

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

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REMZIJA HODOVIC,

Claimant,

vs.

TITAN TIRE CORPORATION,

Employer,

and

ZURICH AMERICAN INSURANCE,

and

SECOND INJURY FUND OF IOWA,

Insurance Carrier,  
Defendants.

**FILED**

NOV 28 2018

WORKERS COMPENSATION

File No. 5062699

ARBITRATION DECISION

Head Note Nos.: 1803.1, 3202

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**STATEMENT OF THE CASE**

Remzija Hodovic, claimant, filed a petition in arbitration seeking workers' compensation benefits from Titan Tire Corporation, the employer, Zurich American Insurance Co., the workers' compensation insurance carrier, and the Second Injury Fund of Iowa.

The matter proceeded to hearing on April 6, 2018. The hearing was interpreted by Azra Sikiric. Following an extension of time, the parties submitted post-hearing briefs on June 22, 2018, and the matter was considered fully submitted at that time.

The evidentiary record includes: Joint Exhibits JE1 through JE11; Claimant's Exhibits 1 through 14; Defendants' Exhibits A, B, C, and E; and, Second Injury Fund Exhibits AA and BB. At hearing, claimant provided testimony.

The parties filed a hearing report at the commencement of the arbitration hearing. On the hearing report, the parties entered into various stipulations. All of those stipulations were accepted and are hereby incorporated into this arbitration decision and no factual or legal issues relative to the parties' stipulations will be raised or discussed in this decision. The parties are now bound by their stipulations.

## ISSUES

The parties submitted the following disputed issues for resolution:

1. Whether the stipulated August 28, 2015 date of injury is the cause of permanent partial disability, and if so, whether the injury is scheduled or industrial, and the extent thereof.
2. Reimbursement under Iowa Code section 85.39 (Exhibit 11).
3. Whether the Second Injury Compensation Act, Iowa Code section 85.64, is triggered.
4. Costs.

## FINDINGS OF FACT

After a review of the evidence presented, I find as follows:

The parties indicated at the outset of the hearing that the issue regarding underpayment for 11.143 weeks of benefits set forth on the hearing report would be resolved between the parties and was no longer an issue for determination in this decision. (Transcript pages 9-10)

The parties agree that claimant sustained an injury that arose out of and in the course of employment on August 28, 2015.

The claimant asserts injury to her left upper extremity, left shoulder and mental injury. (Tr. p. 10)

The defendant employer admits the injury to the left arm and shoulder, but argues that the injuries were temporary only. (Id.)

The Second Injury Fund admits the injury of August 28, 2015, to the left arm and shoulder, but argues that it is an industrial injury and Second Injury Fund benefits are not triggered. They also argue that the first alleged injury is not a qualifying injury. (Id.)

The parties have stipulated that if any permanent disability is awarded, that the proper commencement date is November 20, 2015. They have also stipulated that the applicable weekly rate is \$432.72, and that claimant was previously paid 11.143 weeks of benefits prior to the date of the hearing. (Hearing Report)

## Background

Claimant was born in Serbia, formerly known as Yugoslavia, and was 58 years old at the time of the hearing. (Tr. p. 23) She left Serbia and lived in Germany for five years and then came to the United States in 1998. (Id.)

### **Education**

Although claimant's application for employment indicates that she has 12 years of education, claimant testified that she attended school for only 8 years in Serbia, until she was about 14 or 15 years old. (Ex. 3, p. 4; Tr. p. 24) After arriving in the United States, claimant completed "beginning level" English classes. (Tr. p. 25) She can read and write English "[s]omewhat, but not really." (Id.) She speaks some English and had to be reminded during the interpreted hearing to respond to questions in her first language, not in English. (Tr. pp. 23, 25) I also note that during a mental health examination, claimant was described as understanding English, but she was not fluent. (Ex. JE6, p. 69) However, a significant number of the medical records in this case indicate that claimant's daughter was present at her appointments to serve as an interpreter. (Ex. JE6, p. 61) Therefore, I find that although claimant does have some ability to communicate in English, it is clear that she is not comfortable with English in formal or technical situations. Her lack of skills in English may be a hindrance to her employability in some jobs, although she has shown a clear ability to work in a factory setting with the defendant employer, with all English-speaking supervisors. (Tr. p. 25)

### **Work History**

Claimant's first job outside the home was in Des Moines, Iowa, working for a Marriott hotel, where she worked in housekeeping cleaning rooms. (Tr. pp. 26-27; Ex. 3, p. 5, Ex. AA, p. 3) Claimant also helped her husband with his job of cleaning offices. (Ex. AA, p. 4)

Claimant started working for the defendant employer, Titan Tire Corporation, on October 16, 1998. (Ex. 3, p. 4; Ex. 10, p. 22; Ex. AA, p. 4) She began working as a banner operator, running a machine that would cut tire material. (Tr. p. 28) The job required lifting, and she described it as a heavy physical job. (Tr. p. 30) After about six months in that position she moved to a job on a re-roll machine, which she indicated was not as strenuous. (Tr. pp. 30-31) Claimant worked on the re-roll machine for about three or four years. (Tr. p. 31) She then moved through a series of cleaning jobs. In 2015, after returning from lay-off, she was placed in the scrubber operator position. (Tr. pp. 31-34; Ex. 6, p. 10)

On June 17, 2016, claimant's employment status changed from Equipment Cleaner/Scrubber to "optional layoff." (Ex. 6, p. 11) This was her last day of work. (Ex. AA, p. 3)

The employer stated in their answers to interrogatories that claimant's daughter called in to advise that claimant was retiring/quitting apparently after qualifying for Social Security Disability. Her date of separation from employment was May 24, 2017, over 11 months after her last day of work. (Ex. 10, p. 27)

Claimant has not applied for any jobs since she last worked for Titan Tire. (Ex. AA, p. 8)

### **Pre-injury Medical**

Claimant had a prior left shoulder and left upper extremity claim against the defendant employer following an April 16, 1999 alleged date of injury, which "settled at mediation for \$50,000.00," in file number 5001645. (Ex. B, p. 4) This settlement is understood to have been a compromise settlement under Iowa Code section 85.35(3). (Ex. 13, p. 31; Claimant's Brief, p. 2) Claimant's 1999 injury involved a fractured left arm and surgery between the elbow and shoulder involving a plate and screws in the humerus. (Ex. 2, p. 23) At the time of the injury, claimant was working as a banner operator for the defendant employer. Following the injury, she was off work for a period of time and returned in a "[l]ess physically demanding" position. (Tr. p. 41) The less demanding job included cleaning and working as a scrubber operator. She was asked about the scrubber operator position at hearing. (Tr. p. 65)

Q: That position was an accommodation, wasn't it?

A: In some ways, yes.

Q: Because when you were driving the scrubber, you were only using your right arm; isn't that right?

A: Yes.

(Tr. pp. 65-66) Claimant agreed that after the 1999 injury, she had some work restrictions and the cleaning jobs were offered to her so that she could work within those restrictions. (Tr. 41) The specific restrictions are not clear from the evidence presented.

On October 8, 2014, claimant was seen for "rt arm pain from work," and anxiety and sleep disturbance. (Ex. JE1, p. 2) She used lorazepam three to four times per month. (Id.)

April 27, 2015, claimant received a letter from the insurance carrier stating that "the problem with tingling in your right arm is not related to any incident at work." (Ex. 5, p. 9) (emphasis added)

On August 13, 2015, about two weeks before the injury in this case, claimant was seen for right arm and shoulder pain. She reported filing a workers' compensation claim, which had been denied. (Ex. JE1, p. 6; Ex. 5, p. 9) She also reported paresthesia and pain in her neck and tingling in her right hand. (Id.) At that time, claimant reported active problems, which included anxiety. (Id.) Her current medications included, among other things, lorazepam for anxiety. (Ex. JE1, pp. 6-7)

Claimant stated in her deposition that in the years before the 2015 injury, she did not miss work, unless she "was really sick." (Ex. A, p. 11)

### **The Injury**

On August 28, 2015, claimant stepped off the scrubber machine that she was operating and stepped over a protective curb near the bathroom, which was about six inches tall, when she slipped and fell onto her left side. (Ex. A, pp. 14, 15) The Employee Incident Report, states that claimant hit a safety guard near the restroom and fell on her left arm. (Ex. 2, p. 3)

### **Post-Injury Medical**

As stated above, I note that many of the medical records indicate that claimant's daughter attended the appointments and served as a translator. There is no evidence that claimant's daughter has any medical training.

On September 2, 2015, claimant was seen by Daniel Miller, D.O. as directed by the employer. (Ex. JE2, p. 26) He noted that claimant worked at Titan Tire as a scrubber driver when she slipped and fell on her left side. She reported having instant pain in her forearm and elbow after the fall. (Id.) A review of the neck at that time indicated no abnormality and the assessment was shoulder pain and elbow pain. (Ex. JE2, p. 27)

Claimant was seen at Integrated Physical Therapy and Sports Medicine, on October 5, 2015. (Ex. JE3, p. 30) Her primary complaint was left shoulder, upper arm, and left elbow pain. (Id.) At the conclusion of therapy on November 3, 2015, claimant noted decreased overall pain, but she "continues to guard with overhead motion and continues to display strength deficits." (Ex. JE3, p. 35)

On October 14, 2015, claimant advised Dr. Miller that her left arm was still painful, with some days worse than others. (Ex. JE2, p. 23) At that time, it was recorded that she was not working because the employer was unable to accommodate her restrictions. (Id.)

Claimant sought treatment for her right arm issues with her family physician, Sudeep Gupta, D.O. Dr. Gupta referred claimant to Benjamin Paulson, M.D. of Iowa Ortho. Claimant was seen by Dr. Paulson on October 19, 2015 and received a right carpal tunnel injection. (Ex. JE4, p. 39)

Claimant continued to treat with Dr. Miller for her August 28, 2015 left arm and shoulder injury. On October 21, 2015, claimant underwent an MRI of her left shoulder without contrast, which indicated "[m]ild supra – and infraspinatus tendinopathy with no rotator cuff tear or labral pathology." (Ex. JE8, p. 121)

On November 4, 2015, claimant advised Dr. Miller "that her left arm is much better," with occasional "numbness and tingling at the end of the day." (Ex. JE2, p. 22)

On November 19, 2015, claimant reported to Dr. Miller that her left arm "is better," but she was having a "pinching pain on the top of the shoulder" with occasional

numbness in her arm. (Ex. JE2, p. 21) The assessment was pain in her left shoulder, and her left elbow was noted to be "resolved." (Id.) She was then released to full-duty and Dr. Miller anticipated that she would reach maximum medical improvement (MMI) in two weeks at her next appointment. (Id.) However, claimant did not show for the follow-up appointment on December 3, 2015. (Ex. F, p. 1)

Claimant did not return to see Dr. Miller after November 19, 2015 and did not have any additional authorized care.

Claimant continued to treat with Dr. Gupta and Dr. Paulson. On November 23, 2015, claimant was seen by Dr. Paulson for follow up of her right wrist pain, and she also described symptoms on her left. A carpal tunnel release was recommended. Dr. Paulson planned to inject the left carpal tunnel during the right carpal tunnel surgery. (Ex. JE4, pp. 41-42)

Claimant had the right carpal tunnel release and a left carpal tunnel injection performed by Dr. Paulson on December 15, 2015. (Ex. JE5, p. 59)

On January 4, 2016, claimant was seen by Dr. Paulson for follow-up of her right carpal tunnel release. (Ex. JE4, p. 43) On February 1, 2016, claimant described numbness and tingling on the left. (Ex. JE4, p. 45)

Dr. Paulson performed left carpal tunnel release on February 16, 2016. (Ex. JE5, p. 60)

Apparently there was no attempt to pursue alternate medical care to obtain this surgery via authorized medical care.

On February 29, 2016, claimant was seen by Dr. Paulson in follow-up to her left carpal tunnel release performed on February 16, 2016. (Ex. JE4, p. 47) She reported that her numbness and tingling was "much improved." (Id.)

On May 12, 2016, claimant was seen for the first time at Pine Rest for mental health concerns. (Ex. JE6, p. 61) She described a series of events in her life in the recent past, including the death of her brother in addition to another family member and her two surgeries, presumably her bilateral carpal tunnel surgeries. (Ex. JE6, p. 61) She also described "a history of depression particularly after an accident at Titan in 1999." (Ex. JE6, p. 65) She was prescribed therapy and Cymbalta after reporting that "she did well on a low dose of Cymbalta in the past." (Ex. JE6, p. 66) She had also been previously prescribed trazodone and lorazepam by her family physician. (Ex. JE6, p. 87) Claimant asked about FMLA and was referred to her surgeon. (Id.) Claimant continued to receive mental health treatment at Pine Rest, describing not only her current job situation, but her 1999 work injury and her history of "trauma and loss," including leaving Bosnia in 1994 because of the war. (Ex. JE6, p. 70)

On May 16, 2016, claimant reported to Dr. Paulson that her symptoms following the bilateral carpal tunnel release surgeries have improved, but she had continued mild

symptoms on the left and moderate symptoms on the right. (Ex. JE4, p. 51) Dr. Paulson gave her a cortisone injection for her right trigger thumb and released claimant to return to work, full duty. (Ex. JE4, pp. 52-53)

On June 3, 2016, claimant discussed with her therapist the connection between her identity and her job. She stated that she feels like she "is losing in her life without work." (Ex. JE6, p. 83) The therapist stated on a later date that following her carpal tunnel surgeries in December and February, she had "been fairly depressed due to pain issues," and she "has had several past episodes of depression." (Ex. JE6, p. 87)

Claimant discussed with her therapist that she had "mixed emotions about her decision to take permanent layoff from her job," and that she "is distressed that she cannot physically do the job any longer, but relieved she will not be in pain with the job and has the option to return if the pain improves." (Ex. JE6, p. 88) She later discussed feeling less depressed and was "adjusting to the reality that she will likely not return to work," although "this still affects her feeling of being needed and useful, compounded with her grandchildren getting older and not needing her as much." (Ex. JE6, p. 89) Claimant began "to adjust to the idea of 'retirement.'" (Ex. JE6, p. 92) By September 8, 2016, claimant reported that her mood was improving and she was no longer taking any pain medication other than Tylenol and ibuprofen. She continued taking Zoloft at night. (Ex. JE6, p. 93) Claimant continued to receive treatment, which included a three month break for a time. (Ex. 6, p. 101) On November 14, 2017, claimant was discharged from Pine Rest, although it was noted that claimant's care was not completed. (Ex. JE6, p. 112) There was no specific opinion of causation or permanency related to her mental health.

On December 20, 2016, claimant was seen by her primary care physician, Dr. Gupta, and discussed her complaints of pain in her hand and her left shoulder. (Ex. JE1, p. 13) At that time, claimant had "stopped working due to pain and depression." (Id.) The assessment at that time was neck pain and paresthesia of the left arm. (Ex. JE1, p. 15) She was referred to physical therapy for evaluation and treatment. (Id.)

On January 3, 2017, claimant was seen at Core Physical Therapy on the referral from Dr. Gupta, D.O. (Ex. 7, pp. 113-115) It was noted that claimant "has a long history of LUE problems with recent surgery and [she] also has personal stressors of loss of job, depression/anxiety." (Ex. JE7, p. 115) The therapy goals included improving shoulder range of motion. (Id.)

On January 30, 2017, claimant reported that her shoulder pain was "doing better." (Ex. JE1, p. 16) The assessment included paresthesia of both the left and right arm. (Ex. JE1, p. 18)

On March 20, 2017, at Core Physical Therapy, claimant "demonstrated significant improvements." (Ex. JE7, p. 120) She stated that she "had improvement in all symptoms and function as [sic] 70-80 percent overall." (Id.) She stated that therapy has "helped me so much," but she was worried that she may "lose ground." (Ex. JE7,

p. 117) The therapist noted improved shoulder and cervical range of motion. (Ex. JE7, p. 118) She continued to lack full active range of motion in her left upper extremity, "but has improved significantly and met ROM [range of motion] goals at this time." (Ex. JE7, p. 119) It was recommended that she be discharged with a home exercise program. (Ex. JE7, p. 120)

On February 23, 2018, Sunil Bansal, M.D., issued a report following an independent medical evaluation (IME) performed at the request of claimant's counsel. (Ex. JE10) Dr. Bansal was aware of claimant's 1999 injury and subsequent surgery. (Ex. JE10, p. 132) Claimant advised Dr. Bansal that before the pending work injury, she had pain in her left upper arm in the range of 3-4/10, and "numbness and tingling, especially starting in 2014 to all the fingers in her left hand." (*Id.*) Dr. Bansal concluded following a physical examination that claimant's diagnoses included: (1) left rotator cuff tendinopathy; (2) left elbow strain/sprain that has resolved; (3) left carpal tunnel syndrome, post left carpal tunnel release; and, (4) right carpal tunnel syndrome, post right carpal tunnel release. (Ex. 10, p. 136) Dr. Bansal opined that the August 28, 2015 injury did not aggravate any pre-existing condition involving her neck, shoulder or upper extremity, because it is in "a different anatomic region, involving new pathology." (Ex. JE10, p. 137) He opined that both the left shoulder and left carpal tunnel syndrome were due to the acute incident on August 28, 2015. (*Id.*) Dr. Bansal also opined that the August 28, 2015 work injury aggravated claimant's prior condition of depression/anxiety. (Ex. 10, pp. 137-138) In support of this opinion, he stated generally that "Ms. Hodovic has experienced significant stressors that have affected her physically and functionally. These are known contributors to depression." (Ex. 10, p. 138) Dr. Bansal described the effect of the stressors, but does not discuss the particular stressors involved or their relationship to the August 28, 2015 work injury. The statement is vague and unconvincing. Dr. Bansal also relied upon the fact that claimant "was not being treated for depression in the months or weeks prior to her work-related injuries." (*Id.*) However, I note on August 13, 2015, about two weeks before the work injury, claimant reported taking lorazepam for anxiety. (Ex. JE1, pp. 6-7) I further note that Dr. Bansal has no specific expertise in the area of mental health, psychology or psychiatry. I therefore give little weight to his opinion concerning claimant's mental health status.

Concerning the left shoulder claim, Dr. Bansal assigned permanent partial disability of six percent to the upper extremity for the left shoulder, which he converted to four percent of the whole person, based on reduced range of motion compared to the right shoulder. (Ex. JE10, p. 138) He relied upon Figures 16-40 through 16-46 of the American Medical Association Guides to the Evaluation of Permanent Impairment, Fifth Edition, (AMA Guides). Concerning the left carpal tunnel, he assigned two percent to the upper extremity based on sensory deficits and Table 16-10, 16-11, and 16-15 of the AMA Guides. (*Id.*)

Dr. Bansal assigned permanent restrictions of "no lifting greater than 10 pounds occasionally, or 5 pounds frequently with the left arm, along with no lifting greater than 5 pounds over shoulder level occasionally. No frequent over shoulder lifting with the left



arm.” (Ex. 10, p. 139) However, I note that claimant’s functional shoulder impairment is based only on what could be described as mildly reduced range of motion. Dr. Bansal did not assign any separate impairment for loss of strength, which is allowable under the AMA Guides as described at page 508. I also note that claimant has not required any surgery or other invasive treatment for her diagnosed left rotator cuff tendinopathy. Further she reported significant improvement following physical therapy and was discharged having accomplished her goals. I also note that Dr. Miller, the authorized treating physician, returned claimant to work without restrictions. (Ex. JE2, p. 22) Also, Dr. Paulson, a treating physician chosen by claimant, released claimant to return to work full duty. (Ex. JE4, p. 53) I find that the restrictions assigned by Dr. Bansal are likely significantly more restrictive than necessary given the medical record and I give them little weight.

Concerning the alleged first injury to claimant’s right arm, Dr. Bansal assigned two percent permanent impairment to the right upper extremity based on sensory deficits and Tables 16-10, 16-11 and 16-5 of the AMA Guides. (Ex. JE10, p. 139)

In February 2018, claimant had pain on the top of her left shoulder that went into her neck and down from the shoulder to her left elbow along with tingling in her arm to her small finger, and numbness in her fingers. (Ex. AA, pp. 2, 5) Her shoulder felt warm or inflamed and she had difficulty raising her arm. (Ex. AA, p. 5) She complained of loss of strength in her arm and fingers and difficulty opening bottles and jars. Claimant also stated that her anxiety and depression were worse. (Id.)

Before May 2016 claimant had not received any treatment from a mental health provider. (Ex. A, p. 8) Although, she described herself as mentally struggling “kind of back and forth,” and that not working has been a difficult transition that “kind of ruins your life that you have.” (Ex. A, p. 9)

Although claimant described increased depression and anxiety and there are anecdotal indications of a relationship to her work injury, there is no credible expert opinion to support a finding of causation or any permanent impairment due to her mental health condition. I note that claimant was using medication for anxiety in the weeks prior to the work injury and there are a number of other factors from claimant’s past that are discussed in addition to her employment situation that have affected her mental health condition. I am unable to determine from the evidence presented that claimant has sustained a mental health injury causally connected to her August 28, 2015 work injury, or sustained any permanent impairment related thereto.

On March 15, 2018, Dr. Miller signed and dated a letter indicating his agreement that: claimant would have reached MMI on December 3, 2015; that as of November 19, 2015 she was able to return to full duty work with no physical restrictions; and, that considering the “MRI findings and Ms. Hodovic’s last medical appointment of 11/19/2015 that she would have no permanent partial impairment related to the work injury of 08/28/2015.” (Ex. JE11, p. 142)

However, there is no indication that Dr. Miller evaluated claimant since November 19, 2015. The fact that Dr. Miller did not see claimant for about two years and four months before this opinion was issued reduces its persuasiveness as compared to the much more recent evaluation of Dr. Bansal. In addition, there is no discussion of the fact that on his last appointment with claimant, she continued to complain of a "pinching pain on the top of the shoulder" with occasional numbness in her arm. (Ex. JE2, p. 21) Further, there is no indication that Dr. Miller was aware of Dr. Gupta's evaluation and referral of claimant to physical therapy for her shoulder pain in early 2017. Therefore, I give little weight to Dr. Miller's opinion.

When considering the available medical history and expert opinions, I find that claimant sustained permanent impairment to her left arm and shoulder as described by Dr. Bansal. However, I specifically reject the restrictions he assigned, as described above.

Dr. Bansal assigned six percent permanent impairment to the left upper extremity for the shoulder injury, which he converted to four percent of the whole person. He also assigned two percent permanent impairment to the left upper extremity for the carpal tunnel, which is converted to one percent of the whole person pursuant to Table 16-3 of the AMA Guides, page 439. I find that four percent plus one percent produces a total of five percent permanent impairment to the whole person based on the Combined Values Chart at page 604 of the AMA Guides.

I find that claimant sustained five percent permanent impairment to the whole person as a result of the August 28, 2015 work injury.

Considering industrial disability, I find that claimant's age, limited education, limited English, and her narrow field of work experience would tend to support a higher industrial disability. However, my rejection of Dr. Bansal's work restrictions, claimant's somewhat limited functional impairment and her general improvement following physical therapy, along with her lack of motivation to attempt to locate other work would tend to support a lower industrial disability. Based upon these and all other relevant factors for the consideration of industrial disability, I find that claimant has sustained ten percent industrial disability.

### **Additional Findings**

The Social Security Administration's Statement of Earnings from 2006 through 2015, show a bell-like curve starting at \$24,355.14 in 2006, increasing to \$28,871.71 in 2011, and then decreasing to \$23,482.45 in 2014, to a low of \$18,536.48 in 2015. (Ex. 12, p. 29) I note that 2015 was the year that the injury occurred, and that claimant was laid off for a period of time in 2015. (Ex. 2, p. 3; Ex. 6, p. 10)

Dr. Bansal's IME expense is broken down in the applicable invoice as, \$622.00 for the physical exam and \$2,534.00 for the report, for a total of \$3,156.00. (Ex. 11, p. 28)

## CONCLUSIONS OF LAW

1. Whether the stipulated August 28, 2015 date of injury is the cause of permanent partial disability, and if so, whether that disability is industrial or scheduled and the extent thereof.

I have found above that claimant sustained permanent impairment due to the left carpal tunnel and the left shoulder injury.

Considering the carpal tunnel, I note that a wrist injury is an injury to the arm, not the hand. Holstein Elec. v. Breyfogle, 756 N.W.2d 812 (Iowa 2008).

Considering the shoulder injury, I conclude that when disability is found in the shoulder, a body as a whole situation may exist. Alm v. Morris Barick Cattle Co., 240 Iowa 1174, 38 N.W.2d 161 (1949). In Nazareus v. Oscar Mayer & Co., II Iowa Industrial Comm'r. Report 281 (App. 1982), a torn rotator cuff was found to cause disability to the body as a whole. In this case, claimant's diagnosis was left rotator cuff tendinopathy. (Ex. 10, p. 136) Therefore, I conclude that based on the situs of the injury, the shoulder injury in this case is a body as a whole injury.

Having determined that claimant sustained both a scheduled and unscheduled injury due to the August 28, 2015 work incident, I conclude that "when there is injury to some scheduled member and also to parts of the body not included in the schedule, the resulting disability is compensated on the basis of an unscheduled injury." Mortimer v. Fruehauf Corp., 502 N.W.2d 12, at 16 (Iowa 1993).

Based on the combined injury to the upper extremity and the shoulder/whole person, claimant has an overall impairment to the body as a whole, and has sustained an industrial disability. Industrial disability was defined in Diederich v. Tri-City R. Co., 219 Iowa 587, 593; 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 the 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. However, consideration must also be given to the injured worker's medical condition before the injury, immediately after the injury and presently; the situs of the injury, its severity, and the length of healing period; the work experience of the injured worker prior to the injury, after the injury, and potential for rehabilitation; the injured workers' qualifications intellectually, emotionally and physically; the worker's earning before and after the injury; the willingness of the employer to re-employ the injured worker after the injury; the worker's age, education, and motivation; and, finally the inability because of the injury to engage in employment for which the worker is best fitted. Thilges v. Snap-On Tools Corp., 528 N.W.2d 614, 616 (Iowa 1995); 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).

There are no weighting guidelines that indicate how each of the factors is to be considered. Neither does a rating of functional impairment directly correlate to a degree of industrial disability to the body as a whole. In other words, there are no formulae which can be applied and then added up to determine the degree of industrial disability. It therefore becomes necessary for the deputy or commissioner to draw upon prior experience as well as general and specialized knowledge to make the finding with regard to degree of industrial disability. See Christensen v. Hagen, Inc., Vol. 1 No. 3 Industrial Commissioner Decisions, 529 (App. March 26, 1985); Peterson v. Truck Haven Cafe, Inc., Vol. 1 No. 3 Industrial Commissioner Decisions, 654 (App. February 28, 1985).

Assessments of industrial disability involve a viewing of loss of earning capacity in terms of the injured workers' present ability to earn in the competitive labor market without regard to any accommodation furnished by one's present employer. Quaker Oats Co. v. Ciha, 552 N.W.2d 143, 158 (Iowa 1996); Thilges v. Snap-On Tools Corp., 528 N.W.2d 614 (Iowa 1995).

As stated above and for the reasons there given, I have determined that claimant has sustained ten percent industrial disability.

2. Reimbursement under Iowa Code section 85.39 (Exhibit 11)

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 IME. 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).

The Iowa Supreme Court's decision in Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839 (Iowa 2015), clearly states that if no impairment rating has actually been provided by an employer retained physician prior to the occurrence of the claimant's IME, then the injured worker does not qualify for reimbursement for the IME under section 85.39.

In this case, there was no impairment rating assigned by a physician retained by the employer at the time of Dr. Bansal's IME. Dr. Miller gave an opinion on permanent impairment, but not until March 15, 2018, which was after Dr. Bansal conducted claimant's IME and issued his report. Therefore, claimant is not entitled to reimbursement under Iowa Code section 85.39.

3. Whether the Second Injury Compensation Act, Iowa Code section 85.64, is triggered.

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. Third, permanent disability must exist as to both the initial injury and the second injury.

In this case I have found that claimant's August 28, 2015 work injury caused permanent disability to claimant's left shoulder and is therefore an industrial disability as discussed above. As a result, claimant does not have a qualifying second injury under Iowa Code section 85.64 and Second Injury Fund of Iowa liability is not activated. As a result, Second Injury Fund benefits are not triggered and the question of whether claimant's first injury is a qualifying injury is moot.

4. Costs

The final issue is costs. Assessment of costs is a discretionary function of this agency. Iowa Code section 86.40. Costs are to be assessed at the discretion of the deputy commissioner or workers' compensation commissioner hearing the case. 876 IAC 4.33. I conclude that claimant was generally successful in this claim and therefore exercise my discretion and assess costs against the defendant employer in this matter. I assess costs as follows: (1) filing fee - \$100.00 (Ex. 14, p. 32); and (2) report of Dr. Bansal - \$2,534.00 (Ex. 11, p. 28).

**ORDER**

**THEREFORE, IT IS ORDERED:**

Defendants shall pay claimant industrial disability benefits of fifty (50) weeks, beginning on the stipulated commencement date of November 20, 2015 until all benefits are paid in full.

Defendants shall be entitled to credit for all weekly benefits paid to date, if any.

All weekly benefits shall be paid at the stipulated rate of four hundred thirty-two and 72/100 dollars (\$432.72) per week.

All accrued benefits shall be paid in a lump sum.

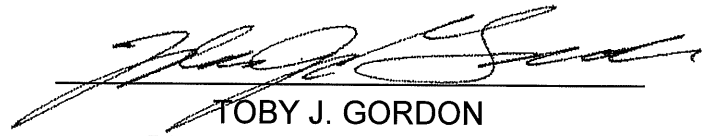
Defendants shall pay accrued weekly benefits in a lump sum together with interest at the rate of ten percent for all weekly benefits payable and not paid when due which accrued before July 1, 2017, and all interest on past due weekly compensation benefits accruing on or after July 1, 2017, shall be payable 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, See Gamble v. AG Leader Technology, File No. 5054686 (App. Apr. 24, 2018).

Defendants shall pay costs of two thousand six hundred thirty-four and 00/100 dollars (\$2,634.00) as set forth above.

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

Claimant shall take nothing from the Second Injury Fund of Iowa.

Signed and filed this 28<sup>th</sup> day of November, 2018.



TOBY J. GORDON  
DEPUTY WORKERS'  
COMPENSATION COMMISSIONER

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TJG/srs

**Right to Appeal:** This decision shall become final unless you or another interested party appeals within 20 days from the date above, pursuant to rule 876 4.27 (17A, 86) of the Iowa Administrative Code. The notice of appeal must be in writing and received by the commissioner's office within 20 days from the date of the decision. The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday. The notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 1000 E. Grand Avenue, Des Moines, Iowa 50319-0209.