

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

DANA KLING,

Claimant,

vs.

MARY ANN'S SPECIALTY FOODS,
INC.,

Employer,

and

WESTFIELD INSURANCE COMPANY,

Insurance Carrier,
Defendants.

File No. 5068821

ARBITRATION DECISION

Headnotes: 1108.50, 1402.30, 1803,
1803.1, 2907

Claimant Dana Kling filed a petition in arbitration on June 24, 2019, alleging she sustained injuries to her right shoulder, right arm, and neck, while working for Defendant Mary Ann's Specialty Foods ("Mary Ann's") on October 21, 2017. Mary Ann's and its insurer, Defendant Westfield Insurance Company ("Westfield"), filed an answer on July 17, 2019, admitting Kling sustained an injury to her right shoulder only.

An arbitration hearing was held *via* CourtCall video conference on May 24, 2021. Attorney Richard Schmidt represented Kling. Kling appeared and testified. Attorney Lori Scardina Utsinger represented Mary Ann's and Westfield. Joint Exhibits ("JE") 1 through 5 and Exhibits 1 through 4 and A through I were admitted into the record. The record was held open through June 25, 2021, for the receipt of post-hearing briefs. The briefs were received and the record was closed.

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

STIPULATIONS

1. An employer-employee relationship existed between Mary Ann's and Kling at the time of the alleged injury.

2. Kling sustained an injury, which arose out of and in the course of her employment with Mary Ann's on October 21, 2017.

3. The alleged injury is a cause of temporary disability during a period of recovery.
4. Temporary benefits are no longer in dispute.
5. The alleged injury is a cause of permanent disability.
6. The commencement date for permanent partial disability benefits, if any are awarded, is February 28, 2018.
7. At the time of the alleged injury Kling's gross earnings were \$721.00 per week, she was married and entitled to two exemptions, and the parties believe the weekly rate is \$475.35.
8. Medical benefits are no longer in dispute.
9. Prior to the hearing Kling was paid 12 weeks of compensation at the rate of \$475.35 per week.
10. Costs have been paid.

ISSUES

1. What is the nature of the injury?
2. If the injury is found to be a cause of permanent disability, what is the extent of disability?
3. Is Kling entitled to recover the cost of the independent medical examination?
4. Should costs be assessed against either party?

FINDINGS OF FACT

Kling lives in Eagle Grove with her husband. (Transcript, page 8; Ex. B, p. 4) Kling attended school through the ninth grade and later earned a GED. (Tr., p. 9; Ex. B, p. 4) After obtaining her GED Kling attended vocational training at a community college and she received a medical billing and coding certificate. (Ex. B, p. 4) At the time of the hearing she was 48. (Tr., p. 8)

Kling has worked for many employers in retail, as a cook, and as a laborer. (Ex. B, p. 5; Tr., p. 14) From October 2013 through March 31, 2017, and February 1, 2019 through the present she has worked as a nurse tech for hog operations. (Ex. B, p. 5)

Kling commenced work for Mary Ann's as a quality control technician in October 2017. (Tr., pp. 14, 16) Mary Ann's operates a meat-processing facility in Webster City. (Tr., p. 14) Kling worked for her current employer as a nursery tech while she was working for Mary Ann's. (Tr., p. 13)

On October 21, 2021, Kling was packaging spiral hams, weighing the boxes of hams, and putting the hams onto a pallet. (Tr., p. 18) Kling testified she turned to her right "to pull a box of full hams off of the conveyor, turned to set it down on the table so I could pick it up again and put it on the scale; and as I picked it up and went to set it

down on the scale, my arm snapped, or my muscle snapped.” (Tr., p. 18) Kling reported she is right-hand dominant and that when her arm snapped, she experienced pain in her arm and whole shoulder and did the best she could to finish her shift. (Tr., p. 19) Kling reported her work injury to Mary Ann’s. (Tr., pp. 19-21)

A few days later Kling attended an appointment with Joseph Latella, D.O., a family practice physician. (JE 1, p. 2; Tr., pp. 22-23) Dr. Latella examined Kling, diagnosed her with a torn right long head biceps tendon, referred her to Gautam Kakade, M.D., an orthopedic surgeon, for surgery, and released her to return to work with no use of the right extremity. (JE 1, pp. 1-2) Kling testified at the time she went to the doctor she was experiencing shoulder and neck pain. (Tr., p. 22)

Kling attended an appointment with Dr. Kakade on October 31, 2017, reporting she experienced sudden arm pain between her elbow and shoulder when setting down a box at work. (JE 2, p. 4) Dr. Kakade examined Kling, documented she had a Popeye deformity with bruising on the anterior aspect of her right upper arm, and noted “[m]ovement of the right shoulder is full range with 5/5 power of the rotator cuff muscles. Impingement sign is negative. Anterior and posterior apprehension negative. Sulcus sign negative. Tenderness present over the bicipital groove and the biceps belly.” (JE 2, p. 5) Dr. Kakade ordered x-rays, diagnosed Kling with a rupture of tendon of biceps, long head, right, and recommended surgical exploration of the right long head of the right biceps tendon and tenodesis of the long head of the biceps. (JE 2, pp. 5-7)

On November 1, 2017, Dr. Kakade performed a biceps tendon repair on Kling, listing a post-operative diagnosis of acute rupture of the long head of the right biceps tendon. (JE 2, p. 8)

Kling underwent a drug screen following the injury. (Ex. C, p. 7) The results were non-negative and the sample was sent to a laboratory. (Ex. C, p. 7) The laboratory confirmed the test was positive for marijuana. (Ex. C, pp. 7-8; Tr., p. 23) Mary Ann’s fired Kling after the positive drug test. (Tr., p. 35) Kling continued to work for Mary Ann’s after her surgery until she was terminated on November 3, 2017. (Tr., pp. 37-38, 43)

Kling attended a follow-up appointment with Dr. Kakade on November 14, 2017. (JE 2, p. 12) Dr. Kakade examined Kling, finding she had no Popeye deformity or bruising and she had full pronation and supination, full range of motion of her elbow and no tenderness of her shoulder, noting an x-ray of the right shoulder “is unremarkable with a type I acromion,” and ordered physical therapy with a restriction of no lifting with any weight for the right arm for six weeks other than activities of daily living and to use a sling at all times for four weeks. (JE 2, pp. 13-14)

On December 19, 2017, Kling returned to Dr. Kakade, reporting no pain. (JE 2, p. 15) Dr. Kakade examined Kling, and ordered her to continue with physical therapy and restrictions. (JE 2, p. 16)

Kling returned to Dr. Kakade on January 30, 2018, reporting she was experiencing activity pain she described as shooting, aching, and burning and that her shoulder pops at times. (JE 2, p. 18) Dr. Kakade examined Kling, noted she had tenderness over the bicipital groove over the proximal insertion of the long head with

occasional snapping, which Dr. Kakade noted "I suspect is the long head of the biceps slipping over the healing scar," noting her range of motion of the right shoulder was full except for internal rotation, which is up to T10 with full rotator cuff and elbow flexion strength. (JE 2, p. 19) Dr. Kakade ordered Kling to continue with home exercises and found she had reached maximum medical improvement. (JE 2, p. 20)

On February 28, 2018, Charles Mooney, M.D., an occupational medicine physician, performed an independent medical examination for Mary Ann's and Westfield. (Ex. E) Dr. Mooney examined Kling, noting Kling had a "very minimal deformity of the bicep muscle on the right compared to the left" and that she did not demonstrate any specific tenderness over the surgical sites or the bicipital groove, noting her range of motion was well maintained, and that she demonstrated 160 degrees of flexion, 160 degrees of abduction, 60 degrees of adduction, 90 degrees of external rotation, and 70 degrees of internal rotation, with 5/5 flexion/extension strength of the elbow, and that she demonstrated 0 degrees of extension and 140 degrees of flexion of the right elbow. (Ex. E, p. 12) Dr. Mooney assessed Kling with status post right biceps tenodesis due to acute long head biceps tendon rupture. (Ex. E, p. 12) Using the Guides to the Evaluation of Permanent Impairment (AMA Press, 5th Ed. 2001) ("AMA Guides"), Dr. Mooney opined:

[s]he does demonstrate a 1% impairment due to loss of flexion, 1% impairment due to loss of abduction, and a 1% impairment due to loss of internal rotation. Subsequently, a 3% impairment is applicable to the upper extremity. It is my opinion she demonstrates no additional impairments and has essentially normal function.

(Ex. E, p. 12)

On July 5, 2019, Kling returned to Dr. Kakade regarding right shoulder and biceps pain. (JE 2, p. 21) Dr. Kakade documented:

[s]he was doing fine until March when, she states that one day at work after a load out of hogs she had pain for about 6 weeks after. Patient reports that there are sharp pains every now and then. Patient reports there is pain when leaning on that side with her weight. Patient had bicep repair done on 11-01-2017 and has had no problems since then until about March when it did begin bothering her again. Patient reports this is not a workmans comp. Patient states that she does not recall any type of injury to this arm.

(JE 2, p. 21) Dr. Kakade examined Kling, noted she had tenderness over the bicipital groove over the proximal insertion of the long head and tenderness over the musculotendinous junction of the biceps as well, and found she had full range of motion of the right shoulder except for internal rotation, which is up to T10, full rotator cuff muscle and elbow flexion strength, and positive impingement and Hawkin [sic] signs. (JE 2, p. 23) Dr. Kakade assessed Kling with right shoulder impingement syndrome and bicipital tendonitis of the right shoulder, imposed a ten-pound lifting and pulling weight restriction for six weeks, recommended a subacromial injection and physical therapy. Kling declined physical therapy, but underwent the injection. (JE 2, pp. 23-24)

On August 2, 2019, Kling returned to Dr. Kakade reporting her right shoulder felt better following the injection, noting she did not complain of pain, numbness or tingling at the time of the appointment, but reported having some burning to her shoulder/bicep area at times after repetitive motion, but it was tolerable. (JE 2, p. 25) Dr. Kakade recommended Kling continue with home exercises, avoid excessive heavy and repetitive work with the right arm. (JE 2, p. 27)

The attorney for Mary Ann's and Westfield sent a letter to Dr. Kakade on May 14, 2020, following a telephone conference. (Ex. D, p. 9) Dr. Kakade responded to a check-the-box letter on June 8, 2020, agreeing to the following contention statements without providing any additional comments:

1. More likely than not, Ms. Kling suffered a new injury to her right shoulder/biceps in early 2019 which would be separate and distinct from her work injury on October 21, 2017.
2. More likely than not, the care and treatment Ms. Kling received from you on July 5, 2019 and August 2, 2019, were causally related to the new 2019 injury rather than to the October 21, 2017 injury.

(Ex. D, pp. 9-10)

On October 7, 2020, Dr. Mooney sent the attorney for Mary Ann's and Westfield a letter after reviewing additional medical records, responding to the following questions:

Question 1: Did Ms. Kling suffer a new injury to her right shoulder and arm in early 2019 which would be separate and distinct from her work injury of 10/21/2017? If yes please explain and provide the basis for your opinion including any necessary references, the distinctions in anatomy or diagnosis between any separate injury dates?

Answer: It is my opinion upon review of the medical records that Ms. Kling was treated by Dr. Gautam Kakade for work-related injury of 10/21/2017 with the performance of a right biceps tendon repair on 11/1/17. This was directly related to the date of injury provided. She did well postoperatively and was released by Dr. Kakade on 1/30/2018.

She re-presented to Dr. Kakade on 7/5/2019 with increasing symptoms of right shoulder pain, noting that she was doing well until March of 2019, and then one day after work loading out hogs, she has had pain for about six weeks. Dr. Kakade reviewed her biceps tendon repair noting she had no problems with the repair, and that this visit was not related to work comp issue. On examination, Dr. Kakade diagnosed impingement syndrome of the right shoulder and provided a subacromial injection and recommended physical therapy.

In follow-up with Dr. Kakade she did appear to respond well and was again released to regular activity and p.r.n. follow-up on 8/2/2019.

It is my opinion upon review of the medical records that Ms. Kling does have an underlying condition of impingement syndrome of the right shoulder. This is a common condition and is related to the anatomic configuration of the acromion. This condition commonly progresses with age and may result in tearing of the rotator cuff. It is my opinion that her representation to Dr. Kakade and the diagnosis of impingement syndrome is unrelated to her previous biceps tendon tear which was specifically related to the date of injury of 10/21/17.

Question 2: To further expand on question one, were the activities in March 2019 in any way a material aggravator to the 10/21/2017 work injury? Please feel free to expand as to any detail and information you would feel is relevant to this question?

Answer: It is my opinion that the activity of March 2019 did provoke an inflammatory response in the rotator cuff which was successfully treated via subacromial injection and physical therapy. It is my opinion that this did not result in a material aggravation to the 10/21/2017 work injury and is a pre-existing and congenital problem.

Question 3: To the extent that any further impairment rating is warranted would that be related to a new and distinct injury which occurred in March 2019?

Answer: It is my opinion based on the review of Dr. Kakade's record that she would not have any additional impairment rating, and specifically any additional impairment would be unrelated to her previous injury of 10/21/2017.

(Ex. E, pp. 13-14)

On April 26, 2021, Robin Sassman, M.D., an occupational medicine physician, conducted an independent medical examination for Kling. (Ex. 1) Dr. Sassman reviewed Kling's medical records and examined her. (Ex. 1) During her examination, Kling complained of a burning sensation in the whole arm and into the back of her neck, shooting pains and aches and radiation down her right arm and up her arm at times, with no numbness or tingling in her hands, but increased pain with holding her right arm out in front of her for long periods of time. Her symptoms bother her at night. (Ex. 1, p. 6) Kling complained she wakes up with her right hand feeling swollen, decreased strength in her right shoulder and that her right arm easily fatigues. (Ex. 1, p. 6)

Dr. Sassman measured Kling's range of motion for both shoulders, concluding for the right, Kling had 140 degrees of flexion, 30 degrees of extension, 140 degrees of abduction, 50 degrees of adduction, 60 degrees of external rotation, and 50 degrees of internal rotation. (Ex. 1, p. 7) Dr. Sassman diagnosed Kling with a right biceps tear status post right long head biceps tendon repair, right shoulder pain with physical examination findings concerning for rotator cuff tear and/or labral tear, and cervicalgia. (Ex. 1, p. 8)

Dr. Sassman found that Kling's right shoulder symptoms had not resolved at the time she was discharged in 2018, and opined there was no new injury in 2019 when she saw Dr. Kakade, averring her symptoms are a continuation of the initial injury, which has worsened over time, noting her range of motion had decreased over time. (Ex. 1, p. 10) Dr. Sassman recommended Kling receive shoulder magnetic resonance imaging and a referral to an orthopedic specialist. (Ex. 1, p. 10)

Using the AMA Guides, Dr. Sassman assigned a three percent upper extremity impairment for loss of flexion, a one percent upper extremity impairment for loss of extension, a two percent upper extremity impairment for loss of abduction, a zero percent upper extremity impairment for loss of adduction, a two percent upper extremity impairment for loss of internal rotation, and a zero percent upper extremity impairment for loss of external rotation, for a total eight percent upper extremity impairment, which she converted to a five percent body as a whole. (Ex. 1, p. 10) Dr. Sassman then found Kling should be placed in DRE Cervical Category II with a five percent whole person impairment, and using the combined values chart, she opined Kling had sustained a ten percent whole person impairment. (Ex. 1, p. 11) Dr. Sassman then recommended permanent restrictions. (Ex. 1, p. 11)

The attorney for Mary Ann's and Westfield sent Dr. Mooney a copy of Dr. Sassman's report, Dr. Kakade's records, and his earlier impairment rating. (Ex. E, p. 15) Dr. Mooney reviewed the records and sent a response letter on May 19, 2021, stating he found no evidence Kling sustained an injury to her cervical spine, nor did she seek treatment for cervical pain and that her treatment was limited to a biceps tendon repair and that it is inappropriate to provide an impairment rating for the cervical spine related to the October 21, 2017 date of injury when the medical records clearly reflect there was no cervical injury. (Ex. E, p. 15)

On May 17, 2021, Matthew Bollier, M.D., an orthopedic surgeon at the University of Iowa Hospitals and Clinics, performed an independent medical examination records review for Mary Ann's and Westfield. (Ex. F) Dr. Bollier wrote that he did not believe an in-person examination would provide any additional information to answer the questions posed by counsel in this case. (Ex. F, p. 16) Dr. Bollier diagnosed Kling with a long head biceps rupture right shoulder related to the October 2017 work injury. (Ex. F, p. 18) Dr. Bollier further responded to the following questions, as follows:

2. Did Ms. Kling suffer a new injury in early 2019, which would be separate and distinct from her work injury of October 21st 2017? More specifically, were the activities in March 2019 in anyway a material aggravator to the October 21st 2017 work injury?

Ms. Kling reported a new injury to the right shoulder in March 2019 while working with hogs. She was diagnosed with right shoulder impingement by Dr. Kakade in July 2019 and responded well to a subacromial injection. She had a new, separate and distinct injury in March 2019 which resulted in a different problem than the October 2017 work injury. I agree with 2 separate physicians (Dr. Kakade and Dr. Mooney) who opined that her right shoulder pain and diagnosis in 2019 was unrelated to the October 2017 work injury. In addition, the March

2019 activities did not cause a material or significant aggravation related to the October 21st 2017 work injury.

3. Was the care and treatment Ms. Kling received in July and August 2019 causally related to the October 21st 2017 work injury?

I agree with 2 separate physicians (Dr. Kakade and Dr. Mooney) who opined that her right shoulder pain and diagnosis in 2019 was unrelated to the October 2017 work injury. There was no causal relationship between the right shoulder pain in 2019 and the 2017 work injury.

(Ex. F, p. 19) Dr. Bollier further opined:

[t]his work comp case is clearly an isolated shoulder injury and not a whole body injury. Although the upper extremity and shoulder connects to the body as a whole, the intent of the 2017 state law was to separate shoulder injuries from whole body injuries. Ms. Kling's work comp injury in 2017 involved a long head biceps tendon rupture. There was no evidence of neck pain in the medical record or a cervical spine injury related to the October 2017 work injury. In addition, the mechanism of injury is not consistent with a cervical spine injury and Ms. Kling didn't report any cervical spine pain or symptoms in 2017 or 2018. It is my strong opinion that her left [*sic*] shoulder injury involved an isolated shoulder injury and not a whole body injury.

(Ex. F, p. 20) Dr. Bollier agreed with Dr. Kakade that Kling reached maximum medical improvement on January 30, 2018, and he also agreed with Dr. Mooney that Kling sustained a three percent upper extremity impairment and that she did not need any permanent work restrictions. (Ex. F, p. 20)

On May 21, 2021, Dr. Kakade responded to a check-the-box letter from the attorney for Mary Ann's and Westfield, agreeing Kling did not report any cervical complaints to him when he treated her following the October 21, 2017 work injury, further agreeing if she had reported cervical complaints, the complaints would have been indicated in his medical records as it is his course and practice to contemporaneously document complaints. (Ex. H) Dr. Kakade agreed Kling did not have any cervical component to the October 21, 2017 work injury and she did not receive any medical treatment for her cervical spine. (Ex. H)

At the time the hearing Kling was working for Valerio Alanis, a contractor for Iowa Select, caring for baby pigs until they reach 60 pounds. (Tr., pp. 10-11) Kling works 12 hours per day and between five and seven days per week, earning \$2,300 per month. (Tr., p. 11) Kling is responsible for checking 20 rooms, cleaning the feeders, performing light maintenance, lifting and treating pigs, killing pigs, removing dead pigs, filling medication buckets from hoses, laundry, and setting bait stations for mice. (Tr., p. 11) Kling reported she cannot perform all of job duties, including the load out because she would have to carry a board weighing 10 to 15 pounds for 12 hours a day and then cart feed and sort the pigs, which requires lifting each pig and size sorting them and putting

them into pens. (Tr., pp. 12-13) Kling testified she cannot perform these duties because it “hurts my arm, my shoulder, my neck. It all gets really tight.” (Tr., p. 12)

Kling avers she told Drs. Kakade and Mooney she was experiencing neck, back, shoulder, bicep, and elbow pain from the October 2017 work injury. (Tr., pp. 28-29) Kling testified she did not sustain a new injury in 2019, reporting at that time she was “loading out, carrying the sort board and shocker for 12 hours a day.” (Tr., p. 29)

Kling testified since the October 2017 work injury she can no longer carry things for long periods of time, she experiences pain when scrubbing the dishes, and washing walls. (Tr., pp. 32-34) Kling reported there was no change in her condition in 2019. (Tr., p. 33) Kling relayed she cannot rake leaves, and it hurts to dig when gardening and tilling. (Tr., p. 33)

CONCLUSIONS OF LAW

I. Applicable Law

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

The calculation of interest is governed by Deciga-Sanchez v. Tyson, File No. 5052008 (Ruling on Defendant's Motion to Enlarge, Reconsider, or Amend Appeal Decision Re: Interest Rate Issue), which holds interest for all weekly benefits payable and not paid when due which accrued before July 1, 2017, is payable at the rate of ten percent; all interest on past due weekly compensation benefits accruing on or after July 1, 2017, is payable at an annual rate equal to the one-year treasury constant maturity published by the federal reserve in the most recent H15 report settled as of the date of injury, plus two percent. Again, given this case concerns an injury occurring after July 1, 2017, the new provision on interest applies to this case.

II. Nature of the Injury

The parties stipulated Kling sustained an injury on October 21, 2017, which arose out of and in the course of her employment with Mary Ann's involving her right upper extremity. Kling contends she sustained an injury to her body as a whole, alleging she also sustained an injury to her cervical spine. Mary Ann's and Westfield deny Kling sustained an injury to her cervical spine and body as a whole.

To receive workers' compensation benefits, an injured employee must prove, by a preponderance of the evidence, 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). An injury arises out of employment when a causal relationship exists between the employment and the injury. Quaker Oats Co. 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, 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., Kingsley v. Manning, 286 N.W.2d 174, 177 (Iowa 1979).

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, 156 (Iowa Ct. 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).

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 is 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).

A. Cervical Spine

Four physicians have provided opinions in this case, Dr. Kakade, a treating orthopedic surgeon, Dr. Mooney, an occupational medicine physician who performed an independent medical examination for Mary Ann's and Westfield, Dr. Bollier, an orthopedic surgeon at the University of Iowa Hospitals and Clinics who performed an independent medical examination records review only for Mary Ann's and Westfield, and Dr. Sassman, an occupational medicine physician who performed an independent medical examination for Kling. I find the opinions of Drs. Kakade, Mooney, and Bollier more persuasive than Dr. Sassman's opinion.

Dr. Kakade treated Kling after the October 2017 work injury and performed surgery on her right upper extremity in 2017. He also treated Kling after she reported symptoms in 2019 and sought treatment, resulting in a shoulder impingement diagnosis. Dr. Mooney examined Kling shortly after she reached maximum medical improvement. Dr. Sassman examined Kling for purposes of an independent medical examination only, and her exam occurred several years after she reached maximum medical improvement.

There is no evidence in the medical record that Kling ever reported cervical spine symptoms to Dr. Kakade or Dr. Mooney. She did not receive any treatment for cervical spine symptoms in 2017 or 2018. Dr. Kakade documented he did not treat Kling for cervical spine symptoms and denied she reported any such symptoms. Dr. Bollier also opined the mechanism of the injury is not consistent with a cervical spine injury and she did not report any cervical spine pain or symptoms in 2017 or 2018. I do not find Dr. Sassman's opinion Kling sustained an injury to her cervical spine persuasive. Kling has not established she sustained an injury to her cervical spine caused by the work injury.

B. 2019 Incident

Dr. Sassman has recommended Kling receive magnetic resonance imaging and a referral to an orthopedic surgeon regarding her shoulder impingement/rotator cuff complaints, opining her current complaints are related to the 2017 work injury. Mary Ann's and Westfield aver Kling's current complaints relate to a new injury from 2019, that the injury is a superseding cause of her current complaints, relying on the opinions of Drs. Kakade, Mooney, and Bollier.

A superseding cause is an act or force that intervenes to prevent a defendant from being liable for harm to "the plaintiff that the defendant's antecedent negligence is a substantial factor in bringing about." Clinkscales v. Nelson Sec., Inc., 697 N.W.2d 836, 843 (Iowa 2005). An intervening act or force is an act or force that "actively operates to produce harm to another after the actor's negligent act or omission has been committed." Rieger v. Jacque, 584 N.W.2d 247, 251 (Iowa 1998). Not all intervening acts or forces become superseding causes. Id. The Iowa Supreme Court

has noted, “[t]he intervention of a force which is a normal consequence of a situation created by the actor’s negligent conduct is not a superseding cause of harm which such conduct has been a substantial factor in bringing about.” Hollingsworth v. Schminkey, 553 N.W.2d 591, 597 (Iowa 1996) (quoting Restatement (Second) of Torts § 472 (1965)).

A force or act is a superseding cause if “the later-occurring event is such as to break the chain of causal events between the actor’s [conduct] and the plaintiff’s injury.” Hayward v. P.D.A., Inc., 573 N.W.2d 29, 32 (Iowa 1997). “An intervening force which falls squarely within the scope of the original risk will not supersede the defendant’s responsibility.” Rieger, 584 N.W.2d at 251.

As noted above, four experts have provided opinions in this case. I find the opinions of Drs. Kakade and Bollier that Kling’s current symptoms are unrelated to the October 2017 work injury and caused by the 2019 work activities more persuasive than Dr. Sassman’s opinion.

Dr. Sassman found that Kling’s right shoulder symptoms had not resolved at the time she was discharged in 2018, and opined there was no new injury in 2019 when she saw Dr. Kakade, averring her symptoms are a continuation of the initial injury, which has worsened over time, noting her range of motion had decreased over time. (Ex. 1, p. 10) Kling did not seek medical treatment after she was discharged until she reported pain while working for her current employer in 2019.

As noted above, Dr. Kakade treated Kling in 2017 and 2018, and then again in 2019, when she returned complaining of right shoulder and biceps pain. Dr. Kakade documented Kling was doing fine when he released her from his care in early 2018. When she returned to Dr. Kakade on July 5, 2019, Kling reported shoulder and bicep pain at work six weeks before her appointment after doing a load out of hogs. (JE 2, p. 21) Dr. Kakade documented Kling told him she did not recall an injury to her right upper extremity, but that it was not a workers’ compensation injury. (JE 2, p. 21) Dr. Kakade assessed Kling with right shoulder impingement syndrome for the first time during the appointment and administered an injection. (JE 2, pp. 23-24) Dr. Kakade agreed that more likely than not, Kling suffered a new injury to her right shoulder/biceps in early 2019 that would be separate and distinct from the October 2017 work injury. (Ex. D, p. 9) Dr. Bollier is an expert orthopedic surgeon who works for a premier institution, the University of Iowa Hospitals and Clinics. (Ex. F) Dr. Bollier agreed with Dr. Kakade that Kling sustained a new, separate, and distinct injury in March 2019, which resulted in a different problem than the October 2017 work injury, and opined the March 2019 work activities did not cause a material or significant aggravation related to the October 2017 work injury. (Ex. F, p. 19) I do not find Kling has established her current symptoms and shoulder impingement are related to the October 2017 work injury.

III. Extent of Disability

Iowa Code section 85.34(2) governs compensation for permanent partial disabilities. The law distinguishes between scheduled and unscheduled disabilities. The Division of Workers Compensation evaluates disability using two methods,

functional and industrial. Simbro v. Delong's Sportswear, 332 N.W.2d 886, 887 (Iowa 1983).

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

Since 2017, compensation or functional loss for scheduled injuries is determined by taking the number of weeks allowed for a complete loss of the body part or scheduled member, multiplied by a percentage of impairment determined using the AMA Guides. Iowa Code § 85.34(2)(x). The statute also requires compensation be awarded for functional loss if an employee returns to work or is offered work "for which the employee receives or would receive the same or greater salary, wages, or earnings than the employee received at the time of the injury." Id. § 85.34(2). That provision does not apply in this case. The Division uses the industrial method for "all cases of permanent partial disability other than those" set forth in Iowa Code section 85.34(a) through (u). All other cases are classified as "unscheduled injuries." Westling, 810 N.W.2d at 252-53. Compensation for unscheduled injuries is determined examining the reduction of earning capacity. Id. at 53.

As noted above, I did not find Kling established she sustained an injury to her cervical spine or body as a whole. At hearing the parties did not aver Kling's injury was to her arm, a scheduled member, but rather focused on the shoulder, a scheduled member.

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

Dr. Sassman assigned Kling an eight percent upper extremity impairment for her shoulder injury and assigned restrictions. (Ex. 1, pp. 10-11) Dr. Mooney assigned Kling a three percent upper extremity impairment for her shoulder injury and assigned restrictions. (Ex. E, p. 12) Dr. Bollier agreed with Dr. Mooney's impairment rating and agreed Kling does not require restrictions. (Ex. F, p. 20) As noted above, I did not find Dr. Sassman's opinion that Kling's current shoulder complaints are related to the

October 2017 work injury. Dr. Sassman did not examine Kling before she sought treatment from Dr. Kakade again in 2019. I do not find her opinion persuasive.

The statute provides a maximum of 400 weeks for loss of a shoulder. Iowa Code § 85.34(2)(n). Under the statute, using the AMA Guides, Kling is entitled to 12 weeks of permanent partial disability benefits, at the stipulated weekly rate of \$475.35, commencing on the stipulated commencement date of February 28, 2018. The parties stipulated that prior to the hearing Kling was paid 12 weeks of compensation at the rate of \$475.35 per week. Kling shall take nothing further.

IV. Recovery of the Cost of an Independent Medical Examination

Kling seeks to recover the \$3,965.00 cost of Dr. Sassman's independent medical examination. At hearing, Mary Ann's and Westfield averred Kling is not entitled to recover the cost of an independent medical examination. In their post-hearing brief, Mary Ann's and Westfield did not address this issue.

Iowa Code section 85.39(2) (2017), provides:

2. 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.

Dr. Sassman provided an impairment rating after Dr. Mooney provided an impairment rating in this case. Kling sustained a compensable injury under the statute and is entitled to recover the cost of the independent medical examination.

V. Costs

Kling seeks to recover the \$100.00 filing fee. Iowa Code section 86.40, provides, "[a]ll costs incurred in the hearing before the commissioner shall be taxed in the discretion of the commissioner." Rule 876 Iowa Administrative Code 4.33, provides costs may be taxed by the deputy workers' compensation commissioner for: (1) the attendance of a certificated shorthand reporter for

hearings and depositions; (2) transcription costs; (3) the cost of service of the original notice and subpoenas; (4) witness fees and expenses; (5) the cost of doctors' and practitioner's deposition testimony; (6) the reasonable cost of obtaining no more than two doctors' or practitioners' reports; (7) filing fees; and (8) the cost of persons reviewing health service disputes. The administrative rule allows for the recovery of the cost of the filing fee. At hearing Mary Ann's and Westfield denied Kling was entitled to recover the cost of the independent medical examination. Given I found in favor of Kling regarding this dispute, I find Mary Ann's and Westfield should be responsible for the cost of the filing fee.

ORDER

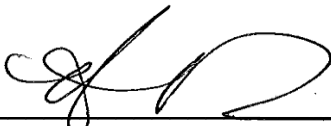
IT IS THEREFORE ORDERED, THAT:

Claimant shall take nothing further in permanency benefits.

Defendants shall reimburse the claimant one hundred and 00/100 dollars (\$100.00) for the filing fee, three thousand nine hundred sixty-five and 00/100 dollars (\$3,965.00) for the cost of the independent medical examination.

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

Signed and filed this 13th day of September, 2021.



HEATHER L. PALMER
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served as follows:

Richard Schmidt (via WCES)

Lori Scardina Utsinger (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.