BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

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| JUVENIO ZUNIGA,<br><br>Claimant,<br><br>vs.<br><br>SMITHFIELD FOODS, INC.,<br><br>Employer,<br><br>and<br><br>SAFETY NATIONAL CAS. CORP.,<br><br>Insurance Carrier,<br>Defendants. | : | File No. 1660515.01<br><br>ARBITRATION DECISION<br><br>Head Note No. 1803.1 |

STATEMENT OF THE CASE

The claimant, Juvenio Zuniga, filed a petition for arbitration and seeks workers' compensation benefits from Smithfield Foods, Inc., employer, and Safety National Casualty Corporation, insurance carrier. The claimant was represented by James Byrne. The defendants were represented by Michael Miller.

The matter came on for hearing on April 6, 2021, before Deputy Workers' Compensation Commissioner Joe Walsh in Des Moines, Iowa via Court Call videoconferencing system. The record in the case consists of Joint Exhibits 1 through 11; Claimant's Exhibits 1 through 8; and Defense Exhibits A through Q. Prior to hearing, defendants filed an objection or Motion in Limine in regard to Claimant's Exhibit 3. Claimant's Exhibit 3 was admitted into evidence, however, the undersigned deferred on ruling about the relevance of information contained in this report.

The claimant testified at hearing, in addition to William Mischnick. Vanessa Marcano-Kelly and Ernest Nino-Murcia served as the Spanish language interpreters. Dina Dulaney was appointed and served as court reporter for the proceeding. The matter was fully submitted on May 10, 2021 after extensive briefing by the parties. The briefs submitted by counsel were both well-written and provided extensive insight as to the positions of the parties.

## ISSUES & STIPULATIONS

The parties submitted a number of stipulations through the hearing report, in addition to issues for determination. The stipulations in the hearing report are memorialized here and are accepted by the agency at this time. Such stipulations are deemed binding upon the parties.

The parties have stipulated that there was an employer-employee relationship at the time of the alleged injury. The parties further stipulated that claimant sustained an injury, which arose out of and in the course of his employment on March 18, 2018. The parties also stipulate that this injury is a cause of permanent disability. The defendants dispute that this injury was to any other body part than claimant's right shoulder and deny any permanency to any other body part than the right shoulder.

At the time of hearing, claimant was not seeking any additional temporary disability benefits. He was seeking permanency benefits and the parties disputed the nature and extent of such benefits, as well as the commencement date for any benefits.

The defendants have waived affirmative defenses.

While the claimant's average gross earnings are stipulated by the parties, they dispute claimant's marital status and entitlement to exemptions. Claimant stipulated that he would have filed his tax returns in 2018 as "single." (Transcript, page 7) Section 85.27 expenses are not in dispute. Claimant is seeking reimbursement for a Section 85.39 examination. Defendants agreed to reimburse the portion of the IME which was related to claimant's right shoulder condition, but not the remainder.

The parties stipulated that, prior to hearing, defendants paid four weeks of compensation at the rate of $595.10.

## FINDINGS OF FACT

Juvenio Zuniga was 49 years old as of the date of hearing. He was born in Guatemala in 1971. Mr. Zuniga's primary language is Spanish and his testimony was translated through two different interpreters through the course of the hearing with the consent of all parties. Mr. Zuniga testified live and under oath during the course of the video hearing. I find his testimony to be highly credible. He is not a sophisticated witness, however, he proved to be an accurate historian. He generally kept his answers simple. His answers corresponded well with the other evidence in the record. There was nothing regarding Mr. Zuniga's demeanor which caused me any concern regarding his truthfulness.

Mr. Zuniga testified regarding his educational background in Guatemala. He testified that he has a learning disability which inhibited his educational progress. (Tr., pp. 13-14) It is likely that he is not truly literate in Spanish, although he testified he can read and write "a bit." (Tr., p. 14) He is unable to type or use a computer.

Mr. Zuniga testified that he has been married to Sandra Nanette Garcia Duerte since 1986. (Tr., p. 11) She resides in Guatemala. He testified that he supports her financially, sending her $200 to $300 per week. The parties have stipulated that he did not or would not have claimed her on his taxes in 2018. In his brief, claimant's counsel contends this is because she does not have a Social Security number. There is no other evidence in the record regarding claimant's marital status. I believe him that he is married. I find, as a matter of fact, that Mr. Zuniga was married at the time of his stipulated work injury.

Farmland Foods (n/k/a Smithfield) hired Mr. Zuniga in 2017. Mr. Zuniga testified that he had no problems or injuries with respect to his right shoulder prior to starting at Smithfield. He also never had any mental health issues. (Tr., p. 21) Mr. Zuniga did testify that he was in an automobile accident in 2014, which resulted in an injury to his left shoulder and low back. He was treated with medications and temporary restrictions and he was released without restrictions sometime in 2015.

At Smithfield, Mr. Zuniga's job was to hook carcasses. The employer's job description is in evidence which notes repetitive motion and awkward body mechanics are involved in the job. (Claimant's Exhibit 6, page 107) There is also a photograph and video of the job, which show a portion of the work Mr. Zuniga performed. (Def. Exs. N, O) As described at hearing, he placed a hook in the belly of a hog carcass that was hanging from an overhead rail. He would reach above his head with his right arm to retrieve several hooks at a time from a chain that came down to him. This work was highly repetitive. He would then maneuver the hogs to hook them appropriately. He testified that he performed this work on approximately 10,000 hogs per day, 5 or 6 days per week, up to 10 hours per day. (Tr., pp. 23-33)

On March 18, 2018, Mr. Zuniga notified his employer of the onset of right shoulder area pain from the repetitive work he was performing. The pain came on gradually. Mr. Zuniga testified at hearing that the motions which bothered his shoulder area and arm the most were the retrieving of the hooks from above his head and pushing and pulling the hogs. (Tr., pp. 33-34) The parties have stipulated that a cumulative injury, which arose out of and in the course of his employment, manifested on March 18, 2018.

Mr. Zuniga actually sought medical care from Denison Family Health Center in January 2018 where it was noted he had been experiencing right shoulder pain for a month with no specific injury. (Jt. Ex. 3, p. 48) He was diagnosed with right rotator cuff syndrome, provided some medication (Naproxen), and an injection for the pain. (Jt. Ex. 3, p. 49) The employer's medical department records document Mr. Zuniga being evaluated on March 20, 2018 and complaining of right shoulder pain and symptoms from hooking hogs. (Jt. Ex. 4, p. 121) Thereafter, he was regularly seen in the medical department for ice therapy.

The employer directed Mr. Zuniga's medical care. On April 25, 2018, Todd Woollen, M.D., examined Mr. Zuniga. He documented gradually worsening pain in the right shoulder and numbness if he works over his head. (Jt. Ex. 1, p. 9) He diagnosed

right shoulder pain consistent with supraspinatus injury. He provided work restrictions, some medications and physical therapy. (Jt. Ex. 1, p. 9) In May 2018, Dr. Woollen ordered an MRI, which he noted demonstrated minimal findings and opined that an orthopedic referral was not necessary. (Jt. Ex. 1, p. 11) He did adjust the work restrictions to ensure that Mr. Zuniga was actually placed in a light-duty job. (Jt. Ex. 1, pp. 11-12) Mr. Zuniga returned to Dr. Woollen in September 2018. It was noted that physical therapy had not helped, nor had light duty. (Jt. Ex. 1, p. 13) An injection for the pain was considered, as well as orthopedic referral.

Orthopedic surgeon, Bradley Lister, M.D., examined Mr. Zuniga on October 15, 2018. Dr. Lister reviewed the history and the MRI from May 2018. He diagnosed tendinitis of the right rotator cuff and arthritis of the acromioclavicular. (Jt. Ex. 1, p. 16) He performed an injection and raised the possibility of AC decompression surgery if his symptoms do not improve. (Jt. Ex. 1, p. 17) He provided severe medical restrictions. Mr. Zuniga returned to Dr. Lister for follow up in November and December 2018. He kept him on the highly limiting restrictions and recommended a second orthopedic opinion.

In January 2019, Timothy Vinyard, M.D., examined Mr. Zuniga. Dr. Vinyard quickly diagnosed right rotator cuff tendonitis and recommended surgery. (Jt. Ex. 7, pp. 173-177) Surgery was performed on February 19, 2019. (Jt. Ex. 8, pp. 223-224) The post-operative diagnosis was: right rotator cuff tear (near full thickness tear involving the junction of the supraspinatus and infraspinatus), proximal biceps tendinopathy, superior labrum anterior and posterior tear, shoulder impingement and AC joint arthropathy. (Jt. Ex. 8, pp. 223-224) Mr. Zuniga testified that he developed a bulge in his right biceps area known as the "Popeye effect." (Tr., p. 39) He was placed in an immobilizer/sling and given significant work restrictions.

His recovery period was complicated and challenging. On March 7, 2019, Dr. Vinyard documented significant continued pain. By March 11, 2019, Mr. Zuniga was experiencing significant mental health symptoms. He was seen in his primary care clinic and diagnosed with depression. (Jt. Ex. 3, pp. 61-64) "Pt reports increased stress and depression related to current health issues." (Jt. Ex. 1, p. 64) He was prescribed medication for a major depressive disorder. He took a leave of absence under the Family Medical Leave Act (FMLA). (Jt. Ex. 3, pp. 65-69) From this point forward, he has had continuous mental health treatment up through the date of hearing.

Mr. Zuniga's shoulder symptoms did improve somewhat with physical therapy. He followed up with Dr. Vinyard in May, June and July 2019, however, he still noted constant pain, particularly with activity. In July 2019, a follow-up MRI of the right shoulder was performed which showed additional, untreated tears.

1. Interval supraspinatus tendon repair. Repaired tendon shows moderate intermediate signal with focal infrasubstance tear likely to be concealed at the time of the arthroscopy. This tear approaches the bursal surface without clear violation. No definite high-grade partial or full thickness supraspinatus re-tear.

2. New low-grade articular sided tear of the infraspinatus tendon at its anterior footprint with mild intrasubstance extension. Additional edema at the myotendinous junction of the infraspinatus muscle belly which may relate to developing sentinel cyst formation versus grade 1 myotendinous muscle strain.

(Jt. Ex. 6, pp. 161-162)

Mr. Zuniga testified these findings were never explained to him. In August 2019, Dr. Vinyard documented Mr. Zuniga was still having constant, worsening, sharp shoulder pains which were aggravated by lifting. (Jt. Ex. 7, p. 201) Nevertheless, Dr. Vinyard placed him at maximum medical improvement (MMI) and released him without any restrictions on August 19, 2019. (Jt. Ex. 7, pp. 201-203) Mr. Zuniga returned to the job hooking carcasses. (Tr., p. 42) Mr. Zuniga testified this was very painful. In October 2019, Mr. Zuniga followed up for his depression and he was taken off work again for a couple of days. (Jt. Ex. 3, pp. 77-82)

Mr. Zuniga also returned to Dr. Vinyard in October 2019, complaining of worsening right shoulder pain. Dr. Vinyard opined Mr. Zuniga was not giving maximum effort and ordered a functional capacity evaluation (FCE). (Jt. Ex. 7 pp. 204-206) On October 21, 2019, he underwent an FCE at Athletico Physical Therapy in Omaha, Nebraska. (Jt. Ex. 10) Mr. Zuniga testified credibly that the testing was very difficult for him because of the pain. I find this testimony credible, particularly in light of the objective MRI findings in July 2019. The physical therapist deemed the FCE invalid primarily based upon pain behaviors during examination. On October 24, 2019, Mr. Zuniga returned to Dr. Vinyard who reviewed the results and declined to place any restrictions upon him. (Jt. Ex. 7, pp. 207-209) A week later, he opined Mr. Zuniga sustained a 1 percent impairment for the shoulder condition.

In November 2019, Mr. Zuniga's primary care provider excused him from work again for his mental health condition. (Jt. Ex. 3, pp. 87-91)

Mr. Zuniga then underwent a second FCE with Daryl Short, DPT on December 1, 2019. This evaluation was deemed valid and placed rather severe restrictions on him. (Cl. Ex. 1) His specific restrictions are set forth on pages 4 and 5 of Claimant's Exhibit 1. They include no frequent lifting from waist to crown and 15-pound maximum, among others.

Mr. Zuniga underwent an independent medical examination (IME) with Sunil Bansal, M.D., on December 4, 2019. (Cl. Ex. 2) Dr. Bansal took a history, reviewed numerous appropriate medical records and performed a thorough examination before offering his expert opinions. Dr. Bansal diagnosed right shoulder rotator cuff tear, proximal biceps tendinopathy, superior labrum anterior and posterior tear, shoulder impingement and acromioclavicular joint arthropathy, noting that the disability is proximal to the glenohumeral joint. Claimant's surgery necessitated removal of a portion of the distal clavicle, which is also proximal to the glenohumeral joint. (Cl. Ex. 2, p. 43) He assigned a 12 percent right upper extremity disability which converts to 7

percent of the whole body and recommended he follow the restrictions set forth in his December 2019 FCE. (Cl. Ex. 2, pp. 43-46)

On January 23, 2020, Mr. Zuniga returned to Dr. Vinyard. By report, Mr. Zuniga's pain had increased and was aggravated by lifting. Dr. Vinyard assessed chronic right shoulder pain. He discussed the Popeye deformity which was likely not contributing to his symptoms. Dr. Vinyard opined it was safe for him to return to work. (Jt. Ex. 7, pp. 212-214) He specifically opined that he had no further treatment to offer.

In March 2020, Mr. Zuniga returned to his primary care clinic and was evaluated by Michael Luft, D.O. He diagnosed reactive depression, continued the medications and removed Mr. Zuniga from work for a week. (Jt. Ex. 3, pp. 96-99) He followed up again in May and August 2020. (Jt. Ex. 3, pp. 101-107)

In April 2020, Dr. Vinyard provided expert medical opinions to defense counsel. (Jt. Ex. 7, pp. 218-219) He disagreed with Dr. Bansal's rating, noting, "it is not customary for me to assign an additional 10% impairment rating for an isolated distal clavicle total shoulder arthroplasty." (Jt. Ex. 7, p. 218) He also reviewed the valid FCE from Mr. Short. He opined that the earlier invalid test was "concerning for malingering type behaviors." (Jt. Ex. 7, p. 218) "However, I am willing to place the patient on permanent restrictions as outlined in his valid functional capacity evaluation." (Jt. Ex. 7, p. 218) He opined firmly that his surgery was exclusive to the right shoulder and not the body as a whole. (Jt. Ex. 7, p. 219)

In this record, it is unclear to me whether these restrictions were utilized by the employer in any way. It appears in this record that he continued his regular job of hooking hogs.

Dr. Vinyard re-examined Mr. Zuniga again on July 6, 2020. He documented Mr. Zuniga's ongoing symptoms. Dr. Vinyard apparently forgot that he had agreed to the permanent restrictions because he opined that due to the earlier invalid FCE, he could not assign restrictions and stated he had nothing further to offer by way of treatment. (Jt. Ex. 7, pp. 220-221)

Robert Arias, Ph.D., performed a neuropsychological evaluation on behalf of defendants on July 30, 2020. (Def. Ex. C) Dr. Arias does not speak Spanish and conducted testing through an interpreter. His opinion is summarized as follows:

> These results revealed pervasive problems with performance/symptom validity psychometrically/empirically. He specifically performed extremely outside of normal limits on multiple measures of validity in all areas. This is congruent with previous records indicating an invalid FCE, with lack of consistent effort, as well as subjective complaints that are out of proportion with objective findings. Records from Iowa Ortho were also remarkable for concerns with regard to "malingering-type behaviors." These opinions are offered within a reasonable degree of neuropsychological certainty, and were derived

> following empirically accepted algorithms of interpreting the data utilized in this assessment. Given these findings, this individual presents as a high risk for a poor outcome from interventions targeted at ameliorating subjective pain complaints. Notably, falsifiability is the essence of science. In the absence of objective impairments, particularly in the presence of empirically invalid findings noted in this evaluation, placing permanent work restrictions will only likely lead to further disability.

(Def. Ex. C, p. 33) Dr. Arias had important details wrong, such as the understanding that Mr. Zuniga had four years of education in Guatemala and was an "advanced" student. (Def. Ex. C, p. 34)

In September 2020, Mr. Zuniga was evaluated at St. Anthony's Clinic where he was instructed to continue to take his mental health medications consistently. (Jt. Ex. 11)

Mr. Zuniga testified that he began to develop left-sided shoulder pain from overuse at work in October 2020. (Tr. pp. 48-50; 96-97) He reported this to the plant nurse. Specifically, he testified that pulling the hooks from overhead, in addition to pulling the carcasses toward him, started to cause pain on his left side. (Tr., pp. 49-50) He testified that the plant medical personnel would not provide any treatment.

Mr. Zuniga was evaluated by Catalina Ressler, Ph.D., a Spanish-speaking psychologist on November 20, 2020. Dr. Ressler took a full, accurate history from Mr. Zuniga. (Cl. Ex. 3, pp. 63-75) Dr. Ressler chose not to perform any written testing with Mr. Zuniga. "Mr. Zuniga does not have the required minimum reading level for the assessment to be valid." (Cl. Ex. 3, p. 62) She diagnosed persistent depressive disorder with anxious distress. (Cl. Ex. 3, p. 66) She opined that Mr. Zuniga is not malingering and specifically rebutted Dr. Arias's conclusion in convincing detail.

> Mr. Byrne, you also asked that I please comment on whether I believe that Mr. Zuniga is malingering. I first want to comment on how a previous conclusion was made about this being the likely case for Mr. Zuniga when he completed a neuro-psychological evaluation on 07/03/2020. I would like to note that he appeared to primarily draw this conclusion from the results of the MMPI-2 administration. I disagree with Dr. Arias' choice to administer assessments such as the MMPI-2 while ignoring Mr. Zuniga's reading level and then basing conclusions off this and other measures. The [*sic*] only has a 1st grade level of educational attainment. I would therefore argue that such results are invalid and should not be considered when drawing conclusions about Mr. Zuniga's current mental health or other behaviors.
>
> I do not believe that Mr. Zuniga is malingering. His claimed stress appears to be congruent with the observations of other providers, his social history, his family's expressed concerns, as well as my clinical observation. Mr. Zuniga has consistently received a diagnosis of major

> depression by various providers and has responded well to the medication regimen in the sense that he has had some mild symptom reduction. Moreover, I believe his narrative is consistent with what one would expect of an individual with his experiences. For example, being dismissed by Smithfield's nurse leading to feelings of hopelessness and helplessness from feeling trapped is not an uncommon or unrealistic outcome.

(Cl. Ex. 3, p. 67) She opined that Mr. Zuniga has sustained permanent psychological impairment as a result of the work injury.

> Given the combination of factors described above, I conclude that this is likely a permanent impairment. Using the Guides to the Evaluation of Permanent Impairment, I would rate Mr. Zuniga's to be in Class 2 – Mild Impairment (Impairment levels are compatible with most useful functioning). Mr. Zuniga is demonstrating most impairment in his social functioning, activities of daily living, and concentration tasks. Comparably, using the VA Disability Ratings for Mental Health Disorders, I would offer a 30% rating since Mr. Zuniga does need his medication regimen in order to function; he is also experiencing frequent drops in mood; is often anxious or stressed; has difficulty sleeping; and has become suspicious (primarily of those whom he works for). Moreover, Mr. Zuniga is having trouble occasionally fulfilling his job requirements because of depression or pain; and he is struggling to maintain social connections outside of those he has with close family members.

(Cl. Ex. 3, p. 68)

I find Dr. Ressler's opinions to be the most credible, accurate opinions regarding Mr. Zuniga's mental condition in the record.

Mr. Zuniga then had a second IME with Dr. Bansal on December 11, 2020. He had been taken off work for depression by his primary care provider at this time as well. (Jt. Ex. 3, p. 119) Dr. Bansal affirmed his earlier (December 2019) opinions related to the right shoulder area, however, he opined that Mr. Zuniga had aggravated his left shoulder impingement from overuse and overcompensation. (Cl. Ex. 2, p. 54)

> In my medical opinion, Mr. Zuniga developed probable left shoulder pathology as a result of overuse and overcompensation from his right shoulder pathology. He had returned to work full duty with increased use and strain of his left arm, including reaching for and pulling heavy hog carcasses. In these situations it is common to have contralateral arm rotator cuff pathology, as there will be excessive overreaching, abduction and shoulder rotation forces, stressing the rotator cuff.

(Cl. Ex. 2, p. 54) He also agreed with Dr. Ressler's opinions regarding Mr. Zuniga's mental health condition.

His primary care provider took him off work for a few days again for depression in January 2021. (Jt. Ex. 3, p. 120)

Finally, Mr. Zuniga was evaluated by Ian Crabb, M.D., for a defense IME in February 2021. Dr. Crabb opined that Mr. Zuniga had sustained 2 percent impairment of his right upper extremity per the AMA Guides, Fifth Edition. (Def. Ex. B, p. 18) Regarding the left shoulder, Dr. Crabb opined the following:

> Mr. Zuniga claims, when clipping the hogs together, that he felt he had to pull harder with his left arm. Mr. Zuniga had a preexisting condition of the left shoulder injury at the time from a motor vehicle accident which he suffered in 2015 and is outlined in the medical record. There is no evidence that Mr. Zuniga suffered an injury to the left shoulder. The idea that the contralateral shoulder is aggravated by "overuse" when there is an injury to one arm is not supported in the medical literature. The action that Mr. Zuniga is doing as he demonstrated to me was an internal rotation force generated by each arm. This would not be a motion that would typically be expected to cause a rotator cuff injury. Again, his right shoulder has essentially full strength, and so the argument that he somehow had to compensate is nonsensical.

(Def. Ex. B, p. 20) He opined in the "absence of further workup" the best diagnosis is "left shoulder pain, not otherwise specified." (Def. Ex. B, p. 20)

Dr. Bansal prepared a rebuttal report on March 3, 2021. He specifically disagreed with Dr. Vinyard and Dr. Crabb regarding their refusal to rate the distal clavicle excision. "I suggest that Drs. Crabb and Vinyard take that issue up with the Orthopedic Editorial Board for the upper extremity chapter of the Guides." (Cl. Ex. 2, p. 58) He went on to challenge Dr. Crabb's analysis of Mr. Zuniga's alleged sequela left shoulder condition.

> Turning specifically to Dr. Crabb's examination, we find that Mr. Zuniga has severely compromised range of motion of his right shoulder. Dr. Crabb measured 110 degrees of flexion (normal 180 degrees) and internal rotation of 24 degrees (normal 90 degrees). This loss of range of motion can itself explain the overcompensation needed by his left arm, in addition to the fatigue potential outlined.
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> Turning to his left shoulder examination, we find that it also is compromised in range of motion with 110 degrees of flexion and 23 degrees of internal rotation. . . . The loss of ROM in the left shoulder is also further noted in the FCE recently performed at Short Physical Therapy. He also found deficits in strength for the right shoulder. Overall the FCE found functional deficits with corresponding restrictions for both shoulders, further supportive of the bilateral shoulder restrictions I assigned.

> The overcompensation necessitated by the left shoulder is the best explanation for its restriction in light of the logical progression, timing, and mechanism in play. As Dr. Crabb points out, Mr. Zuniga had to pull harder with his left arm to hook the hog carcasses. He further states/implies that the forceful repetitive internal rotation of the shoulder would not affect the rotator cuff. This is a counterintuitive statement, as internal rotation as implied by the term itself (rotation) is governed by the rotator cuff.

(Cl. Ex. 2, pp. 58-59)

Since he was released by Dr. Vinyard in August 2019, Mr. Zuniga has continued in his same position hooking carcasses at Smithfield. The parties agree that he has not had a decrease in his wages as a result of his work injury. Mr. Zuniga testified at hearing that both of his shoulders are highly symptomatic. (Tr., pp. 53-54) He continues to suffer from depression and anxiety.

## CONCLUSIONS OF LAW

The first issue to be determined is the correct rate of compensation. The parties have actually stipulated to claimant's gross earnings. The only dispute is about the claimant's marital status at the time of injury and his exemptions.

In calculating the rate of compensation, the injured worker's marital status and number of dependents entitled to be claimed are necessary. "The weekly benefit amount payable to any employee for any one week shall be upon the basis of eighty percent of the employee's weekly spendable earnings, . . ." Iowa Code Section 85.37 (2015) Weekly spendable earnings is defined as the amount remaining after payroll taxes are deducted from gross weekly earnings. Iowa Code Section 85.61(9) (2015).

Iowa Code Section 85.61(6) defines payroll taxes:

> "Payroll taxes" means an amount, determined by tables adopted by the workers' compensation commissioner pursuant to chapter 17A, equal to the sum of the following:
>
> a. An amount equal to the amount which would be withheld pursuant to withholding tables in effect on July 1 preceding the injury under the Internal Revenue Code, and regulations pursuant thereto, as amended, as though the employee had elected to claim the maximum number of exemptions for actual dependency, blindness and old age to which the employee is entitled on the date on which the employee was injured.

Iowa Code Section 85.61(6) 2015).

The agency "has long held that actual exemptions claimed on the income tax return controls. . . . A claimant is typically limited to those exemptions claimed on his

tax returns." Kayser v. Farmers Cooperative Society, File No. 5034699 (Arb. March 13, 2012) *citing* DeRaad v. Fred's Plumbing & Heating, File No. 1134532 (App. Jan. 16, 2002) *and* Webber v. West Side Transport, File No. 1278549 (App. Dec. 20, 2002). In essence, the agency recognizes a presumption that the claimant is entitled to the number of exemptions and marital status which were actually claimed on their tax returns. The party seeking to overcome that presumption must present sufficient evidence at hearing to rebut the presumption.

In this case, the issue is whether claimant's testimony is enough to overcome the rebuttable presumption. I find that it is. I have found claimant to be a highly credible witness. I have no reason to disbelieve him that he is married to Sandra Nanette Garcia Duerte since 1986. He provides her financial support although she has remained in Guatemala. While claimant did not provide a marriage certificate or other documentation, the medical records are replete with references to his marital status which bolsters his credible testimony. Mr. Zuniga is married with two exemptions, and utilizing the appropriate rate book his rate of compensation is $626.67 per week.

The next issue is the nature of claimant's disability. The parties have stipulated that Mr. Zuniga sustained an injury which arose out of and in the course of his employment which manifested on or about March 18, 2018. The parties have further stipulated that this injury caused some level of temporary and permanent disability to his right shoulder area. The primary question submitted is the nature of this disability. The claimant contends the following: (1) that his injury has led to disability which extends past his shoulder as defined by Iowa law and into his body as a whole; (2) that his injury has caused a mental sequela which should be deemed permanent; and (3) that his injury has caused a left shoulder area sequela which also should be deemed permanent. Thus, claimant alleges his disability extends into his whole body and must be evaluated under Iowa Code Section 85.34(2)(v). The defendants deny all of this and contend that Mr. Zuniga's only permanent disability is a minimal impairment rating in his right shoulder under Section 85.34(2)(n).

This is, fundamentally, an issue of medical causation.

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).

As an initial matter, the claimant contends that his disability should be assessed under Iowa Code Section 85.34(2)(v) (2019) because the disability extends beyond his "shoulder." Since 2017, "shoulder" disabilities are assessed under Iowa Code Section 85.34(2)(n).

Iowa Code Section 85.34(2)(n) states: For the loss of a shoulder, weekly compensation during four hundred weeks.

Iowa Code Section 85.34(2)(v) states:

> In all cases of permanent partial disability other than those described or referred to in paragraphs "a" through "u", the compensation shall be paid during the number of weeks in relation to five hundred weeks as the reduction in the employee's earning capacity caused by the disability bears in relation to the earning capacity that the employee possessed when the injury occurred. A determination of the reduction in the employee's earning capacity caused by the disability shall take into account the permanent partial disability of the employee and the number of years in the future it was reasonably anticipated that the employee would work at the time of the injury. 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 have 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. Notwithstanding section 85.26, subsection 2, if an employee who is eligible for compensation under this paragraph returns to work with the same employer and is compensated based only upon the employee's functional impairment resulting from the injury as provided in this paragraph and is terminated from employment by that employer, the award or agreement for settlement for benefits under this chapter shall be reviewed upon commencement of reopening proceedings by the employee for a determination of any reduction in the employee's earning capacity caused by the employee's permanent partial disability.

Claimant cites Rubalcava v. Siouxpreme Egg Products, File No. 5066865 (Arb. 6/23/20) for the proposition that a shoulder area surgery which results in a distal clavicle excision should be analyzed under subsection (v) as opposed to (n). A number of the cases cited in Rubalcava have been overturned on appeal. Moreover, there is contrary

authority at the deputy level in Bautista v. Iowa Premium Beef, File No. 1643891.01 (Arb. 6/15/21), which was decided after Deng and Chavez and has since been affirmed on appeal. Bautista v. Iowa Premium Beef, File No. 1643891.01 (App. 12/6/21).

Having reviewed all of the evidence in the record, and applying the correct legal principles, I conclude that the claimant's right shoulder area injury itself is limited to permanent disability analysis under Iowa Code Section 85.34(2)(n).

The next issue considered is whether claimant sustained either a mental sequela or a left shoulder sequela.

When an injury occurs in the course of employment, the employer is liable for all of the consequences that "naturally and proximately flow from the accident." Iowa Workers' Compensation Law and Practice, Lawyer and Higgs, section 4-4. The Supreme Court has stated the following. "If the employee suffers a compensable injury and thereafter suffers further disability which is the proximate result of the original injury, such further disability is compensable." Oldham v. Scofield & Welch, 222 Iowa 764, 767, 266 N.W. 480, 481 (1936). The Oldham Court opined that a claimant must present sufficient evidence that the disability was naturally and proximately related to the original work injury.

An employer may be liable for a sequela of an original work injury if the employee sustained a compensable injury and later sustained further disability that is a proximate result of the original injury. Mallory v. Mercy Medical Center, File No. 5029834 (Appeal February 15, 2012). A sequela can be an after effect or secondary effect of an injury. Lewis v. Dee Zee Manufacturing, File No. 797154, (Arb. September 11, 1989). One form of sequela of a work injury is an adverse effect from medical treatment for the original injury. Where treatment rendered with respect to a compensable injury itself causes further injury, the subsequent injury is also compensable. Yount v. United Fire & Casualty Co., 256 Iowa 813, 129 N.W.2d 75 (1964). For example, the death of a claimant who died on the operating table during surgery for a work injury may be compensable, since the injury caused the need for surgery. Breeden v. Firestone Tire, File No. 966020, (Arb. February 27, 1992). As another example, a claimant who fell as a result of dizziness from medication he was taking to treat a work injury is to be compensated for both the original injury and the resulting fall as a sequela of the first injury. Hamilton v. Combined Ins. Co. of America, File Nos. 854465, 877068, (Arb. February 21, 1991).

A sequela can also take the form of a secondary effect on the claimant's body stemming from the original injury. For example, where a leg injury causing shortening of the leg in turn alters the claimant's gait, causing mechanical back pain, the back condition can be found to be a sequela of the leg injury. Fridlington v. 3M, File No. 788758, (Arb. November 15, 1991).

A sequela can also take the form of a later injury that is caused by the original injury. For example, where a leg injury leads to the claimant's knee giving out in a grocery store, the resulting fall is compensable as a sequela of the leg injury. Taylor v.

Oscar Mayer & Co., III Iowa Ind. Comm. Rep. 257, 258 (1982).

Based upon the expert opinions of Dr. Ressler and Dr. Bansal, I find that claimant has, in fact, met his burden of proof that he has sustained permanent disability in both his left shoulder area, as well as a permanent psychological disability. For the reasons set forth in the findings of fact I find these opinions more convincing than the expert opinions of Dr. Crabb and Dr. Arias. Simply stated, the opinions of Dr. Ressler and Dr. Bansal more closely align with the underlying facts of this case, including the claimant's testimony, as well as the contemporaneous medical documentation.

The next issue is to assess the degree of disability to the claimant's mental disability, right shoulder and left shoulder.

> In all cases of permanent partial disability described in paragraphs "a" through "t", or paragraph "u" 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 "t", or paragraph "u" when determining functional impairment 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.

It is noted that there is no evidence that Mr. Zuniga has lost any earnings at this time since he has returned to work for the same employer, in the same position, with the same or better earnings. Consequently, whether there is a valid sequela condition or not, the analysis under subsection (x) mandates an assessment which is limited to the impairment ratings.

Having reviewed all of the evidence in the record, I find the expert opinion of Dr. Bansal to be the most compelling impairment ratings in the record regarding claimant's physical impairments to his right and left shoulders. Consequently, I find the claimant has sustained a 12 percent functional loss of the right upper extremity and a 3 percent impairment of the left upper extremity. Therefore, I conclude he is entitled to 48 weeks for the right shoulder and 12 weeks for the left shoulder. These benefits shall be paid consecutively commencing on October 24, 2019. The claimant has not obtained an impairment rating pursuant to the AMA Guides to the Evaluation of Permanent Impairment for his depression and anxiety and therefore is not entitled at this time to

any benefits for this condition.

It is noted that defendants objected to Dr. Ressler's report and moved to exclude Claimant's Exhibit 3. The defense motion in limine is denied. The report contains significant relevant information. While I am prohibited by statute from utilizing the final impairment rating for purposes of awarding benefits, this goes to the weight of the evidence, not the admissibility.[1]

The final issue is whether claimant is entitled to reimbursement for his IME or 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).

Iowa Code section 86.40 states:

> **Costs.** All costs incurred in the hearing before the commissioner shall be taxed in the discretion of the commissioner.

Iowa Administrative Code Rule 876—4.33(86) states:

> **Costs.** Costs 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

[1] Iowa Code Section 85.34(2)(x) is quite clear that the only basis for awarding permanency benefits when the claimant has returned to work with the same and better earnings, is an impairment rating pursuant to the AMA Guides to the Evaluation of Permanent Impairment. This agency is precluded from any type of assessment of the worker's actual functional disability. The Guides state the following regarding permanent disability ratings for mental injuries: "Percentages are not provided to estimate mental impairment in this edition of the Guides." AMA Guides, 5th ed., Section 14.3, p. 361. This section goes on to explain how mental disabilities are assessed in some detail, however, there is nowhere in the Guides – that I can locate - which provide a numeric rating. The result is that workers, such as Mr. Zuniga, who have permanent mental disability, are not entitled to any compensation under the Iowa Workers' Compensation Act. In essence, the Legislature has chosen to discriminate between physical and mental injuries for purposes of compensating permanent disabilities. Workers with permanent mental disabilities take nothing. While this result appears, on its face, to be absurd, counter-intuitive, and contrary to fundamental principles of justice and fairness, this agency has no authority to question the law as enacted.

> 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, (8) costs of persons reviewing health service disputes. Costs of service of notice and subpoenas shall be paid initially to the serving person or agency by the party utilizing the service. Expenses and fees of witnesses or of obtaining doctors' or practitioners' reports initially shall be paid to the witnesses, doctors or practitioners by the party on whose behalf the witness is called or by whom the report is requested. Witness fees shall be paid in accordance with Iowa Code section 622.74. Proof of payment of any cost shall be filed with the workers' compensation commissioner before it is taxed. The party initially paying the expense shall be reimbursed by the party taxed with the cost. If the expense is unpaid, it shall be paid by the party taxed with the cost. Costs are to be assessed at the discretion of the deputy commissioner or workers' compensation commissioner hearing the case unless otherwise required by the rules of civil procedure governing discovery. This rule is intended to implement Iowa Code section 86.40.

Iowa Administrative Code rule 876—4.17 includes as a practitioner, "persons engaged in physical or vocational rehabilitation or evaluation for rehabilitation." A report or evaluation from a vocational rehabilitation expert constitutes a practitioner report under our administrative rules. Bohr v. Donaldson Company, File No. 5028959 (Arb. November 23, 2010); Muller v. Crouse Transportation, File No. 5026809 (Arb. December 8, 2010) The entire reasonable costs of doctors' and practitioners' reports may be taxed as costs pursuant to 876 IAC 4.33. Caven v. John Deere Dubuque Works, File Nos. 5023051, 5023052 (App. July 21, 2009).

I find that claimant is entitled to payment of IME expenses in the amount of $2,672.00 for Dr. Bansal's report and $1,293.00 for the Dr. Ressler report. He is entitled to additional costs amounting to $2,690.50.

ORDER

THEREFORE IT IS ORDERED:

Defendants shall pay the claimant sixty (60) weeks of permanent partial disability benefits at the rate of six hundred twenty-six and 67/100 ($626.67) per week from December 19, 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 four (4) weeks previously paid.

Defendants shall reimburse claimant for the IME expenses of Dr. Bansal and Dr. Ressler as set forth above.

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

Costs are taxed to defendants in the amount of two thousand six hundred ninety and 50/100 dollars ($2,690.50).

Signed and filed this 24th day of January, 2022.

JOSEPH L. WALSH
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

James Byrne (via WCES)

Michael J. Miller (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.