

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

ELIJAH WELCH,

Claimant,

vs.

SENECA TANK,

Employer,

and

FEDERATED INSURANCE,

Insurance Carrier,
Defendants.

File No. 1647781.01

ARBITRATION DECISION

Head Note Nos.: 1800, 1803, 2200,
2500, 2501, 2700**STATEMENT OF THE CASE**

The claimant, Elijah Welch, filed a petition for arbitration seeking workers' compensation benefits from Seneca Tank ("Seneca") and Federated Insurance. John Dougherty appeared on behalf of the claimant. Rene Lapierre appeared on behalf of the defendants.

The matter came on for hearing on January 21, 2021, before Deputy Workers' Compensation Commissioner Andrew M. Phillips. An order issued on March 13, 2020, and updated June 1, 2020, August 14, 2020, and October 12, 2020, by the Iowa Workers' Compensation Commissioner, In the Matter of Coronavirus/COVID-19 Impact on Hearings (Available online at: <https://www.iowaworkcomp.gov/order-coronavirus-covid-19> (last viewed December 29, 2020)) amended the hearing assignment order in each case before the Commissioner scheduled for an in-person regular proceeding hearing between March 18, 2020, and March 19, 2021. The amendment makes it so that such hearings will be held by Internet-based video, using CourtCall. The parties appeared electronically, and the hearing proceeded without significant difficulties. The matter was fully submitted on February 26, 2021, after briefing by the parties.

The record in this case consists of Joint Exhibits 1-6, Claimant's Exhibits 1-5, and Defendants' Exhibits A-L. All of the proposed exhibits were received into evidence. Testimony under oath was also taken from Elijah Welch, Bruce Overton, Mark Morgan, and Harvey Jonas Hunemueller. Caleb Cork, a representative of Seneca was present, and observed the hearing. Kira Stover was appointed the official reporter and custodian of the notes of the proceeding.

STIPULATIONS

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

1. There was an employer-employee relationship at the time of the alleged injury.
2. The claimant sustained an injury arising out of, and in the course of, employment, on December 6, 2017.
3. That the alleged injury is a cause of temporary disability during a period of recovery.
4. That the alleged injury is a cause of permanent disability.
5. That the commencement date for permanent partial disability benefits, if any are awarded, is January 9, 2019.
6. That the claimant was single, and entitled to one exemption.
7. With regard to disputed medical expenses in Claimant's Exhibit 2:
 - a. The fees or prices charged by providers are fair and reasonable.
 - b. Although disputed, the medical providers would testify as to the reasonableness of their fees and/or treatment set forth in the listed expenses and defendants are not offering contrary evidence.
 - c. Although causal connection of the expenses to a work injury cannot be stipulated, the listed expenses are at least causally connected to the medical condition(s) upon which the claim of injury is based.
8. That the costs listed in Claimant's Exhibit 9 have been paid.

Any entitlement to temporary disability and/or healing period benefits is no longer in dispute. The defendants paid the claimant 44 weeks of compensation at the rate of six hundred seventeen and 24/100 dollars (\$617.24) per week. The defendants waived their affirmative defenses.

The parties are now bound by their stipulations.

ISSUES

The parties submitted the following issues for determination:

1. The extent of permanent disability, if any is awarded.
2. Whether the disability is an industrial disability, or a scheduled member disability to the shoulder.
3. Whether the claimant's gross earnings are one thousand one hundred seventy-five and 87/100 dollars (\$1,175.87) or nine hundred eighty-eight and 94/100 dollars (\$988.94), and thus whether the weekly rate of compensation is six hundred seventy-seven and 63/100 dollars (\$677.63) or five hundred eighty-five and 76/100 dollars (\$585.76).

4. Whether the claimant is entitled to payment of medical expenses listed in Claimant's Exhibit 2, and with regard to the disputed medical expenses:
 - a. Whether the treatment was reasonable and necessary.
 - b. Whether the listed expenses are causally connected to the work injury.
 - c. Whether the requested expenses were authorized by defendants.
5. Whether the claimant is entitled to the costs of a supplemental independent medical examination ("IME") report, and the filing fee.

FINDINGS OF FACT

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

Elijah Welch, the claimant, was 35 years old at the time of the hearing. (Testimony). He resides in Milo, Iowa. (Defendants' Exhibit A). He is single. (Testimony).

Mr. Welch graduated from high school in 2004. (Testimony; DE A). After completing high school, he attended a two-and-a-half-year diesel mechanic program at Des Moines Area Community College. (Testimony; DE A). In 2007, he began working for Housby Mack. (Testimony). He received a degree from the Des Moines Area Community College program in 2009. (Testimony; DE A). At Housby Mack, he was a service mechanic working on the night shift. (Testimony). He worked on Mack engines, transmissions, axles, and other parts of large trucks. (Testimony). He left Housby Mack in 2010. (Testimony).

In 2012, Mr. Welch began working for Seneca. (Testimony). He started at Seneca, but had a positive drug test. (Testimony). He had to come back several weeks later after having a "clean" drug screen. (Testimony). At Seneca, he worked on petroleum tanks and petroleum trailers. (Testimony). He performed DOT annual inspections, repairs, emergency repairs, and preventative or basic maintenance. (Testimony). He also worked on suspensions and brakes on trailers. (Testimony). He also did some welding. (Testimony). One of the more difficult tasks at Seneca involved pump removal. (Testimony). A pump weighed between 75 and 100 pounds. (Testimony). These pumps can shift upon removal. (Testimony). He also lifted metal piping. (Testimony).

On December 6, 2017, Mr. Welch was refurbishing a tank trailer. (Testimony). When a tank is refurbished, the tank is detached from the chassis and brought up to Department of Transportation ("DOT") standards. (Testimony). He was working on a 3-inch steel pipe and was working overhead trying to remove the pipe. (Testimony). He tried to remove the U-bolt which put him in a "weird spot" with his shoulder. (Testimony). He felt a sensation in his shoulder, and rubbed his shoulder. (Testimony). He told his manager, Mark Morgan, that he had a "little weird pain." (Testimony). He felt that it should be ok. (Testimony).

On January 22, 2018, Mr. Welch reported to Mercy Indianola Family Medicine & Urgent Care. (JE 5:35-37). Mr. Welch presented for “work CPX” and to discuss anger issues. (JE 5:35). Mr. Welch told the medical provider that he had right shoulder discomfort for several months. (JE 5:35). He denied any injury. (JE 5:35). The pain was mild and intermittent. (JE 5:35). Upon physical examination, Mr. Welch showed tenderness with range of motion and resistance on the right shoulder. (JE 5:37).

Between January 22, 2018, and March 6, 2018, Mr. Welch continued to work. (Testimony). Certain movements aggravated his right shoulder. (Testimony). Being on the creeper and doing overhead worked caused increased issues. (Testimony). On March 6, 2018, Mr. Welch returned to Mercy Indianola Clinic and left work early due to his shoulder pain. (Testimony). His right shoulder pain was to the anterior shoulder. (JE 5:38-40). Mr. Welch also showed a mild decrease in range of motion. (JE 5:38). The medical provider noted a history of shoulder subluxations as a child and a right clavicular or scapular fracture. (JE 5:38). Mr. Welch felt he aggravated his right shoulder after walking under an engine. (JE 5:38). The medical provider opined that Mr. Welch presented with signs and symptoms consistent with impingement syndrome of the right shoulder affecting the long head of the biceps tendon. (JE 5:39). The provider recommended physical therapy. (JE 5:39).

On March 12, 2018, Mr. Welch returned to Mercy Indianola for physical therapy supervised by Jenilee Foster, DPT. (JE 5:44-45). Mr. Welch was “a little sore,” but felt that he was doing better. (JE 5:44). Working in a tight area aggravated his shoulder pain. (JE 5:44). Mr. Welch complied with the home exercise program, and continued to ice his shoulder at home. (JE 5:44).

Mr. Welch followed up with Mercy Indianola for continued physical therapy on March 14, 2018. (JE 5:46-47). He continued to report right shoulder pain and tenderness to palpation. (JE 5:46). He reported aggravating his right shoulder at work. (JE 5:46). He attempted to “take it easy,” but had to install a water pump. (JE 5:46). Mr. Welch wanted a physician’s note to provide work restrictions. (JE 5:46). Mr. Welch’s symptoms improved since beginning physical therapy. (JE 5:46). Ms. Foster provided a note on March 14, 2018, requesting that the employer modify Mr. Welch’s work duties to avoid aggravating activities and lifting anything over 15 pounds. (JE 5:47).

On March 20, 2018, Mr. Welch returned to Mercy Indianola for continued physical therapy. (JE 5:48). Mr. Welch continued to have right shoulder pain. (JE 5:48). He could perform activities that bothered his right shoulder before, with only a small irritation. (JE 5:48). He was off work. (JE 5:48). While he reported reduced pain, his symptoms were not resolved. (JE 5:48).

Mr. Welch continued physical therapy at Mercy Indianola on March 22, 2018. (JE 5:49-50). Mr. Welch complained of moderate pain. (JE 5:49). Mr. Welch rated his pain 5 out of 10. (JE 5:49). Mr. Welch was off work for one week, and avoided use of the right upper extremity to allow for healing. (JE 5:49).

On March 27, 2018, Mr. Welch returned to Mercy Indianola for additional physical therapy. (JE 5:51-52). At rest, Mr. Welch was pain free for a while; however, at times he moved it in a way that caused pain. (JE 5:51). Week to week Mr. Welch noted more improvement than day to day. (JE 5:51).

Mr. Welch continued physical therapy at Mercy Indianola on March 29, 2018. (JE 5:53-54). Overall, Mr. Welch improved, but irritated his right shoulder working on a hydraulic system. (JE 5:53-54). Reaching behind his body into his pocket causes his right shoulder pain. (JE 5:53). His shoulder did not feel right. (JE 5:53). Mr. Welch felt 75 percent improved. (JE 5:53).

On April 2, 2018, Mr. Welch returned to Mercy Indianola for physical therapy. (JE 5:55). Mr. Welch reported soreness after his last visit. (JE 5:55). He felt that he improved, but more slowly. (JE 5:55). Mr. Welch complied with his home exercise plan. (JE 5:55).

Mr. Welch visited Mercy Indianola for physical therapy on April 5, 2018. (JE 5:56). Mr. Welch felt good. (JE 5:56). His right shoulder had a small irritation after picking up shingles from the ground for one and a half hours. (JE 5:56). He rated his pain 1 out of 10. (JE 5:56). The therapist initiated return to work simulation, and noted that Mr. Welch performed outdoor chores at home using his left arm. (JE 5:56).

On April 9, 2018, Mr. Welch followed up at Mercy Indianola for another session of physical therapy. (JE 5:58-59). Mr. Welch was feeling good, but raked leaves for two to three hours. (JE 5:58). This caused an increase in his pain from 2.5 to 3 out of 10. The therapist opined that Mr. Welch progressed back into work simulation in the clinic with generalized muscle fatigue and increased activity level at home. (JE 5:58).

Mr. Welch's physical therapy continued on April 12, 2018, at Mercy Indianola. (JE 5:60-61). Mr. Welch felt that his pain was back to how he felt in December. (JE 5:60). He reported waking up with discomfort, but that his right arm felt "ok" during the day for the most part. (JE 5:60). The therapist noted that Mr. Welch had good range of motion and strength. (JE 5:60). Mr. Welch still experienced pain in the anterior shoulder localized to the long head of the biceps tendon. (JE 5:60).

On April 16, 2018, Mr. Welch visited Mercy Indianola for repeated physical therapy. (JE 5:62-65). Mr. Welch felt as though he was back to normal irritation, and could deal with it. (JE 5:62). His pain remained localized to the long head of the biceps tendon. (JE 5:62). Teresa Kolarik, A.R.N.P. also examined Mr. Welch. (JE 5:63-65). Mr. Welch reported to Ms. Kolarik that he was up and down in physical therapy. (JE 5:63). His pain was down to 3 to 4 out of 10. (JE 5:63). He took diclofenac daily to help with his pain. (JE 5:64). Ms. Kolarik recommended that Mr. Welch continue physical therapy and the same restrictions at work until he was seen by an orthopedic doctor. (JE 5:65).

Mr. Welch continued physical therapy on April 19, 2018, at Mercy Indianola. (JE 5:66). His pain increased in the superior shoulder. (JE 5:66). He reported pain when he opened a door or drove. (JE 5:66). He rated his pain 6 out of 10. (JE 5:66). Mr. Welch was limited in physical therapy by pain, especially at the right long head of the biceps tendon. (JE 5:66).

David Berg, D.O., examined Mr. Welch at UnityPoint Health – Des Moines Occupational Medicine on May 4, 2018. (JE 2:3-4). Mr. Welch complained of pain in his right shoulder since early December of 2017. (JE 2:3). Mr. Welch reported a right shoulder injury when he was a child. (JE 2:3). Upon physical examination, Dr. Berg found mild tenderness over the levator scapula insertion at the right scapular border. (JE 2:3). Dr. Berg found no tenderness over the AC joint. (JE 2:3). Mr. Welch had global weakness in the right rotator cuff. (JE 2:3). Dr. Berg assessed Mr. Welch with right shoulder pain. (JE 2:3). Dr. Berg also recommended an MRI. (JE 2:3). His symptoms correlated with a rotator cuff tear, according to Dr. Berg. (JE 2:3). Dr. Berg provided restrictions including modified duty of lifting up to five pounds with his right arm, and no overhead work with his right arm. (JE 2:4).

Mr. Welch had an MRI of his right shoulder at DMOS Orthopaedic Centers on May 21, 2018. (JE 4:15). The MRI showed a superior labral tear from three to nine o'clock with small paralabral cysts along the periphery of the posterior superior labral tear. (JE 4:15). The MRI also showed a presumed mild chronic supraspinatus, infraspinatus, and subscapularis tendinopathy without a full-thickness tear. (JE 4:15). Also noted was a presumed old fracture about the distal clavicle and old coracoclavicular ligament injury. (JE 4:15).

On May 23, 2018, Mr. Welch returned to Dr. Berg's office. (JE 2:5-6). Dr. Berg reviewed the results of the MRI from May 21, 2018. (JE 2:5). The MRI showed a superior labral tear from three to nine o'clock with a small paralabral cyst. (JE 2:5). Dr. Berg also found chronic supraspinatus, infraspinatus, and subscapularis tendinitis without tearing. (JE 2:5). The MRI also showed a prior fracture of the distal clavical and old coracoclavicular ligament injury, as well as moderate AC joint degenerative disease with a type II acromion. (JE 2:5). Dr. Berg indicated that his assessment of Mr. Welch was a labral tear to the right shoulder, tendinitis of the right shoulder, and impingement syndrome of the right shoulder. (JE 2:5). Dr. Berg returned Mr. Welch to work with the same restrictions as his May 4, 2018 visit. (JE 2:6). Dr. Berg recommended examination by an orthopedic physician, as the doctor suspected that Mr. Welch may require a labral repair. (JE 2:5).

Mr. Welch visited DMOS, P.C. on June 20, 2018, where Jeffrey Davick, M.D., examined him. (JE 4:16-20). Dr. Davick found Mr. Welch to have excellent strength in abduction and external rotation with tenderness at the AC joint. (JE 4:16). Dr. Davick reviewed the imaging to date, including the MRI. (JE 4:16). Dr. Davick opined that the MRI showed "definite signal change at the AC joint," labral fraying, and rotator cuff tendonitis; however, no full thickness tears were found. (JE 4:16). Dr. Davick opined that Mr. Welch's symptoms were from the AC joint, and provided Mr. Welch with an injection in the right shoulder. (JE 4:16). Dr. Davick allowed Mr. Welch to return to work, but noted that Mr. Welch could not lift above 10 pounds, and could not use his right arm above chest height. (JE 4:17).

Mr. Welch returned to Dr. Davick's office on July 9, 2018. (JE 4:21). The injection worked for about three hours, and Mr. Welch continued to have superior pain radiating down his arm. (JE 4:21). He continued to have tenderness at the right AC joint, and the proximal biceps. (JE 4:21). Dr. Davick discussed the situation with Mr. Welch, and they agreed to proceed with a right shoulder arthroscopy including a labral debridement, evaluation of the biceps and rotator cuff, followed by a decompression

and distal clavicle excision. (JE 4:21). Mr. Welch's restrictions remained unchanged. (JE 4:22).

On July 20, 2018, Mr. Welch reported to Orthopaedic Outpatient Surgery Center, L.C. (JE 1:1-2). Dr. Davick noted a post and preoperative diagnosis of right shoulder impingement with acromioclavicular joint arthropathy. (JE 1:1). Dr. Davick performed a right shoulder arthroscopy with subacromial decompression followed by a distal clavicle excision. (JE 1:1). Dr. Davick excised 1 cm of the distal clavicle. (JE 1:1).

Dr. Davick examined Mr. Welch for a postoperative review on July 25, 2018. (JE 4:23). Mr. Welch was doing well. (JE 4:23). He could abduct and forward flex 80 degrees with his right shoulder. (JE 4:23). Dr. Davick ordered physical therapy, and requested that Mr. Welch return in six weeks. (JE 4:23). Mr. Welch's restrictions were increased to include no lifting above five pounds, and no use of the right arm above chest height. (JE 4:24).

Mr. Welch began physical therapy on July 31, 2018, at 21st Century Rehab in Indianola, Iowa. (JE 3:7-9). His right shoulder pain began in December, and "took awhile to get to work comp." (JE 3:7). Surgery improved his pain, and he had more of a dull pain. (JE 3:7). Mr. Welch reported being anxious to return to work. (JE 3:7). Mr. Welch felt clicking and popping in his shoulder a couple days prior. (JE 3:7). The therapist instructed Mr. Welch on a home exercise plan. (JE 3:8). The therapist opined that Mr. Welch had a good potential for rehabilitation. (JE 3:9).

Dr. Davick examined Mr. Welch again on September 5, 2018. (JE 4:25-26). He was doing well, and could abduct and forward flex to 150 degrees. (JE 4:25). Dr. Davick ordered continued therapy. (JE 4:25). Dr. Davick allowed for increased lifting to 15 pounds, and continued ordering no use of Mr. Welch's arm above chest height. (JE 4:26).

On October 17, 2018, Dr. Davick re-examined Mr. Welch. (JE 4:27-28). Mr. Welch was improved, but still had superior pain. (JE 4:27). He could abduct and forward flex to 145 degrees with good strength. (JE 4:27). He continued to be tender at the AC joint and proximal biceps. (JE 4:27). Dr. Davick opined that Mr. Welch's discomfort was normal. (JE 4:27). Mr. Welch's restrictions were unchanged. (JE 4:28).

On November 21, 2018, Mr. Welch had a follow up physical therapy visit with 21st Century Rehab. (JE 3:10-13). He felt slight discomfort to the front of his shoulder, but noted that it improved. (JE 3:10). His right shoulder strength was normal and his flexion and abduction were within normal limits. (JE 3:10). Mr. Welch tolerated physical therapy without reports of pain. (JE 3:11). The therapist encouraged Mr. Welch to continue the home exercise plan. (JE 3:12). The therapist recommended that Mr. Welch continue therapy 2 visits per week for 12 weeks, followed by 2 visits per week for 6 weeks. (JE 3:13).

On November 28, 2018, Mr. Welch returned to Dr. Davick's office. (JE 4:29-30). Upon examination, Mr. Welch could abduct and forward flex to 150 degrees. (JE 4:29). He could extend and adduct to about 30 degrees. (JE 4:29). Dr. Davick opined that Mr. Welch was doing well with some residual symptoms near the AC joint. (JE 4:29). Dr.

Davick returned Mr. Welch to full duty work. (JE 4:29-30). Dr. Davick requested that Mr. Welch return in six weeks. (JE 4:29).

Mr. Welch called 21st Century Rehab on November 29, 2018, and told them that a doctor released him from physical therapy. (JE 3:14). Mr. Welch was going to return to work. (JE 3:14).

For a short period of time after returning to Seneca, Mr. Welch worked on the refurbishing portion of the business. (Testimony). Mark Morgan supervised him. (Testimony). Mr. Morgan testified that Mr. Welch worked under no restrictions when he returned in November of 2018. (Testimony). Bruce Overton testified that he managed Mr. Welch for a period of time at Seneca. (Testimony). Mr. Overton supervised the service department. (Testimony). After returning from surgery in November, Mr. Overton indicated that Mr. Welch performed the same tasks as he did prior to his shoulder surgery. (Testimony). He performed DOT inspections, repairs and modifications on tanks and trailers, electrical repairs, fixing leaks, and rebuilding wrecked trailers. (Testimony). Mr. Overton testified that he did not make any changes to Mr. Welch's job, and that Mr. Welch never requested an accommodation. (Testimony). Mr. Welch performed his job every day, and was a hard worker. (Testimony). However, Mr. Overton and Mr. Morgan felt that Mr. Welch sometimes displayed an attitude problem towards authority. (Testimony).

On January 9, 2019, Mr. Welch returned to Dr. Davick's office. (JE 4:31). Dr. Davick indicated that Mr. Welch was doing well. (JE 4:31). Mr. Welch was working full duty, and Dr. Davick opined that Mr. Welch reached maximum medical improvement ("MMI"). (JE 4:31).

Dr. Davick wrote a letter to Michael Mills of Federated Insurance on January 10, 2019, to issue an impairment rating. (JE 4:32). Dr. Davick noted that Mr. Welch was doing well, and that Mr. Welch achieved MMI on January 9, 2019. (JE 4:32). Dr. Davick opined that Mr. Welch could continue to work full duty with no permanent restrictions. (JE 4:32). Based upon the AMA Guides to the Evaluation of Permanent Impairment, 5th Edition, Dr. Davick provided an 11 percent upper extremity or 7 percent whole person impairment rating due to Mr. Welch's issues with range of motion and distal clavicle excision. (JE 4:32).

On February 19, 2020, Dr. Davick wrote a letter to counsel for the defendants. (JE 4:33). Dr. Davick reviewed Dr. Stoken's January 20, 2020, IME. (JE 4:33). Dr. Davick agreed that placing Mr. Welch in the medium category of work and specific lifting restrictions, as provided by Dr. Stoken "seem reasonable." (JE 4:33). However, Dr. Davick noted his discussion with Mr. Welch on January 19, 2019, wherein Mr. Welch felt good, and was working full duty. (JE 4:33). Dr. Davick recommended a functional capacity evaluation ("FCE") for an objective measurement of Mr. Welch's abilities. (JE 4:33). Dr. Davick opined that his impairment rating remained unchanged. (JE 4:33).

Seneca terminated Mr. Welch on April 8, 2020. (Claimant's Exhibit 3:16). The termination letter indicated that Mr. Welch threw tools off a workbench on April 7, 2020, in the presence of a manager. (CE 3:16). He also made an expletive laden statement. (CE 3:16). Seneca also alleged that Mr. Welch placed ruined gauges in a tool crib. (CE 3:16; Testimony). Mr. Welch disputed that he replaced ruined gauges. (DE A;

Testimony). Mr. Welch alleged that a new employee replaced the gauges. (Testimony). Up until his termination, he worked full time as a mechanic. (Testimony).

Mr. Welch reported to Advantage Physical Therapy and Rehab in Windsor Heights, Iowa, on November 27, 2020, for a FCE. (JE 6:67-79). Melanie Wrabek, M.S.P.T. examined him. (JE 6:67-79). Ms. Wrabek reviewed Mr. Welch's history. (JE 6:67). Mr. Welch indicated that he worked for Fed Ex at the time of the examination. (JE 6:67). He told Ms. Wrabek that Fed Ex allowed him to have assistance for overhead work and heavy lifting due to continued right shoulder issues. (JE 6:67). Mr. Welch complained of pain of 2 out of 10 at the best and 4 out of 10 at the worst. (JE 6:67). Mr. Welch worked without restrictions from a physician, but noted moderate difficulty with overhead lifting or prolonged positioning of his right arm above shoulder height. (JE 6:67). He could no longer shoot guns, ride ATVs, do yardwork, or help with his children's sporting activities. (JE 6:68). He also reported a sleep disturbance. (JE 6:68).

Throughout the duration of the examination, Ms. Wrabek found that Mr. Welch demonstrated maximal, consistent effort. (JE 6:68). Ms. Wrabek observed that Mr. Welch had moderate deficits or abilities in the following exercises or tests: front carry, pushing and pulling, horizontal lifting, and fine motor coordination of the left hand. (JE 6:70). Ms. Wrabek found Mr. Welch to have significant deficits in the following areas: elevated work with the right upper extremity especially with prolonged use and repetitive reaching at shoulder height or above, lifting from his waist to over his head, a right single upper extremity carry, right grip strength, right hand fine motor coordination, quadruped positioning, and crawling. (JE 6:70). Ms. Wrabek opined that Mr. Welch's functional ability placed him into the medium work category. (JE 6:70).

Upon physical examination, Ms. Wrabek found that Mr. Welch's use of his right shoulder and upper extremity was guarded, rigid, and at a slower pace than the left upper extremity. (JE 6:72). Mr. Welch also displayed muscular edema in the right forearm and biceps based upon circumferential measurements. (JE 6:74).

Ms. Wrabek recommended that Mr. Welch should avoid performing elevated work activities requiring prolonged use and repetitive reaching of bilateral upper extremity at shoulder heights and above to no more than a rare occasion. (JE 6:71). Mr. Wrabek also recommended that Mr. Welch should limit performing work activities which require quadruped to no more than a rare occasion. (JE 6:71). Ms. Wrabek indicated that the following restrictions were appropriate:

- Floor to waist lifting occasionally of 40 pounds, and frequently to 25 pounds.
- Waist to overhead lifting should be avoided entirely due to decreased right shoulder range of motion and decreased right shoulder stability.
- Horizontal lifting up to 40 pounds occasionally, and frequently to 25 pounds.
- Rarely pushing and pulling 70 pounds.
- Occasionally pushing and pulling 50 pounds.
- No pushing and pulling on a frequent or constant basis.
- Carrying with the right upper extremity to 20 pounds on an occasional basis, and 10 pounds on a frequent basis.
- Carrying in the front up to 20 pounds on an occasional basis and 10 pounds on a frequent basis.

- Complete avoidance of elevated work with the right upper extremity.
- Crawling on a rare basis.

(JE 6:75-79).

Mr. Welch attended an IME with Jacqueline M. Stoken, D.O., on January 15, 2020. (CE 1:1-10). Dr. Stoken is board certified in physical medicine and rehabilitation, independent medical examination, and holistic medicine. (CE 1:1). Dr. Stoken issued an amended report on December 18, 2020. (CE 1:1). Dr. Stoken examined Mr. Welch, and also reviewed medical records from D.M.O.S., Dr. Berg, Mercy Indianola, 21st Century Rehab, and the FCE. (CE 1:1-5). Mr. Welch told Dr. Stoken that he continued to have popping and pain in his right shoulder, especially when the weather changed, or he worked. (CE 1:2). Mr. Welch described his pain as aching, throbbing, shooting, stabbing, sharp, nagging, miserable, and unbearable. (CE 1:5). Pain interfered with lifting, sleeping, social activities, activities of daily living, showering and bathing, and dressing. (CE 1:5). Dr. Stoken's impressions included mentions of the surgical procedures, and chronic right shoulder pain. (CE 1:6). Dr. Stoken causally related the diagnoses to a work injury on December 6, 2017. (CE 1:6). Dr. Stoken noted that "the risk factors associated with several shoulder disorders include awkward or static postures, heavy work, direct load bearing, repetitive arm movements, working with hands above shoulder height, and lack of rest." (CE 1:6). Dr. Stoken opined that those risk factors were present in Mr. Welch's job duties with Seneca. (CE 1:6).

Dr. Stoken then indicated that Mr. Welch sustained a permanent partial impairment to the body as a whole. (CE 1:6). She then goes on to provide an impairment rating based upon an injury to the right rotator cuff and clavicle. (CE 1:7). Dr. Stoken utilized Chapter 16 of the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, to evaluate Mr. Welch's impairment. (CE 1:7). Chapter 16 provides information for evaluating permanent impairment to the upper extremities. (CE 1:7). Based upon Dr. Stoken's examination, she found a 10 percent impairment of the right upper extremity due to deficits in range of motion. (CE 1:7). She also found a 10 percent right upper extremity impairment due to Mr. Welch's distal clavicle excision. (CE 1:7). Dr. Stoken also rated Mr. Welch with a 6 percent upper extremity impairment rating due to deficits of flexion strength and 3 percent upper extremity impairment rating due to deficits in abduction strength. (CE 1:7). Dr. Stoken opined that the upper extremity impairment ratings equated to a 26 percent right upper extremity impairment rating. (CE 1:7). Dr. Stoken converted this to a 16 percent impairment of the whole person. (CE 1:7). Dr. Stoken felt that Mr. Welch sustained an impairment to the whole person due to the clavicle injury, as "[t]he clavicle connects the arms to the body. It sits outside the shoulder joint." (CE 1:7). She further indicated that a distal clavicle excision is a procedure to remove the outer end of the clavicle to treat shoulder pain and disability due to arthritis or impingement. (CE 1:7). Dr. Stoken adopted the restrictions from the FCE. (CE 1:8-9).

On December 28, 2020, Dr. Davick wrote another letter to defendants' counsel. (JE 4:34). Dr. Davick reviewed Dr. Stoken's amended IME report. (JE 4:34). He noted that Mr. Welch had a FCE in November of 2020. (JE 4:34). Dr. Davick adopted the restrictions from the valid FCE as permanent restrictions. (JE 4:34). Dr. Davick again refused to alter his impairment rating. (JE 4:34). Dr. Davick noted that Dr. Stoken provided the same impairment rating as Dr. Davick for the distal clavicle excision. (JE

4:34). Dr. Davick noted that the difference in the ratings is due to differences found in range of motion and strength between the examinations. (JE 4:34). Finally, Dr. Davick concluded, “[h]is injury and need for surgery is truly a shoulder condition. In my opinion, addressing the AC joint in the form of a distal clavicle excision is still a shoulder or upper extremity rating.” (JE 4:34).

Mr. Welch had issues working in confined spaces due to his shoulder issue. (Testimony). He could not lift over his head to get into tanks. (Testimony).

When Mr. Welch left Seneca he made “around” twenty-eight and 00/100 dollars (\$28.00) per hour. (DE A). After leaving Seneca, Mr. Welch applied for, and was offered, several jobs. (DE A). He worked for a brief time at Absolute Repair. (DE A). At Absolute Repair, Mr. Welch worked as a diesel mechanic. (Testimony). He worked on over the road tractors and smaller diesel trucks. (Testimony). While at Absolute Repair, he obtained his CDL, which required a medical examiner certificate. (Testimony). He passed the medical examination for the CDL. (Testimony). While working at Absolute Repair, Mr. Welch worked overtime, and earned over one thousand and 00/100 dollars (\$1,000.00) in overtime pay during his brief time at Absolute. (Testimony). He had some difficulties with certain repair tasks due to the weight or location of certain items. (Testimony). He left that job because he felt that his shoulder was becoming irritated. (Testimony; DE A).

Mr. Welch got a job at Fed Ex Freight, where he worked at the time of the hearing. (DE A; Testimony). When he started at Fed Ex Freight, he passed a medical examination. (Testimony). He earns twenty-seven and 10/100 dollars (\$27.10) per hour. (DE A). Mr. Welch performs preventive maintenance on equipment, including tractors, trailers, and forklifts. (Testimony). At Fed Ex Freight, Mr. Welch is able to use special equipment for heavy lifting. (DE A; Testimony). He still did some heavy movement, including pushing and pulling; however, the tools help alleviate some of the strain on his body. (Testimony). Fed Ex Freight never asked Mr. Welch about his restrictions, nor did he inform them of the restrictions. (DE A; Testimony). He also never took Dr. Stoken’s IME report, or the FCE for Fed Ex Freight to review. (Testimony).

Mr. Welch opined that he could not repair construction equipment after his injury. (Testimony). He could work on personal automobiles provided there was not a requirement to complete his work in a timely manner. (Testimony).

In his free time, the claimant enjoyed target shooting on his property with various handguns and rifles. (Testimony). He also rode ATVs with his son. (Testimony). Since this incident, Mr. Welch built a house on his property. (Testimony). He testified that he performed some of the work on the house himself. (Testimony).

CONCLUSIONS OF LAW

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

Scheduled Member v. Industrial Disability

Under the Iowa Workers' Compensation Act, permanent partial disability is compensated either for a loss of use of a scheduled member under Iowa Code 85.34(2)(a)-(u) or for loss of earning capacity under Iowa Code 85.34(2)(v). The extent of scheduled member disability benefits to which an injured worker is entitled is determined by using the functional method. Functional disability is "limited to the loss of the physiological capacity of the body or body part." Mortimer v. Fruehauf Corp., 502 N.W.2d 12, 15 (Iowa 1993); Sherman v. Pella Corp., 576 N.W.2d 312 (Iowa 1998).

An injury to a scheduled member may, because of after effects or compensatory change, result in permanent impairment of the body as a whole. Such impairment may in turn be the basis for a rating of industrial disability. It is the anatomical situs of the permanent injury or impairment which determines whether the schedules in Iowa Code 85.34(a) – (u) are applied. Lauhoff Grain v. MacIntosh, 395 N.W.2d 834 (Iowa 1986); Blacksmith v. All-American, Inc., 290 N.W.2d 348 (Iowa 1980); Dailey v. Pooley Lumber Co., 233 Iowa 758, 10 N.W.2d 569 (1943); Soukup v. Shores Co., 222 Iowa 272, 268 N.W. 598 (1936).

In 2017, the legislature made significant changes to Iowa Code Chapter 85. Among these changes, the legislature included Iowa Code section 85.34(2)(n), making the "shoulder" a scheduled member. The main dispute regarding permanency in this case is whether the claimant's disability is to his "shoulder" under Iowa Code section 85.34(2)(n), or an unscheduled disability under Iowa Code Section 85.34(2)(v).

In September of 2020, the Commissioner filed two appeal decisions addressing the 2017 addition of Iowa Code section 85.34(2)(n). The first such case was Deng v. Farmland Foods, File No. 5061883 (App. September 29, 2020). The Commissioner held in Deng that Iowa Code 85.34(2)(n) was ambiguous as to the definition of the shoulder. The Commissioner examined the intent of the legislature and determined:

I recognize the well-established standard that workers' compensation statutes are to be liberally construed in favor of the worker, as their primary purposes is to benefit the worker. See Des Moines Area Reg'l Transit Auth. v. Young, 867 N.W.2d 839, 842 (Iowa 2015)(citations omitted); Xenia Rural Water Dist. v. Vegors, 786 N.W.2d 250, 257 (Iowa 2010)("We apply the workers' compensation statute broadly and liberally in keeping with its humanitarian objective. . . ."); Griffin Pipe Prods. Co. v. Guarino, 663 N.W.2d 862, 865 (Iowa 2003)("The primary purpose of chapter 85 is to benefit the worker and so we interpret this law liberally in favor of the employee."). This liberal construction, however, cannot be performed in a vacuum. As discussed above, several of the principles of statutory construction indicate the legislature did not intend to limit the definition of "shoulder" under section 85.34(2)(n) to the glenohumeral joint. For these reasons, I conclude "shoulder" under section 85.34(2)(n) is not limited to the glenohumeral joint.

Claimant's injury in this case was to the infraspinatus muscle. As discussed, the infraspinatus is part of the rotator cuff, and the rotator cuff's main function is to stabilize the ball-and-socket joint. As noted by both Dr.

Bansal and Dr. Bolda, the rotator cuff is generally proximal to the joint. However, because the rotator cuff is essential to the function of the glenohumeral joint, it seems arbitrary to exclude it from the definition of “shoulder” under section 85.34(2)(n) simply because it “originates on the scapula, which is proximal to the glenohumeral joint for the most part.” (Def. Ex. A, [Depo. Tr., 27]). In other words, being proximal to the joint should not render the muscle automatically distinct.

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

Deng at 10-11.

A second case, Chavez v. MS Technology, LLC, File No. 5066270 (App. September 30, 2020), applied the logic of Deng to another shoulder case. The Commissioner affirmed his holding in Deng, and further noted:

[C]laimant’s subacromial decompression was performed to remove scar tissue and fraying between the supraspinatus and the underside of the acromion. As discussed above, the acromion forms part of the socket and helps protect the glenoid cavity, and as such, I found it is closely interconnected with the glenohumeral joint in both location and function. And as discussed in Deng, I found the supraspinatus – a muscle that forms the rotator cuff – to be similarly entwined with the glenohumeral joint. Thus, claimant’s subacromial decompression impacted two anatomical parts that are essential to the functioning of the glenohumeral joint; in fact, the procedure was actually performed to improve function of the joint. As such, I find any disability resulting from her subacromial decompression should be compensated as a shoulder under section 85.34(2)(n).

I therefore find none of claimant’s injuries are compensable as unscheduled, whole body injuries under section 85.34(2)(v). The deputy commissioner’s finding that claimant sustained an injury to her body as a whole is therefore respectfully reversed.

Chavez at 6. In Chavez, the claimant suffered injuries to her supraspinatus, infraspinatus, and subscapularis muscles. Id. at 3. She also suffered a tear to the biceps tendon and labrum, as discovered during an arthroscopic surgery. Id. She had a surgical repair of her rotator cuff, along with “extensive debridement of the labrum, biceps tendon, and subacromial space with biceps tenotomy, subacromial decompression.” Id.

As noted in other cases, post Deng and Chavez, the key holdings of those cases include:

1. The definition of a “shoulder” is ambiguous in Section 85.34(2)(n). Deng at 4.
2. There is no “ordinary” meaning of the word shoulder. Deng at 5.
3. The appropriate way to interpret the statute is to examine the legislative history. Deng at 5.
4. The legislature did not intend to limit the definition of a “shoulder” to the glenohumeral joint. Rather, the legislature intended to include the entwinement of the glenohumeral joint and the muscles that make up the rotator cuff. Deng at 11.

See e.g. Retterath v. John Deere Waterloo Works, File No. 5067003 (Arb. Dec. 22, 2020).

In this matter, Dr. Davick, the treating physician, diagnosed Mr. Welch with right shoulder impingement with acromioclavicular joint arthropathy. He confirmed these diagnoses after completing arthroscopic surgery to the claimant’s right shoulder. The surgery consisted of a subacromial decompression and a distal clavicle excision. In Chavez, the Commissioner ruled that any disability resulting from the subacromial decompression performed on Ms. Chavez resulted in an impairment to the shoulder, as the subacromial decompression was performed to improve the functioning of the glenohumeral joint. Clearly a subacromial decompression for right shoulder impingement with acromioclavicular joint arthropathy is related to the shoulder as these issues are entwined with the glenohumeral joint.

The question becomes whether the distal clavicle excision relates to the shoulder, or causes the disability to relate to the body as a whole. Dr. Stoken and the claimant argue that the clavicle sits outside of the shoulder joint, and sits entirely in the trunk. However, Dr. Stoken opined that a distal clavicle excision is to treat shoulder pain and disability due to impingement. Dr. Stoken also included a diagram that shows the distal clavicle in proximity to the shoulder. Dr. Davick opined in his December 28, 2020, letter that the distal clavicle excision was required to address the acromioclavicular joint issues. Dr. Davick explicitly noted that Mr. Welch’s injury and the need for surgery were a shoulder condition. While an injury to the clavicle in proximity to where the clavicle attaches to the sternum is clearly not an injury to the shoulder, the distal clavicle is located near the acromion below which sits the glenoid cavity. See e.g. <https://www.Britannica.com/science/clavicle> (last viewed April 2, 2021). The clavicle is a curved anterior bone of the *shoulder girdle* that functions as a strut to support the *shoulder*. Id. (emphasis added). Strong ligaments hold the clavicle in place at either end, and the shaft gives attachment to the muscles of the shoulder girdle, and neck. Id. Distal is defined as “situated away from the point of attachment or origin or a central point especially of the body.” See e.g. <https://www.merriam-webster.com/dictionary/distal/?src=search-dict-hed> (last viewed April 2, 2021). Therefore, excising the distal end of the clavicle indicates that it is the portion of the clavicle situated away from the central point or trunk of the body. If it is located away from the body, it is the portion closest to the shoulder. Based upon the foregoing, I find

that a disability caused by the excision of the distal end of the clavicle relates to the shoulder.

Considering the foregoing, Mr. Welch's injuries constitute an injury to the shoulder. Iowa Code section 85.34(2)(n) provides that a loss of a shoulder shall be compensated based upon 400 weeks.

Extent of Permanent Disability

Where an injury is limited to a scheduled member, the loss is measured functionally, not industrially. Graves v. Eagle Iron Works, 331 N.W.2d 116 (Iowa 1983).

Iowa Courts have repeatedly stated that for those injuries limited to the schedules in Iowa Code 85.34(2)(a)-(u), this agency must only consider the functional loss of the particular scheduled member involved, and not the other factors which constitute an "industrial disability." Iowa Supreme Court decisions over the years have repeatedly cited favorably language in a 66-year old case, Soukup v. Shores Co., 222 Iowa 272, 277, 268 N.W. 598, 601 (1936), which states:

The legislature has definitely fixed the amount of compensation that shall be paid for specific injuries ... and that, regardless of the education or qualifications or nature of the particular individual, or of his inability ... to engage in employment ... the compensation payable ... is limited to the amount therein fixed.

Our court has even specifically upheld the constitutionality of the scheduled member compensation scheme. Gilleland v. Armstrong Rubber Co., 524 N.W.2d 404 (Iowa 1994). Permanent partial disabilities are classified as either scheduled or unscheduled. A specific scheduled disability is evaluated by the functional method; the industrial method is used to evaluate an unscheduled disability. Graves, 331 N.W.2d 116; Simbro v. DeLong's Sportswear, 332 N.W.2d 886, 887 (Iowa 1983); Martin v. Skelly Oil Co., 252 Iowa 128, 133, 106 N.W.2d 95, 98 (1960).

When the result of an injury is loss to a scheduled member, the compensation payable is limited to that set forth in the appropriate subdivision of Iowa Code 85.34(2). Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961). "Loss of use of a member is equivalent to "loss" of the member. Moses v. National Union C.M. Co., 194 Iowa 819, 184 N.W. 746 (1921). Pursuant to Iowa Code 85.34(2)(w), the workers' compensation commissioner may equitably prorate compensation payable in those cases wherein the loss is something less than that provided for in the schedule. Blizek v. Eagle Signal Co., 164 N.W.2d 84 (Iowa 1969).

Because the injury is to a scheduled member, claimant is not entitled to an evaluation of disability based upon loss of earning capacity. Only the functional loss can be awarded.

The commissioner, as the trier of fact, must "weigh the evidence and measure the credibility of witnesses." Id. The trier of fact may accept or reject expert testimony, even if uncontroverted, in whole or in part. Frye, 569 N.W.2d at 156. When considering the weight of an expert opinion, the fact-finder may consider whether the examination

occurred shortly after the claimant was injured, the compensation arrangement, the nature and extent of the examination, the expert's education, experience, training, and practice, and "all other factors which bear upon the weight and value" of the opinion. Rockwell Graphic Sys., Inc. v. Prince, 366 N.W.2d 187, 192 (Iowa 1985). Unrebutted expert medical testimony cannot be summarily rejected. Poula v. Siouxland Wall & Ceiling, Inc., 516 N.W.2d 910 (Iowa App. 1994).

In this matter, there are conflicting impairment ratings. Dr. Davick assigned Mr. Welch an 11 percent impairment to the upper extremity. Dr. Stoken assigned Mr. Welch a 26 percent impairment to the upper extremity. Dr. Davick was Mr. Welch's treating physician. He performed the arthroscopic surgery to Mr. Welch's right shoulder. Dr. Davick last examined Mr. Welch in January of 2019, when he issued his impairment rating. The claimant retained Dr. Stoken to provide an IME in January of 2020. She initially issued a report in January, and then issued an addendum in December of 2020. In this case, Dr. Davick, performed strength and range of motion testing. He indicated that the difference between his rating and Dr. Stoken's rating was due to differences in measurements of strength and range of motion.

Initially, Dr. Davick recommended no restrictions. This was because Mr. Welch continued working on a full time basis. However, after reviewing the valid FCE, Dr. Davick agreed that the restrictions presented by the FCE should be adopted.

In this case, I find the opinions of Dr. Davick to be more persuasive. Dr. Davick performed Mr. Welch's surgery, and followed his course of treatment through Mr. Welch achieving MMI in January of 2019. The fact that Mr. Welch never presented his restrictions or recommendations of Dr. Stoken to his subsequent employers harmed Mr. Welch's claim that Dr. Stoken's opinions should control.

Therefore, I find that Mr. Welch suffered an 11 percent impairment to the right shoulder. This represents 44 weeks (11 percent x 400 weeks = 44 weeks) commencing on January 9, 2019.

Gross Earnings and Compensation Rate

The parties dispute the claimant's gross earnings, and thus the resulting compensation rate. The claimant contends that the gross earnings equal one thousand one hundred seventy-five and 87/100 dollars (\$1,175.87) with a resulting compensation rate of six hundred seventy-seven and 63/100 dollars (\$677.63). The defendants dispute this, and contend that the claimant received a one hundred eighty-five and 00/100 dollars (\$185.00) payment for health insurance premiums, and a twenty-five and 00/100 dollars (\$25.00) payment for his birthday, that should not be considered. The defendants contend that the claimant's gross earnings were nine hundred eighty-eight and 94/100 dollars (\$988.94) per week, with a resulting rate of five hundred eighty-five and 76/100 dollars (\$585.76) per week.

Iowa Code section 85.36 states "[t]he basis of compensation shall be the weekly earnings of the injured employee at the time of the injury." Weekly earnings are defined as the gross salary, wages, or earnings of an employee had the employee worked the customary hours for the full pay period in which the employee was injured as the employer regularly required for work of employment. Id. The subsections of Iowa Code

85.36 set forth methods for computing weekly earnings depending upon the type of earnings and employment. If the employee is paid on a weekly pay period basis, the weekly gross earnings are the basis of compensation. Iowa Code section 85.36(1). If the employee is paid on a biweekly basis, the weekly earnings are one-half of the biweekly gross earnings. Iowa Code section 85.36(2).

If an employee is paid on a daily, or hourly basis, or based upon output, weekly earnings are computed by dividing by thirteen (13) the earnings over the thirteen (13) week period immediately preceding the injury. However, any week that does not fairly reflect the employee's customary earnings shall be replaced by the closest previous week that is a fair representation of the employee's customary earnings. Iowa Code 85.36(6). The calculation shall include shift differential pay, but not overtime or premium pay in the calendar weeks immediately preceding the injury. Id. If the employee was absent during the time period subject to calculation for personal reasons, the weekly earnings are the amount the employee would have earned had the employee worked when work was available to other employees in a similar occupation for the employer. Id.

Gross earnings are defined as:

[R]ecurring payments by the employer to the employee for employment, before any authorized or lawfully required deduction or withholding of funds by the employer, excluding irregular bonuses, retroactive pay, overtime, penalty pay, reimbursement of expenses, expense allowances, and the employer's contribution for welfare benefits.

Iowa Code section 85.61(3). "Welfare benefits" can include "something extra given to an employee for their well-being." Evenson v. Winnebago Industries, Inc., 881 N.W.2d 360, 368 (Iowa 2016). In Evenson, the court indicated that an employer's matching contribution to an employee's 401k plan is a welfare benefit under the statute. Id. The court further noted that "[t]he statute contemplates that there may be welfare benefits given to employees that are separate and distinct from their normal weekly earnings." Id.

Regarding his pay, Mr. Welch testified that one hundred eighty-five and 00/100 dollars (\$185.00) of every check was applied to his health insurance premium. If he did not apply it to his health insurance premium, this amount would be added to his weekly paycheck. He also received a twenty-five and 00/100 dollar (\$25.00) birthday allowance once per year, which was to be used to purchase donuts for the shop at Seneca.

The health insurance premium allowance is a welfare benefit, as it was given to Mr. Welch, and was separate and distinct from his normal weekly earnings. The premium allowance was provided to Mr. Welch for his well-being. Therefore, it should not be included in his gross earnings, or weekly compensation rate.

Iowa Code section 85.61(3) allows for inclusion of regular bonuses in the calculation of gross earnings. Some factors considered by this body in determining whether a bonus is regular is whether the bonus payment is subject to a condition precedent, varied in amount, and fixed in terms of entitlement or amount. Noel v. Rolscreen Co., 475 N.W.2d 666 (Iowa Ct. App. 1991). In this case, the birthday

payment occurred for a claimant celebrating his birthday. It was fixed at twenty-five and 00/100 dollars (\$25.00), and was not subject to a condition precedent. Therefore, I find that the birthday payment was a regular bonus, and should be included in the claimant's gross earnings.

Considering the foregoing, I find that the claimant's gross earnings are twelve thousand eight hundred thirty-one and 25/100 dollars (\$12,831.25) for the thirteen weeks preceding the work injury. Twelve thousand eight hundred thirty-one and 25/100 dollars divided by 13 equals nine hundred eighty-seven and 02/100 dollars (\$987.02) per week in gross earnings. Considering the claimant is single and qualifies for one exemption, the weekly compensation rate is five hundred eighty-four and 78/100 dollars (\$584.78).

Payment of Medical Expenses

The employer shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance, and hospital services and supplies for all conditions compensable under the workers' compensation law. The employer shall also allow reasonable and necessary transportation expenses incurred for those services. The employer has the right to choose the provider of care, except where the employer has denied liability for the injury. Iowa Code 85.27. Holbert v. Townsend Engineering Co., Thirty-second Biennial Report of the Industrial Commissioner 78 (Review-Reopening, October 1975).

Pursuant to Iowa Code 85.27, claimant is entitled to payment of reasonable medical expenses incurred for treatment of a work injury. Claimant is entitled to an order of reimbursement if he/she has paid those expenses. Otherwise, claimant is entitled only to an order directing the responsible defendants to make such payments directly to the provider. See Krohn v. State, 420 N.W.2d 463 (Iowa 1988).

In cases where the employer's medical plan covers the medical expenses, claimant is entitled to an order of reimbursement only if he has paid treatment costs; otherwise, the defendants are ordered to make payments directly to the provider. See Krohn, 420 N.W.2d at 463. Where medical payments are made from a plan to which the employer did not contribute, the claimant is entitled to a direct payment. Midwest Ambulance Service v. Ruud, 754 N.W.2d 860, 867-68 (Iowa 2008) ("We therefore hold that the commissioner did not err in ordering direct payment to the claimant for past medical expenses paid through insurance coverage obtained by the claimant independent of any employer contribution."). See also Carl A. Nelson & Co. v. Sloan, 873 N.W.2d 552 (Iowa App. 2015)(Table) 2015 WL 7574232 15-0323.

The employee has the burden of proof to show medical charges are reasonable and necessary, and must produce evidence to that effect. Poindexter v. Grant's Carpet Service, 1 Iowa Industrial Commissioner Decisions, No. 1, at 195 (1984); McClellan v. Iowa S. Util., 91-92, IAWC, 266-272 (App. 1992).

The employee has the burden of proof in showing that treatment is related to the injury. Auxier v. Woodard State Hospital School, 266 N.W.2d 139 (Iowa 1978), Watson v. Hanes Border Company, No. 1 Industrial Comm'r report 356, 358 (1980) (claimant failed to prove medical charges were related to the injury where medical records

contained nothing related to that injury) See also Bass v Vieth Construction Corp., File No 5044430 (App. May 27, 2016)(Claimant failed to prove causal connection between injury and claimed medical expenses); Becirevic v Trinity Health, File No. 5063498 (Arb. December 28, 2018) (Claimant failed to recover on unsupported medical bills).

Iowa Code section 85.27(4) provides that the employee may choose their own care at the employer's expense in an emergency, if the employer's agent cannot be immediately reached. However, the duty of an employer to furnish reasonable medical care supports all claims for care by an employee that are reasonable under the totality of the circumstances, "even when the employee obtains unauthorized care." Bell Bros. Heating and Air Conditioning v. Gwinn, 779 N.W.2d 193, 206 (Iowa 2010). The employee must still prove by a preponderance of the evidence that unauthorized care was reasonable and beneficial. Id. The Court in Bell Bros. concluded that unauthorized medical care is beneficial if it provides a "more favorable medical outcome than would likely have been achieved by the care authorized by the employer." Id.

In this case, the claimant requests reimbursement for medical care provided at Mercy Clinics. The records provided indicate that the claimant had physical therapy at the times requested. The claimant requests reimbursement for three hundred eighty-five and 22/100 dollars (\$385.22). Based upon the medical records in evidence, the unauthorized care was reasonable and beneficial. Therefore, the defendants are ordered to reimburse the claimant three hundred eighty-five and 22/100 dollars (\$385.22) for medical expenses.

Costs

Claimant seeks the award of costs for the filing fee, as well as those outlined in Claimant's Exhibit 1. Costs are to be assessed at the discretion of the deputy commissioner hearing the case. See 876 Iowa Administrative Code 4.33; Iowa Code 86.40. 876 Iowa Administrative Code 4.33(6) provides:

[c]osts taxed by the workers' compensation commissioner or a deputy commissioner shall be (1) attendance of a certified shorthand reporter or presence of mechanical means at hearings and evidential depositions, (2) transcription costs when appropriate, (3) costs of service of the original notice and subpoenas, (4) witness fees and expenses as provided by Iowa Code sections 622.69 and 622.72, (5) the costs of doctors' and practitioners' deposition testimony, provided that said costs do not exceed the amounts provided by Iowa Code sections 622.69 and 622.72, (6) the reasonable costs of obtaining no more than two doctors' or practitioners' reports, (7) filing fees when appropriate, including convenience fees incurred by using the WCES payment gateway, and (8) costs of persons reviewing health service disputes.

Pursuant to the holding in Des Moines Area Regional Transit v. Young, 867 N.W.2d 839 (Iowa 2015), only the report of an IME physician, and not the examination itself, can be taxed as a cost according to 876 IAC 4.33(6). The Iowa Supreme Court reasoned, "a physician's report becomes a cost incurred in a hearing because it is used as evidence in lieu of the doctor's testimony," while "[t]he underlying medical expenses associated with the examination do not become costs of a report needed for a hearing,

just as they do not become costs of the testimony or deposition.” Id. (noting additionally that “[i]n the context of the assessment of costs, the expenses of the underlying medical treatment and examination are not part of the costs of the report or deposition”). The commissioner has found this rationale applicable to expenses incurred by vocational experts. See Kirkendall v. Cargill Meat Solutions Corp., File No. 5055494 (App., December 17, 2018); Voshell v. Compass Group, USA, Inc., File No. 5056587 (App., September 27, 2019).

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

ORDER

THEREFORE, IT IS ORDERED:

That the defendants are to pay unto claimant forty-four (44) weeks of permanent partial disability benefits at the rate of five hundred eighty-four and 78/100 dollars (\$584.78) per week from the commencement date of January 9, 2019.

That the claimant’s gross earnings are nine hundred eighty-seven and 02/100 dollars (\$987.02) per week.

That the defendants shall reimburse the claimant three hundred eighty-five and 22/100 dollars (\$385.22) for outstanding medical bill payments.


That the defendants are entitled to a credit as stipulated.

That the parties shall bear their own costs.

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).

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

Signed and filed this 11th day of June, 2021.


ANDREW M. PHILLIPS
DEPUTY WORKERS’
COMPENSATION COMMISSIONER

The parties have been served, as follows:

John Dougherty (via WCES)

Rene Lapierre (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.