evaluation in July 2020. He opined Mr. Carte sustained an 18 percent functional impairment rating for the left shoulder pursuant to the AMA Guides, Fifth Edition. (Cl. Ex. 2, p. 99) His rating was quite similar to that of Dr. Bollier, however, he assigned slightly higher ratings for loss of range of motion. (Cl. Ex. 2, p. 99) He assigned the same rating, 18 percent for claimant's right shoulder area condition (9 percent for range of motion deficits and 10 percent for distal clavicle excision). (Cl. Ex. 2, p. 100) He recommended permanent work restrictions on the left, including a 25-pound lifting restriction. (Cl. Ex. 2, p. 100) Restrictions on the right included a 20-pound restriction using both arms. Dr. Taylor also provided opinions regarding the situs of the injury, including a detailed medical opinion about the anatomy of the shoulder. Specifically he opined the following:

> All of the structures necessary to make the glenohumeral joint perform useful functions originate on the body side of the joint. In light of the above, and given the injuries and surgical findings, as well as the necessary surgical procedures, it is my opinion that Mr. Carte's injuries impacted structures both proximal and distal to the glenohumeral joint, especially when considering not only the anatomy, but also the function of the joint originating on the boy side of the joint.

(Cl. Ex. 2, p. 104)

Joseph Chen, M.D., performed a record review but never examined Mr. Carte in March 2021. He opined that claimant's disability for both injuries was limited to the "shoulder" and did not extend into either arm or whole body. (Fund Ex. BB, pp. 6-7).

I find the greater weight of evidence supports a finding that claimant's left and right shoulder injuries produced disabilities which are anatomically limited to the shoulders as defined by Iowa law, not his arms or his whole body.

At the time Mr. Carte retired, he had the condition of tinnitus. The parties have stipulated that his tinnitus arose out of and in the course of his employment and it manifested on or about May 1, 2019.[1] Mr. Carte undoubtedly worked in a noisy environment at Whirlpool. Mr. Carte testified he began noticing ringing in his ears several years prior to his retirement. At the time of hearing, he used hearing aids and described a constant buzzing or ringing in the ears. (Tr. p. 26)

There are two competing expert medical opinions in the record relating to the tinnitus. Claimant obtained an opinion from Richard Tyler, Ph.D., on September 5, 2020. The defendants secured an opinion from Timothy Simplot, M.D., on September 15, 2020. Both diagnosed tinnitus but used vastly different methods to calculate impairment. Dr. Tyler specifically did not use the AMA Guides. (Cl. Ex. 1, p. 14) He assigned a whole person impairment of 67 percent. (Cl. Ex. 1, p. 14) His analysis is quite detailed. Dr. Simplot assigned a 5 percent rating pursuant to the AMA Guides, Fifth Edition. (Def. Ex. B, p. 3)

CONCLUSIONS OF LAW

There are numerous factual and legal questions presented for determination.

File Nos. 1643167.01, 1656980.01

The first issue addressed is appropriate gross wages for each shoulder injury.

Section 85.36 states the basis of compensation is the weekly earnings of the employee at the time of the injury. The section defines weekly earnings as the gross salary, wages, or earnings to which an employee would have been entitled had the employee worked the customary hours for the full pay period in which injured as the employer regularly required for the work or employment. The various subsections of section 85.36 set forth methods of computing weekly earnings depending upon the type of earnings and employment.

If the employee is paid on a daily or hourly basis or by output, weekly earnings are computed by dividing by 13 the earnings over the 13-week period immediately preceding the injury. Any week that does not fairly reflect the employee's customary earnings that fairly represent the employee's customary earnings, however. Section 85.36(6).

[1] May 1, 2019, is claimant's retirement date. His actual last day of work in a noisy environment was March 13, 2019. Nevertheless, I accepted the parties' stipulation regarding the date of injury. He had just returned to work from his shoulder surgery.

The burden is on the claimant to prove gross wages. For the reasons set forth in the findings of fact I find that the claimant's gross wages are set forth in Claimant's Exhibit 3, page 109, for date of injury January 11, 2018, and Claimant's Exhibit 3, page 110 for date of injury October 12, 2018. Therefore, utilizing the stipulations regarding marital status and exemptions I conclude that the claimant's correct weekly rate is as follows:

File No.	Date of Injury	Correct Weekly Rate
1643167.01	January 11, 2018	$528.61
1656980.01	October 12, 2018	$535.26

The next issue is the nature of claimant's disability.

The claimant alleges he has sustained three separate unscheduled injuries under Iowa Code section 85.34(2)(v). Alternatively, he contends that he has sustained two separate scheduled injuries which would invoke application of the Second Injury Fund Act, Iowa Code section 85.64. The employer and insurance carrier contend that his disabilities are scheduled under Iowa Code section 85.34(2)(n), and limited exclusively to his shoulders. The Second Injury Fund essentially concurs with the defendant employer and carrier.

The legal issue, therefore, is whether either or both of the shoulder injuries extend into claimant's body as a whole, or whether they are limited to the shoulder as defined in subsection (n). The secondary issue is whether either injury produced a scheduled member disability which would invoke potential Second Injury Fund liability. For the reasons set forth below, I find that the disabilities are limited to the shoulders and do not extend into the body as a whole. I further find that there is no work-connected disability to a scheduled member which would invoke Second Injury Fund liability.

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).

Section 85.64 governs Second Injury Fund liability. Before liability of the Fund is triggered, three requirements must be met. First, the employee must have lost or lost the use of a hand, arm, foot, leg, or eye. Second, the employee must sustain a loss or loss of use of another specified member or organ through a compensable injury. A "shoulder" is not included in this analysis. Third, permanent disability must exist as to both the initial injury and the second injury.

The Second Injury Fund Act exists to encourage the hiring of individuals with disabilities by making a current employer responsible only for the amount of disability related to an injury occurring while that employer employed the individual as if the individual had had no preexisting disability. See Anderson v. Second Injury Fund, 262 N.W.2d 789 (Iowa 1978); 15 Iowa Practice, Workers' Compensation, Lawyer, Section 17:1, p. 211 (2014-2015).

The Fund is responsible for the industrial disability present after the second injury that exceeds the disability attributable to the first and second injuries. Section 85.64. Second Injury Fund of Iowa v. Braden, 459 N.W.2d 467 (Iowa 1990); Second Injury Fund v. Neelans, 436 N.W.2d 355 (Iowa 1989); Second Injury Fund v. Mich. Coal Co., 274 N.W.2d 300 (Iowa 1970).

Prior to July 1, 2017, injuries to the shoulder were considered proximal to the arm, extending beyond the arm, and compensated with industrial disability as an unscheduled injury pursuant to prior Iowa Code section 85.34(2)(u) (2016). See Alm v. Morris Barick Cattle Co., 240 Iowa 1174, 38 N.W.2d 161 (1949). The Iowa legislature enacted significant amendments to the Iowa workers' compensation laws, which took effect in July 2017. As part of those amendments, the legislature specified that injuries to the shoulder should be compensated as scheduled member injuries on a 400-week schedule. Iowa Code section 85.34(2)(n) (2017). It has long been understood that an injury must be compensated as a scheduled injury if the legislature saw fit to list the injured body part in Iowa Code section 85.34(2)(a)-(u). Williams v. Larsen Construction Co., 255 Iowa 1149, 125 N.W.2d 248 (1963).

In Deng v. Farmland Foods, File No. 5061883 (App. September 29, 2020), the Commissioner held that the 2017 amendments to Chapter 85 were ambiguous as to the definition of the shoulder. He therefore undertook an effort to construe the statute by looking to the intent of the legislature. Id. at 5. He ultimately concluded the following:

> I recognize the well-established standard that workers' compensation statutes are to be liberally construed in favor of the worker, as their primary purposes is to benefit the worker. See Des Moines Area Reg'l Transit Auth. v. Young, 867 N.W.2d 839, 842 (Iowa 2015) (citations omitted); see also Jacobson Transp. Co. v. Harris, 778 N.W.2d 192, 197 (Iowa 2010); Xenia Rural Water Dist. v. Vegors, 786 N.W.2d 250, 257

(Iowa 2010) ("We apply the workers' compensation statute broadly and liberally in keeping with its humanitarian objective...."); Griffin Pipe Prods. Co. v. Guarino, 663 N.W.2d 862, 865 (Iowa 2003) ("[T]he primary purpose of chapter 85 is to benefit the worker and so we interpret this law liberally in favor of the employee."). This liberal construction, however, cannot be performed in a vacuum. As discussed above, several of the principles of statutory construction indicate the legislature did not intend to limit the definition of "shoulder" under section 85.34(2)(n) to the glenohumeral joint. For these reasons, I conclude "shoulder" under section 85.34(2)(n) is not limited to the glenohumeral joint.

Claimant's injury in this case was to the infraspinatus muscle. As discussed, the infraspinatus is part of the rotator cuff, and the rotator cuff's main function is to stabilize the ball-and-socket joint. As noted by both Dr. Bansal and Dr. Bolda, the rotator cuff is generally proximal to the joint. However, because the rotator cuff is essential to the function of the glenohumeral joint, it seems arbitrary to exclude it from the definition of "shoulder" under section 85.34(2)(n) simply because it "originates on the scapula, which is proximal to the glenohumeral joint for the most part." (Def. Ex. A, [Depo. Tr., 27]). In other words, being proximal to the joint should not render the muscle automatically distinct.

Given the entwinement of the glenohumeral joint and the muscles that make up the rotator cuff, including the infraspinatus, and the importance of the rotator cuff to the function of the joint, I find the muscles that make up the rotator cuff are included within the definition of "shoulder" under section 85.34(2)(n). Thus, I find claimant's injury to her infraspinatus should be compensated as a shoulder under section 85.34(2)(n). The deputy commissioner's determination that claimant's infraspinatus injury is a whole body injury that should be compensated industrially under section 85.34(2)(v) is therefore respectfully reversed.

Deng, at 10-11.

In Chavez v. MS Technology, LLC, File No. 5066270 (App. September 30, 2020) filed just after Deng, the Commissioner affirmed his legal holding in Deng and applied his interpretation to the various impairments and disabilities sustained by the claimant in that case.

Again, as explained in Dr. Peterson's operative note, claimant's subacromial decompression was performed to remove scar tissue and fraying between the supraspinatus and the underside of the acromion. As discussed above, the acromiom [sic] forms part of the socket and helps protect the glenoid cavity, and as such, I found it is closely interconnected with the glenohumeral joint in both location and function. And as discussed in Deng, I found the supraspinatus - a muscle that forms the rotator cuff - to be similarly entwined with the glenohumeral joint. Thus, claimant's subacromial decompression impacted two anatomical

> parts that are essential to the functioning of the glenohumeral joint; in fact, the procedure was actually performed to improve the function of the joint. As such, I find any disability resulting from her subacromial decompression should be compensated as a shoulder under section 85.34(2)(n).
>
> I therefore find none of claimant's injuries are compensable as unscheduled, whole body injuries under section 85.34(2)(v). The deputy commissioner's finding that claimant sustained an injury to her body as a whole is therefore respectfully reversed.

Chavez, at 6.

I conclude the key holdings of Deng and Chavez are:

1. The definition of a "shoulder" is ambiguous in Section 85.34(2)(n). Deng, at 4.

2. There is no "ordinary" meaning of the word shoulder. Deng, at 5.

3. The appropriate way to interpret the statute is to examine the legislative history. Deng, at 5.

4. The well-established history of "liberal construction" of workers' compensation statutes is inapplicable here because to do so would be to ignore the legislature's intent to limit compensation to injured workers in the 2017 amendments.[2] Deng, at 10-11.

5. The legislature did not intend to limit the definition of a "shoulder" to the glenohumeral joint. Rather, the legislature intended to include the entwinement of the glenohumeral joint and the muscles that make up the rotator cuff. Deng, at 11.

Having reviewed the entire record, I find that the claimant's left and right shoulder disabilities are confined to his shoulders under subsection (n). Consequently, claimant is entitled to compensation under Iowa Code section 85.34(2)(n). Moreover, there is no rating which extends into the arm itself, so there is no entitlement to disability which could be compensated under subsection (m). Such scheduled disabilities, however, are not covered under the Second Injury Fund Act, Section 85.64. Consequently, I

[2] The fundamental guiding principle of statutory construction in a workers' compensation case is that the statute is to be interpreted liberally in favor of the injured worker and their family. "*Any* doubt in its construction is thus resolved in favor of the employee." Teel v. McCord, 394 N.W. 2d 405, 407 (Iowa 1986). Workers' compensation laws are to be construed in favor of the injured worker. Myers. v. F.C.A. Services, Inc., 592 N.W.2d 354, 356 (Iowa 1999). The beneficent purpose is not to be defeated by reading something into the statute that is not there. Cedar Rapids Community School v. Cady, 278 N.W.2d 298 (Iowa 1979). This, combined with the legal principle that the legislature is presumed to know the prior construction of the law. State ex rel. Palmer v. Board of Supervisors of Polk County, 365 N.W.2d 35, 37 (Iowa 1985), would lead me to reach the alternative conclusion in this case. This, however, is not what the Commissioner held. As a Deputy Commissioner, I am bound to follow the rulings of the Commissioner as binding precedent.

conclude there is no Second Injury Fund liability for either injury.

Having concluded that the disability is a scheduled member evaluated under Section 85.34(2)(n), the next issue is to assess the degree of disability to each of the claimant's shoulders.

> x. In all cases of permanent partial disability described in paragraphs "a" through "u", or paragraph "v" when determining functional disability and not loss of earning capacity, the extent of loss or percentage of permanent impairment shall be determined solely by utilizing the guides to the evaluation of permanent impairment, published by the American medical association, as adopted by the workers' compensation commissioner by rule pursuant to chapter 17A. Lay testimony or agency expertise shall not be utilized in determining loss or percentage of permanent impairment pursuant to paragraphs "a" through "u", or paragraph "v" when determining functional disability and not loss of earning capacity.

Iowa Code section 85.34(2)(x) (2019).

Thus, the law, as written, is not concerned with an injured worker's actual loss of use or functional disability as determined by the evidence, but rather the impairment rating as assigned by the adopted version of the AMA Guides to the Evaluation of Permanent Impairment. The only function of the agency is to determine which impairment rating should be utilized. While no explicit guidance is provided in the statute for this analysis, presumably the rating which most closely aligns with the worker's actual functional disability.

Having reviewed the competing impairment ratings in the record, I find that, for both injuries, the ratings of Dr. Taylor are most accurate representation of Mr. Carte's functional disability. Dr. Taylor's ratings appear to be the best utilization of the Guides and most closely comport with Mr. Carte's symptoms of disability in each shoulder at the time of hearing. He provided a clear analysis of how he used the Guides and arrived at each rating. The ratings of Dr. Bollier are less convincing. He opined, for example that claimant actually had a higher rating for the left shoulder in spite of claimant's testimony that the right shoulder was more symptomatic. Therefore, I conclude the following. For the January 11, 2018, left shoulder disability, claimant is entitled to 72 weeks commencing on July 20, 2018. For the October 12, 2018, right shoulder disability claimant is entitled to 72 weeks of compensation commencing on March 29, 2019.

File No. 19700417.01:

The claimant's tinnitus disability is an unscheduled disability analyzed under Section 85.34(2)(v). In Ehteshamfar v. UTA Engineering Systems Div., 555 N.W.2d 450 (1996). The question then is whether the following provision of law is applicable.

> If an employee who is eligible for compensation under this paragraph returns to work or is offered work for which the employee receives or would receive the same or greater salary, wages, or earnings than the

> employee received at the time of the injury, the employee shall be compensated based only upon the employee's functional impairment resulting from the injury, and not in relation to the employee's earning capacity.

Iowa Code section 85.34(2)(v) (2019). Therefore, the legal question is whether Mr. Carte returned to work or was offered work which would result in the same or greater earnings than he had at the time of injury.

In this case, Mr. Carte voluntarily retired on March 13, 2019, which was effective on May 1, 2019. Mr. Carte testified credibly that he retired because, "My body was telling me it was time to go." (Tr., p. 24) This is general testimony. He conceded he had no medical restrictions from an authorized physician and no physician specifically advised him to retire. In fact, he has no ratable hearing loss. He did not testify in detail about severe, ongoing tinnitus symptoms. He testified that he could return to his work at Whirlpool regardless of the tinnitus. He did not testify that his retirement was motivated by his tinnitus specifically. In this case, claimant's retirement date coincides closely with his date of injury.

The employer argues the following: "Most importantly … the Claimant was not 'terminated' from the Employer and therefore is not entitled to industrial disability." (Def. Brief, p. 8) This argument appears to have been rejected in Martinez v. Pavlich, Inc., File No. 5063900 (App. July 30, 2020). I find that the claimant retired, due to a combination of his disabilities, including his tinnitus. Therefore, subsection (v), limiting the assessment of his disability to the impairment rating, is inapplicable.

Since claimant has an impairment to the body as a whole, an industrial disability has been sustained. Industrial disability was defined in Diederich v. Tri-City R. Co., 219 Iowa 587, 258 N.W. 899 (1935) as follows: "It is therefore plain that the Legislature intended the term 'disability' to mean 'industrial disability' or loss of earning capacity and not a mere 'functional disability' to be computed in terms of percentages of the total physical and mental ability of a normal man."

Functional impairment is an element to be considered in determining industrial disability which is the reduction of earning capacity, but consideration must also be given to the injured employee's age, education, qualifications, experience, motivation, loss of earnings, severity and situs of the injury, work restrictions, inability to engage in employment for which the employee is fitted and the employer's offer of work or failure to so offer. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963); Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961).

Compensation for permanent partial disability shall begin at the termination of the healing period. Compensation shall be paid in relation to 500 weeks as the disability bears to the body as a whole.

Having considered all of the evidence of claimant's industrial disability, I find that he has sustained a minimal loss of earning capacity of 5 percent. It is not entirely clear

whether Mr. Carte would have retired if he had not developed tinnitus, however, it is highly likely that retirement was relatively imminent. In this case, I do not find Dr. Tyler's report compelling; his ratings and opinions seem to be out of alignment with claimant's testimony regarding the severity of his condition. I conclude claimant is entitled to 25 weeks of compensation commencing on May 1, 2019.

The next issue is penalty. Claimant originally alleged penalty claims on all three files, however, in his brief withdrew the penalty claims on each shoulder injury. The only penalty claim remaining is with regard to claimant's tinnitus condition.

Iowa Code section 86.13(4) provides:

> a. If a denial, a delay in payment, or a termination of benefits occurs without reasonable or probable cause or excuse known to the employer or insurance carrier at the time of the denial, delay in payment, or termination of benefits, the workers' compensation commissioner shall award benefits in addition to those benefits payable under this chapter, or chapter 85, 85A, or 85B, up to fifty percent of the amount of benefits that were denied, delayed, or terminated without reasonable or probable cause or excuse.
>
> b. The workers' compensation commissioner shall award benefits under this subsection if the commissioner finds both of the following facts:
>
> (1) The employee has demonstrated a denial, delay in payment, or termination in benefits.
>
> (2) The employer has failed to prove a reasonable or probable cause or excuse for the denial, delay in payment, or termination of benefits.
>
> c. In order to be considered a reasonable or probable cause or excuse under paragraph "b," an excuse shall satisfy all of the following criteria:
>
> (1) The excuse was preceded by a reasonable investigation and evaluation by the employer or insurance carrier into whether benefits were owed to the employee.
>
> (2) The results of the reasonable investigation and evaluation were the actual basis upon which the employer or insurance carrier contemporaneously relied to deny, delay payment of, or terminate benefits.
>
> (3) The employer or insurance carrier contemporaneously conveyed the basis for the denial, delay in payment, or termination of benefits

> to the employee at the time of the denial, delay, or termination of benefits.

Dr. Simplot provided his opinions regarding permanent impairment on September 15, 2020. (Def. Ex. B) Within days, claimant's counsel had requested payment of this rating. The rating was finally paid on December 7, 2020, 12 weeks later. (Def. Ex. L, p. 51) There is no explanation for this delay in the record. A penalty is mandatory. Claimant has requested a maximum penalty of 50 percent of the entire late amount. Using the appropriate factors for assessment of the amount of penalty, I find that a $3,000.00 penalty is appropriate to deter defendants from this conduct in the future.

The final issue is IME expenses and other costs.

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

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

I find that the defendants are responsible for the IME costs of Dr. Taylor for both shoulders. The total cost for both shoulders is $3,432.50.

Defendants are responsible for additional costs in the amount of $2,646.45. This includes the costs of Dr. Tyler's report in the amount $2,375.00 plus the other remaining costs of $271.45.

ORDER

THEREFORE IT IS ORDERED:

File No. 1643167.01 (Date of injury January 11, 2018):

All benefits shall be paid at the rate of five hundred twenty-eight and 61/100 dollars ($528.61).

Defendants shall pay the claimant seventy-two (72) weeks of permanent partial disability benefits commencing July 20, 2018.

Defendants shall pay accrued weekly benefits in a lump sum.

Defendants shall pay interest on unpaid weekly benefits awarded herein as set forth in Iowa Code section 85.30.

Defendants shall be given credit for the weeks previously paid.

Defendants shall file subsequent reports of injury as required by this agency pursuant to rule 876 IAC 3.1(2).

The Second Injury Fund has no liability.

File No. 1656980.01 (Date of injury October 12, 2018):

All benefits shall be paid at the rate of five hundred thirty-five and 26/100 dollars ($535.26).

Defendants shall pay the claimant seventy-two (72) weeks of permanent partial disability benefits commencing March 29, 2019.

Defendants shall pay accrued weekly benefits in a lump sum.

Defendants shall pay interest on unpaid weekly benefits awarded herein as set forth in Iowa Code section 85.30.

Defendants shall be given credit for the weeks previously paid.

Defendants shall file subsequent reports of injury as required by this agency pursuant to rule 876 IAC 3.1(2).

The Second Injury Fund has no liability.

File No. 19700417.01, (Date of injury May 1, 2019):

All benefits shall be paid at the rate of five hundred forty and 61/100 dollars ($540.61).

Defendants shall pay the claimant twenty-five (25) weeks of permanent partial disability benefits commencing May 1, 2019.

Defendants shall pay accrued weekly benefits in a lump sum.

Defendants shall pay interest on unpaid weekly benefits awarded herein as set forth in Iowa Code section 85.30.

Defendants shall be given credit for the weeks previously paid.

Defendants shall pay a penalty in the amount of three thousand dollars ($3,000.00).

Defendants shall file subsequent reports of injury as required by this agency pursuant to rule 876 IAC 3.1(2).

For all files:

Defendants shall reimburse claimant for the expenses associated with Dr. Taylor's IME in the amount of three thousand four hundred thirty-two and 50/100 dollars ($3,432.50).

Costs are taxed to defendant in the amount of two thousand six hundred and forty-six and 45/100 dollars ($2,646.45).

Signed and filed this 25th day of January, 2022.

JOSEPH L. WALSH
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Gary Nelson (via WCES)

Steven Durick (via WCES)

Kayli Paul (via WCES)

Jonathan Bergman (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.