BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

MARY FOX, Claimant, vs. NPC INTERNATIONAL, INC., d/b/a PIZZA HUT, Employer, and OLD REPUBLIC INSURANCE COMPANY, Insurance Carrier, Defendants.	File Nos. 5063378, 5068744 ARBITRATION DECISION Head Note Nos.: 1402.40, 1702, 1803.1, 2907

STATEMENT OF THE CASE

Mary Fox, claimant, filed a petition in arbitration seeking workers' compensation benefits from NPC International, Inc. d/b/a Pizza Hut, employer and Old Republic Insurance Company, insurance carrier as defendants. Hearing was held on October 20, 2020. This case was scheduled to be an in-person hearing. However, due to the outbreak of a pandemic in Iowa, the Iowa Workers' Compensation Commissioner ordered all hearings to occur via video means, using CourtCall. Accordingly, this case proceeded to a live video hearing via CourtCall with all parties and the court report appearing remotely.

The parties filed a hearing report for each date of injury at the commencement of the arbitration hearing. On the hearing reports, 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.

Mary Fox was the only witness to testify live at trial. The evidentiary record also includes joint exhibits JE1-JE11, claimant's exhibits 1-9, and defendant's exhibits A-F. All exhibits were received without objection. It should be noted that a clerical error was discovered after the hearing. Claimant's exhibit 9 was inadvertently left out of the set of claimant's exhibits. The undersigned contacted the parties and claimant's exhibit 9 was submitted. Defendants stated they had no objection to correcting this apparent clerical error.

ISSUES

File Number 5063378 (DOI: May 19, 2016):

The parties submitted the following issues for resolution:

1. The extent of industrial disability claimant sustained as the result of the stipulated May 19, 2016 work injury.
2. Whether claimant is entitled to reimbursement for the independent medical evaluation (IME) pursuant to Iowa Code section 85.39.
3. Assessment of costs.

File Number 5068744 (DOI: January 4, 2018):

The parties submitted the following issues for resolution:

1. The nature and extent of permanent disability claimant sustained as the result of the stipulated January 4, 2018 work injury.
2. Whether claimant is entitled to reimbursement for the independent medical evaluation (IME) pursuant to Iowa Code section 85.39.
3. Assessment of costs.

FINDINGS OF FACT

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

Claimant, Mary Fox, has filed two petitions. The parties stipulate that Ms. Fox sustained a work injury on May 19, 2016. There is a dispute regarding the extent of industrial disability she sustained as the result of the injury. Ms. Fox has alleged that she sustained injury to her right shoulder, left arm/elbow, headaches, dizziness, and memory problems as the result of the May 19, 2016 injury. The defendants, Pizza Hut, employer and Old Republic Insurance Company, insurance carrier (hereinafter "Pizza Hut"). Ms. Fox also sustained a work injury on January 4, 2018. She sustained an injury involving her right shoulder. The primary dispute is whether the injury should be compensated as a "shoulder" under the "new" law or as a body as a whole injury.

At the time of the hearing, Ms. Fox was 68 years old. She graduated from high school and also earned an associate degree from University of Phoenix online. During the 1970s, Ms. Fox worked sewing coats. She also has experience working as a secretary. From 2009 to 2013, Ms. Fox worked at General Electric and Great America as a cash research specialist, verifying customer payments. Both employers terminated her for performance-related reasons. Ms. Fox considered herself retired at this point and she began to draw Social Security retirement benefits. She testified that she considered her part-time job at Pizza Hut to be more play. (Testimony)

Ms. Fox began working for Pizza Hut in December of 2014. She enjoys working in restaurants because it allows her to meet and work with people. She was hired as a waitress/server in a Cedar Rapids Pizza Hut which had a dining room. She was paid on an hourly basis, plus tips. She has worked at several different Pizza Hut locations. In addition to working in the server position, Ms. Fox also worked in a food prep position. She advanced to a shift manger role which included partial pay for her health insurance. As a shift manager, her duties increased to include ordering, scheduling, supervising, and general needs at the restaurant, but her duties did not include hiring and firing or performance review responsibilities. She received an increase in pay. Since the pandemic began, Ms. Fox's hours have increased because some of her co-workers left the workforce. (Testimony)

On May 19, 2016, Ms. Fox was working as a server at Pizza Hut. She was carrying a tray of dishes to the kitchen after clearing a table. Ms. Fox tripped on a rug and fell face-first into the tray of glasses and onto the ground. She lost consciousness for a time. During the fall, Ms. Fox attempted to grab a chair with her right arm, but missed. She hit her head directly on the glasses that were on the tray. She testified that she injured her head, face, left elbow, and right shoulder. She had a laceration on her forehead and two black eyes. Ms. Fox is left-hand dominant. (Testimony)

Ms. Fox sought treatment at Mercy Medical Center that same day. She tripped and fell while at Pizza Hut. She reported a loss of consciousness for a few seconds. She sustained a facial laceration and a nosebleed. Ms. Fox reported some left elbow pain. Peter Peraud, M.D., sutured the laceration on her face. X-rays of the left elbow revealed nondisplaced radial head fracture; she was placed in a sling. (JE2, p. 58)

On June 9, 2016, Ms. Fox sought treatment with David S. Tearse, M.D. His impression was left elbow mildly displaced radial head fracture. He recommended a physical therapy program to improve her motion and pain. Ms. Fox was also instructed to ice for swelling. She was restricted to light use of the left arm, with a 2-pound weight restriction and no forceful pushing or pulling. (JE3, p. 66)

On June 28, 2016, Ms. Fox saw Richard Louvar, D.O., a family medicine practitioner. Ms. Fox reported that since her fall at work, she has had frontal headaches and difficulty with dizziness when she tries to walk, she feels unsteady. Dr. Louvar diagnosed Ms. Fox with concussion, dizziness, and frontal headaches. (JE4, p. 72)

Ms. Fox followed-up with Dr. Tearse on July 28, 2016. Her left elbow continued to be painful and had some catching. She also reported pain and stiffness in her right shoulder. Both her elbow and her shoulder get sore when pulling pizza dough off the rack at work. Ms. Fox is not able to lift cheese boxes, which weight approximately 25 pounds. Dr. Tearse recommended an MRI. Ms. Fox was to continue with Tylenol and ice. She was kept off of work. (JE3, p. 67)

On August 25, 2016, Ms. Fox returned to Dr. Tearse. For the left elbow he recommended she see Peter Pardubsky, M.D., to determine if there is anything further that should be considered for the radial head fracture. With regard to her right shoulder, Dr. Pardubsky recommended a course of physical therapy. If that was not successful, then he recommended a corticosteroid injection and perhaps an MRI to evaluate for a significant rotator cuff injury. Ms. Fox was to return in three weeks. She was kept off of work. (JE3, p. 68)

Ms. Fox returned to Dr. Tearse on September 29, 2016 and received a corticosteroid injection into the subacromial space of her right shoulder. She was restricted to driving to deliver fliers and coupons only. (JE3, pp. 68-69).

On October 3, 2016, Ms. Fox returned to see Dr. Pardubsky. She presented with the nurse case manager for evaluation of left elbow symptoms. Despite conservative treatment, her left elbow pain persisted. Dr. Pardubsky examined Ms. Fox and reviewed her MRI. He felt she might benefit from intra-articular corticosteroid injection or elbow arthroscopy, but surgery may be deferred pending upcoming knee arthroplasty (unrelated to work) and further evaluation of neck and shoulder pain. The plan was for Ms. Fox to return in two months to assess her progress with conservative management and adapted use of her left arm. In the meantime, she was to continue her current use of her left arm as comfort allows and allow treatment of her knee arthritis with upcoming knee arthroplasty. (JE1, pp. 17-20)

Ms. Fox returned to Dr. Tearse on October 13, 2016. The corticosteroid injection helped her shoulder for a few days. She still had soreness after therapy. Due to her persistent right shoulder symptoms, Dr. Tearse recommended an MR/arthrogram to evaluate her rotator cuff. He recommended she hold off on physical therapy and focus on her home exercise program. In the meantime, Ms. Fox was allowed to drive to deliver fliers and coupons, answer telephones, and fill sauce cups. (JE3, p. 69)

The MRI arthrogram of the right shoulder took place on October 31, 2016. The MRI revealed a retracted insertional tear involving the entire supraspinatus tendon extending only mildly into the superior infraspinatus tendon insertion. There also appeared to be more mild partial thickness articular sided tearing of the majority of the long head biceps tendon, which is either due to a complete tear from its origin with scarring in the distal bicipital groove, or to tenodesis changes. (JE6, pp. 87-88)

Dr. Tearse reviewed the MRI findings and felt they were consistent with her clinical presentation. He recommended right shoulder rotator cuff repair. However, Ms. Fox needed to wait to have the operation until she was off ambulatory aides, following her total knee arthroplasty. (JE3, p. 70)

On December 5, 2016, Ms. Fox returned to Dr. Pardubsky. She did not want to consider any further intervention for her left elbow. She still had medial sided pain, but her motion was improving. He noted that she had not yet resumed full duty capacity due to ongoing right shoulder complaints. Dr. Pardubsky released Ms. Fox to full duty

for use of her left arm; however, her return to full duty work may be limited by her current right shoulder. He felt she could safely use her left arm without limitations. (JE1, pp. 24-26)

On January 19, 2017, Ms. Fox saw Dr. Pardubsky for recent cramping involving the ulnar aspect of her left hand with diffuse numbness throughout the hand. She was assessed with closed fracture of head of the left radius, healed. The doctor felt that the new left arm symptoms suggested possible ulnar neuropathy at the elbow and median neuropathy at the wrist. Dr. Pardubsky recommended that Ms. Fox continue to use her left arm as comfort allowed pending electro diagnostic studies. Given the magnitude of her injury and blow to her left arm, the doctor felt Ms. Fox may have a component of ulnar nerve entrapment as the result of scarring at the elbow or median nerve entrapment at the wrist for a similar reason. Due to her closed head injury, Dr. Pardubsky wanted to be certain her symptoms were not related to either central nervous system or cervical spine injury. He felt the electro diagnostic studies would help to determine etiology of her symptoms. Ms. Fox was to follow-up after the testing was complete. (JE1, pp. 28-29)

On January 23, 2017, Matthew J. Bollier, M.D., evaluated Ms. Fox's right shoulder. Dr. Bollier reviewed the imaging and noted a right shoulder rotator cuff tear, AC joint arthropathy and biceps tendonitis. Dr. Bollier felt the imaging showed a more recent injury and it was "more likely than not that the work incident was a significant factor" in this injury. (JE7, p. 94) Ms. Fox opted to undergo surgery. (JE7, pp. 91-95)

Ms. Fox returned to Dr. Pardubsky on February 2, 2017 to discuss the findings of the testing. The January 25, 2017 EMG revealed ulnar nerve conduction delay at elbow and moderate left carpal tunnel syndrome by sensory latency delay at her wrist. Dr. Pardubsky's assessment included closed fracture of head of left radius, healed, left carpal tunnel syndrome, cubital tunnel syndrome of the left arm. Dr. Pardubsky stated that Ms. Fox may continue to use her left arm as comfort allows pending surgical intervention for her left CTS and ulnar neuropathy at the elbow. Ms. Fox anticipated upcoming right shoulder surgery in early March. Dr. Pardubsky deferred left arm surgery until her right arm had recovered adequately to perform activities of daily living with limited left arm use after surgery. Dr. Pardubsky opined that it was reasonable to attribute her current onset of nerve compression to aggravation by her work injury. He stated that certainly the valgus about the forearm can contribute to median nerve compression at the wrist. Dr. Pardubsky recommended that Ms. Fox continue her current use of her left arm in a full duty capacity pending left surgical intervention in the form of carpal tunnel release and ulnar neurolysis at the elbow. (JE1, pp. 30-32)

On March 1, 2017, Dr. Bollier performed right rotator cuff repair, biceps tenotomy, distal clavicle excision, debridement, and decompression. (JE1, pp. 96-100)

On March 20, 2017, Ms. Fox saw Nicholas O. Bingham, M.D. She reported her fall at work and her continued headaches and vertigo. He felt her symptoms seemed to be true vertigo and a sensation of motion. She reported that her memory is not what it

used to be since the work accident. Dr. Bingham stated that the dizziness with changes in head position was consistent with benign positional vertigo. He diagnosed her with closed head injury with concussion. He referred her for a neurological consultation. (JE2, pp. 62-63)

On April 3, 2017, Ms. Fox saw Jill N. Miller, ARNP-DNP, for evaluation of vertigo and headaches. Marty reported that she noticed vertigo and dizziness right after the fall. She also noticed the headaches right after the fall. The notes indicate that prior to the injury, Ms. Fox did not have dizziness or headaches. ARNP Miller prescribed Amitriptyline and vestibular therapy. She also recommended an MRI. (JE1, pp. 33-37)

Ms. Fox returned to see Dr. Bollier on April 10, 2017. Overall, she was doing well and her pain had improved. She was instructed to begin therapy. She underwent vestibular therapy, but she did not find it to be helpful. Her dizziness persisted through the time of the hearing. (JE1, pp. 101-103; Testimony)

Robert J. Struthers, M.D., saw Ms. Fox on May 17, 2017 for follow-up of her post traumatic headaches and dizziness form her work accident. Ms. Fox still feels off balance at times. Her pain is bifrontal and spreads to entire head. The assessment was headache, post-concussion syndrome, vertigo, possibly migrainous. Dr. Struthers recommended she stop Depakote, start Topamax, keep track of headaches, and if her nighttime headaches persist the doctor recommended a sleep study. In July, Dr. Struthers changed Ms. Fox's medication. (JE1, pp. 38-47)

On July 26, 2017, Dr. Bollier saw Ms. Fox again. On May 13, 2017, she sustained a fall while shopping at Menards. She slipped and fell posteriorly, reaching out to catch herself with her left arm outstretched. She denied any obvious bruising, deformities or significant increased swelling. She is nearly 5 months post-right shoulder surgery. Her pain has improved significantly since she began taking meloxicam daily. She reports intermittent tingling of her right hand. The plan was for her to continue with physical therapy for strengthening and to continue taking meloxicam for pain relief. (JE7, pp. 104-105)

Ms. Fox saw Robert J. Struthers, M.D., for a neuro recheck on July 10, 2017. She reported daily headaches and she feels dizzy when her headaches are a problem. Dr. Struthers' assessment included: headache, postconcussion syndrome, vertigo possibly migrainous, cervicalgia, and occipital neuralgia. (JE1, pp. 45-47)

Ms. Fox returned to Dr. Pardubsky on August 19, 2017. Ms. Fox was concerned about ongoing cramping involving the ulnar aspect of her left hand with diffuse numbness throughout the left hand. Ms. Fox indicated she was ready to proceed with surgical intervention for left carpal tunnel syndrome and cubital tunnel syndrome of the left arm. Dr. Pardubsky opined that given the severity of her trauma from the work fall, it is reasonable to attribute her current onset of nerve compression to aggravation by the work injury. (JE1, pp. 41-44)

Dr. Pardubsky performed surgery on Ms. Fox's left arm on August 22, 2017. He performed a left arm ulnar neurolysis at elbow and carpal tunnel release with median nerve block at the wrist. (JE2, pp. 64-65)

When Ms. Fox returned to see Dr. Bollier on September 8, 2017, she reported doing well overall and much better than she was prior to surgery. She still has dull anterior shoulder pain that increases with movement of her arm. She also has some pins and needles sensations that run along the ulnar aspect of the forearm to the long, ring, and small fingers. Dr. Bollier anticipated that her soreness with activity would continue to reduce over time. He felt she was at maximum medical improvement (MMI). Pursuant to the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, he assigned her 21 percent permanent partial impairment of the upper extremity. Dr. Bollier recommended over the counter NSAIDS as needed for pain relief. Dr. Bollier also recommended long-term home exercise program to maintain her shoulder. She did not have any activity restrictions for her right shoulder and was to follow-up as needed. (JE7, pp. 107-108)

Ms. Fox returned to Dr. Struthers again on October 16, 2017. She was still having problems with dizziness and neck pain. TENS unit has helped her neck pain, but not the headaches. Gabapentin has not provided benefit. Depakote caused weight gain, Topamax made her feel stupid. The assessment was headache, postconcussion syndrome, vertigo, cervicalgia, and occipital neuralgia. Ms. Fox was functioning reasonably well. Dr. Struthers recommended consideration of a sleep study. Dr. Struthers felt there was not much else to offer Ms. Fox for headaches. Ms. Fox was placed at MMI and was to follow-up as needed. (JE1, pp. 48-50)

Ms. Fox returned to Dr. Bollier on November 13, 2017, for an evaluation of increased right shoulder pain and numbness and tingling. Her pain increased during the first few weeks after she returned to work without restrictions. She has a stabbing right shoulder pain accompanied by pins and needles pain that radiates to the right side of the neck and down to the elbow. Pain is most significant with lifting above shoulder height. She takes meloxicam daily for pain relief and requests a refill. She has been working without restrictions, but notes that she is most painful when using her arm above shoulder height at work. Dr. Bollier's diagnoses included right shoulder pain and chronic right shoulder pain. He felt she was still at MMI. He noted Ms. Fox had permanent restrictions for her right shoulder of no lifting greater than 5 pounds above chest height with the right arm. He noted that she must be allowed to use a TENS unit as needed. Dr. Bollier refilled her meloxicam. (JE7, pp. 109-111)

On December 4, 2017, Ms. Fox returned to Dr. Pardubsky. Ms. Fox reported ongoing numbness, shaking of her hand after heavy use, and mild medial sided elbow pain. A discussion was held regarding nerve healing and postoperative expectations. She was given work restrictions. Ms. Fox was encouraged to continue using her left arm to increase her endurance. She was to return in 3 months to assess her progress; he hoped to have her resume to full work duty at that time. MMI was anticipated to be one year after surgery. (JE1, p. 52)

Ms. Fox sustained a second work injury on January 4, 2018. She was working at Pizza Hut and reaching for product at work from the top shelf when the box fell onto her left shoulder. She attempted to catch the falling box with her dominant hand, her left hand. Ms. Fox felt pain from the injury on the front of her left shoulder where the seams meet on a shirt, to the back of her shoulder along the shoulder blade, and extending to the back of her body on the left side. It is estimated that the box weighed 10 pounds. (Testimony: JE7, p. 112)

At the request of the defendants, Ms. Fox was evaluated by Kenneth McMains, M.D., on January 22, 2018. He noted that although she had numerous injuries from her fall and appeared to have had an excellent outcome. He felt she had essentially fully recovered, except for some residual symptoms of headaches and intermittent vertigo. Dr. McMains found no permanent impairment or restrictions for Ms. Fox's head, shoulder, elbow, or wrist. (Def. Ex, A, pp. 1-4) Because the opinions of Dr. McMains are not consistent with the other physicians in this case or the record as a whole, I do not find them to be persuasive.

Ms. Fox was sent to St. Luke's Work Well Clinic for treatment on February 8, 2018. She reported left shoulder pain. She was at work, reaching the top shelf for a box of lettuce, when the box fell onto her shoulder and when she tried to grab the box, it pulled her shoulder. Since then Ms. Fox has had quite a bit of pain and decreased range of motion. She was assessed with left shoulder pain with possible internal derangement. Dr. Pospisil restricted her to no reaching overhead with her left arm. An MRI was ordered. (JE9, p. 148)

On February 28, 2018, Ms. Fox returned to Dr. Pospisil to review the findings from the February 26, 2018 MRI. The findings showed a large full-thickness tear of the superior rotator cuff which appears to involve the entire supraspinatus tendon and nearly the entire subscapularis tendon. He also noted AC joint degeneration. The MRI correlates with her symptoms. Dr. Pospisil's assessment was left rotator cuff tear. Ms. Fox was referred to an orthopedist. Ms. Fox requested to see Dr. Bollier at the University of Iowa Hospitals and Clinics (UIHC) because he performed surgery on her right shoulder. In the meantime, she was given restrictions. (JE9, p. 149)

On March 22, 2018, Dr. Bollier evaluated Ms. Fox for left shoulder pain. She reported aching and stabbing 9 out of 10 pain. She described her pain deep in the joint. The pain wakes her at night. The pain radiates across the anterior chest, down the left arm and to her shoulder blade. She is not able to actively lift her left arm. She reported that she was not taking any pain medications. She said she had tried meloxicam without significant relief of pain. Ms. Fox has been working with 5 pound lifting restrictions for her left shoulder and permanent restrictions for her right shoulder. Dr. Bollier assessed her with full-thickness rotator cuff tear and AC joint arthropathy of the left shoulder. He felt that the reported work incident was a significant factor and caused current shoulder findings. A discussion was held about surgical treatment versus non-surgical treatment. A decision was made to proceed with surgery. (JE7, pp. 112-115)

Dr. Bollier performed surgery on March 27, 2018. The diagnoses include left shoulder arthroscopy, rotator cuff repair (supraspinatus and subscapularis), biceps tenotomy, distal clavicle excision. (JE7, p. 119-120)

Following surgery, Ms. Fox attended physical therapy. She also worked with restrictions. At the July 5, 2018 therapy visit, Ms. Fox reported aching, dull, stabbing and radiating left shoulder pain. She rated the pain as 5/10, depending on her activity level. She was to continue with physical therapy and her home exercise plan. Ms. Fox was also told to continue meloxicam daily, gabapentin at bedtime, ice and/or heat application as needed for pain. She was restricted to no lifting, pushing or pulling greater than 3 pounds with the left arm. (JE7, pp. 122-123)

On October 15, 2018, Ms. Fox saw Dr. Bollier. Ms. Fox reported aching and radiating left anterior and posterior shoulder pain rated at 5/10. Her greatest pain is when she abducts the arm. She also notes frequent crepitus. Overall, she was better post-surgery, but not where she wants to be. Dr. Bollier recommended left shoulder US-guided SA and GH injections to facilitate reduction of inflammation and promote pain relief. She could also use ibuprofen. She was to continue with work restrictions. Ms. Fox underwent a subacromial bursitis of the left shoulder joint on November 6, 2018. (JE7, pp. 128-131)

Dr. Bollier saw Ms. Fox on November 29, 2018. She reported constant, left shoulder pain, greatest along the trapezius. She has increased pain with driving, reaching and lifting and radiates down her arm to her palm and thumb. She denied paresthesias of her left arm. Her pain was controlled without medications. She has been working with restrictions. Ms. Fox reported that her right shoulder has started to get more sore. Dr. Bollier stated that she remained at MMI for her right shoulder. He also noted that she has permanent restrictions for her right shoulder which include, no lifting greater than 5 pounds above chest height with the right arm. He assigned 15 percent permanent functional impairment to the right upper extremity. (JE7, pp. 133-136)

It should be noted that Ms. Fox did have some medical issues prior to working at Pizza Hut. On July 24, 2012, she had right shoulder acromioplasty with rotator cuff repair surgery. (JE1, p. 7) On January 29, 2016, Ms. Fox saw Sandeep Munjal, M.D., for left knee pain. She also mentioned some shoulder pain. She testified that she did not have any ongoing problems after her 2012 right shoulder injury and surgery. The 2012 injury was not work-related. (JE1, p. 7; JE1, pp. 13-16; testimony)

It should also be noted that Ms. Fox had left arm problems before her May 19, 2016 injury. In 2012, she sought treatment for left wrist pain. Electro diagnostic studies in January of 2012 were normal. Timothy S. Loth, M.D.'s impression was pisotriquetral dysfunction. An injection improved her symptoms. (JE1, pp. 1-3)

Defendants contend Ms. Fox is not credible because she denied prior problems with dizziness, headaches, and memory to Dr. Sassman. (Cl. Ex. 1, p. 17) Defendants argue that Ms. Fox had problems with dizziness and headaches prior to the 2016 work injury. In support of their position, defendants point to a fall Ms. Fox sustained in her garage in 2007 wherein she fell, hit her head, and felt dazed. (JE4, p. 71) In December of 2009, Ms. Fox was seen for a recheck of her blood pressure medicine and reported she was having problems with dizziness and vertigo; the blood pressure medication was stopped. (JE4, p. 72) In May of 2012, Ms. Fox was seen for hypertension. She reported an increase in her blood pressure readings and associated headaches. The note indicates that her medications were changed. (JE4, p. 73) In July of 2012, Ms. Fox was seen for a pre-operative evaluation. As part of the history, she mentioned occasional dizziness. (JE10, p. 151) There is no medical documentation of ongoing problems with headaches, dizziness, or vertigo.

Throughout Ms. Fox's testimony there were several times when she was not able to recall information. This occurred during questioning from her own attorney and during questioning from the defendants' attorney. This seemed to happen with regard to what medical records stated. Ms. Fox did not disagree with what the medical records stated, she seemed to genuinely not be able to recall the history she was asked about. I find Ms. Fox's testimony to be credible.

We now turn to the January 4, 2018 date of injury. Several doctors have rendered their opinions regarding permanent impairment and restrictions related to the May 19, 2016 right shoulder injury. Dr. Bollier released Ms. Fox from his care for her right shoulder on September 20, 2017. Pursuant to the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, Dr. Bollier assigned14 percent upper extremity impairment which is the equivalent of 8 percent whole person impairment. (JE7, p. 107-108) He restricted Ms. Fox to no lifting greater than 5 pounds above chest height with the right arm. Dr. Bollier agreed that if Ms. Fox wished to pursue full-time work, he does not have any objection to her working full-time. (Def. Ex. B, p. 9) In March of 2020, Dr. Sassman assigned 10 percent whole person impairment. Dr. Sassman agreed with Dr. Bollier's restrictions of no lifting, pushing, or pulling of greater than 5 pounds on an occasional basis with either upper extremity. (Cl. Ex. 1, pp. 20-21) Both Dr. Bollier and Dr. Sassman rely on the same portions of The Guides, Fifth Edition. Because Dr. Sassman's rating is based on a more recent examination of Ms. Fox than Dr. Bollier's rating, I find it likely more accurately represents Ms. Fox's condition at the time of the hearing. Thus, I find that as the result of the May 19, 2016 injury to her right shoulder, Ms. Fox sustained 10 percent whole person functional impairment. Additionally, I find that as the result of the May 19, 2016 injury to her right shoulder, Ms. Fox is permanently restricted to no lifting, pushing, or pulling of greater than 5 pounds on an occasional basis with her right upper extremity.

We now turn to Ms. Fox's left radial head fracture which occurred as the result of the May 19, 2016 work injury. Dr. Pardubsky determined Ms. Fox was able to return to full duty capacity without additional treatment, on December 5, 2016. (JE1, p. 26) In January 2017, Ms. Fox sought treatment for the ulnar neuropathy and median

neuropathy in her wrist. He opined that it was reasonable that the radial head fracture led to the neuropathy findings in her left arm. Dr. Pardubsky placed her at MMI for her wrist on July 23, 2018. Per The Guides, Fifth Edition, and based upon a diagnosis of residual left hand and wrist carpal tunnel symptoms without any further contribution from her elbow, with a positive EMG finding, he assigned 3 percent impairment of the left upper extremity. He felt she did not need any permanent restrictions. (JE1, p. 29, 57)

Dr. Sassman utilized The Guides, Fifth Edition, to calculate one percent upper extremity impairment due to loss of extension, which is the equivalent of one percent of the whole person. Dr. Sassman restricts Ms. Fox to no lifting, pushing, or pulling of greater than 5 pounds on an occasional basis with either upper extremity. She should limit her use of vibratory and power tools to a rare basis. (CE1, pp. 20-21)

Ms. Fox testified that she still has constant pain in her hand and arm. She has tingling in her wrist and hand and a loss of strength in her arm, from her elbow down. She also has cramping in her biceps. Because Dr. Sassman's opinions are based on a more recent examination of Ms. Fox than Dr. Pardubsky's examination, I find Dr. Sassman's opinions likely more accurately represents Ms. Fox's condition at the time of the hearing. Thus, I find that as the result of the May 19, 2016 injury to her left elbow Ms. Fox sustained one percent whole person functional impairment. Additionally, I find that as the result of the May 19, 2016 injury to her left elbow, Ms. Fox is permanently restricted to no lifting, pushing, or pulling of greater than 5 pounds on an occasional basis with either upper extremity. Additionally, she should limit her use of vibratory and power tools to a rare basis.

Ms. Fox testified that she still continues to experience post-concussive symptoms. While I recognize that Ms. Fox did seek sporadic treatment for headaches, dizziness, and vertigo years before the 2016 work injury; there is no medical documentation of ongoing problems with headaches, dizziness, or vertigo. She continues to experience headaches, dizziness, and memory deficits. Dr. Struthers assessed Ms. Fox with headache, postconcussion syndrome, vertigo, cervicalgia, and occipital neuralgia. He placed her at MMI on October 16, 2017. Dr. Sassman diagnosed Ms. Fox with head trauma with residual dizziness, headaches, and memory issues. Dr. Sassman opined that these diagnoses were causally connected to the May 19, 2016 fall. Dr. Sassman assigned 3 percent impairment for memory issues. She assigned an additional 3 percent for headaches. Dr. Sassman assigned 10 percent whole person impairment for ongoing symptoms of vertigo. Dr. Sassman restricted Ms. Fox to no use of ladders and she should limit her use of stairs to a rare basis and should always use a handrail for safety. Additionally, Ms. Fox is not to walk on uneven surfaces. (JE1, pp. 48-50; Cl. Ex. 1, p. 19)

I find that Ms. Fox's ongoing issues with headaches, dizziness, or vertigo is the result of the May 19, 2016 work injury. I further find that she sustained permanent impairment and restrictions as set forth by Dr. Sassman.

At the time of the May 19, 2016 work injury, Ms. Fox was working in the server position. She was paid on an hourly basis, plus tips. The parties have stipulated that her average weekly wage at the time of the 2016 injury was $131.02. (Hearing Report, File number 5063378) The parties have stipulated that her average weekly wage at the time of the January 4, 2018 injury was $188.25. (Hearing Report, File number 5068744) By the fall of 2020, Ms. Fox was earning more per hour as a shift leader than she was at the time of the 2016 injury. Additionally, due to COVID-19, Ms. Fox was also working more hours. By the fall of 2020, her average weekly wage was around $330.00 per week. (Def. Ex. D)

Defendants offered the September 17, 2020, vocational employability assessment authored by Tom Karrow. The report offers Mr. Karrow's opinions regarding Ms. Fox's employability after the May 19, 2016 and January 4, 2018 work injuries. Mr. Karrow's report is based on his review of records; he did not interview Ms. Fox. Mr. Karrow notes that Ms. Fox continues to work for Pizza Hut with permanent restrictions and no actual loss of earnings due to her work injuries. At the time of Mr. Karrow's report, Ms. Fox was working more hours and earning a higher wage than she was at the time of her injuries. Mr. Karrow noted that Ms. Fox was working as a shift leader/manager at the time of the hearing. He noted the mental and physical requirements for this and that Pizza Hut is accommodating Ms. Fox in this position because of her restrictions. Mr. Karrow conducted a labor market research based on Ms. Fox's permanent restrictions of no lifting, pushing or pulling greater than 5 pounds on an occasional basis with either upper extremity. He also considered the transferable skills that Ms. Fox has based on her education and work experience. Mr. Karrow listed several companies with job openings for non-management positions with wages that range from $9.50 to $11.50 per hour. He also identified retail management positions with wages that ranged from $15.00 to $18.00 per hour. (Def. Ex. C)

At the time of hearing, Ms. Fox was still employed with Pizza Hut as a shift manager. The job description states that the mental/physical requirements of this position are: "Prolonged standing, frequent bending and stooping, ability to lit up to 35 lbs, ability to read computer screens, ability to communicate verbally with customers and employees via telephone and face to face." (Cl. Ex. 7, p. 49)

Although Ms. Fox cannot return to her prior position of waiting tables at Pizza Hut, she has remained employed at Pizza Hut, with accommodation. She is still able to help prepare the pizzas, but has modified how she does this job. Her hourly wage and hours at Pizza Hut have increased since the 2016 injury. Ms. Fox believes that she is still capable of performing her duties at General Electric and GreatAmerica. She also testified that she is still capable of performing the management positions that she has held in the restaurant industry. However, all the management jobs she had in the restaurant industry also required her to perform some waitressing duties and therefore, she could not physically perform all of the required duties of a manager. However, her restrictions do preclude her from a number of jobs. I find that the preponderance of the evidence demonstrates she has a work history with a varied employment and skills that would enable her to pursue alternate employment if she were so motivated. Ms. Fox

has testified that she enjoys her work and plans to continue to perform it. There is no indication that she has sought employment elsewhere. She enjoys her work at Pizza Hut. (Testimony)

I find that Ms. Fox has sustained a significant loss of future earning capacity as a result of the work injury. Unfortunately, she has significant restrictions. She has lost access to a significant portion of her pre-injury employment opportunities. To the credit of Ms. Fox and Pizza Hut, they have continued with what seems to be a mutually beneficial employment relationship.

Considering Ms. Fox's age, educational background, employment history, ability to retrain, motivation to continue her employment, length of healing period, permanent impairment, and permanent restrictions, and the other industrial disability factors set forth by the Iowa Supreme Court, I find that she has sustained a 30 percent loss of future earning capacity as a result of her 2016 work injury with the defendant employer.

We now turn to permanent disability and the January 4, 2018 work injury. The primary dispute with regard to the January 4, 2018 injury extends beyond the left shoulder.

As the result of the January 4, 2018 work injury, Dr. Bollier's diagnoses include left shoulder arthroscopy, rotator cuff repair (supraspinatus and subscapularis), biceps tenotomy, distal clavicle excision. He placed Ms. Fox at MMI on November 29, 2018. For the left shoulder, Dr. Bollier permanently restricted Ms. Fox to no lifting greater than 5 pounds above chest height with the left arm. On November 29, 2018, Dr. Bollier assigned 15 percent impairment of the upper extremity which is the equivalent to 9 percent of the whole person. He assigned the impairment pursuant to The Guides, Fifth Edition, figures 16-40, 16-43, 16-46, and table 16-27. (JE7, p. 119-120, 135-136)

In September of 2020, defendants sought additional answers from Dr. Bollier regarding the situs of the injury. Defendants wrote to Dr. Bollier with a series of questions and asked for his response. The letter states:

> 6. As a Board Certified Orthopaedic Surgeon specializing I the treatment of shoulder injuries, it is my understanding you believe the anatomical situs of Ms. Fox's May 19, 2016 right shoulder injury, including the location of the distal clavicle excision, to be within and confined to Ms. Fox's right shoulder. Is this correct? If so, please explain.
>
> Yes ___X____ No _____
>
> As you know, Iowa state law changed in 2017 and shoulder injuries are no longer considered a whole boy injury. This case is clearly a shoulder case and not a whole body injury. Although the upper extremity and shoulder connects to the body as a whole, the intent of the 2017 state law was to separate shoulder injuries from whole body injuries. Ms. Fox's work comp

injury and surgery involved a distal clavicle excision and didn't involve any injury to the sternoclavicular joint or scapulothoracic articulation (which connect to the thorax and body as a whole). The AC joint is directly superior to the glenohumeral joint and I would not consider it to be proximal to the glenohumeral joint. It is my strong opinion that both of her shoulder injuries were isolated to the shoulder and pout a whole body injury.

7. As a Board Certified Orthpaedic Surgeon specializing in the treatment of shoulder injuries, it is my understanding you believe the anatomical situs of Ms. Fox's January 4, 2018 left shoulder injury, including the location of the distal clavicle excision, to be within and confined to Ms. Fox's left shoulder. Is This correct? If so, please explain.

Yes ____X____ No _____

(Def. Ex. B, p. 8)

As the result of the January 4, 2018 work injury, Dr. Sassman diagnosed Ms. Fox with left rotator cuff tear status post left arthroscopy, rotator cuff repair (supraspinatus and subscapularis), biceps tenotomy and distal clavicle excision. Dr. Sassman did express concern that Ms. Fox may have a cervical issue that has not been evaluated. She noted that on exam Ms. Fox exhibited a loss of sensation in a dermatomal pattern in her left upper extremity. She also noted some cervical –type symptoms in her right upper extremity. Dr. Sassman felt that Ms. Fox may benefit from an MRI of the cervical spine. However, if this did not occur then she would be considered at MMI. Dr. Sassman opined Ms. Fox reached MMI on March 27, 2019, which was one-year post-operation. On March 16, 2020, Dr. Sassman utilized essentially the same tables as Dr. Bollier of The Guides, Fifth Edition, she assigned 26 percent impairment of the left upper extremity, which is the equivalent of 16 percent impairment of the whole person. (Cl. Ex. 1, p. 20) Dr. Sassman agreed with Dr. Bollier's restrictions of no lifting, pushing, or pulling of greater than 5 pounds on an occasional basis with the left shoulder. (Cl. Ex. 1, p. 21)

Dr. Sassman supplemented her opinions in October of 2020. Dr. Sassman offered her opinions from an anatomical perspective. She noted that most of the supraspinatus muscle is proximal to the glenohumeral joint. Dr. Sassman noted that the subscapularis muscle is located underneath the scapula. Additionally, the majority of the clavicle is proximal to the glenohumeral joint. Dr. Sassman opined that given the location of the areas of injury and the surgical procedure performed she does not consider Ms. Fox's 2018 injury to be confined only to the upper extremity. Dr. Sassman felt the injury should be considered as an injury to the body as a whole. (Cl. Ex. 9)

I find the following are related to the January 4, 2018 work injury: rotator cuff injury (supraspinatus and subscapularis), biceps tenotomy, and distal clavicle excision. Dr. Bollier's rating was based on Ms. Fox's physical condition on November 29, 2018.

Dr. Sassman's rating was based on Ms. Fox's physical condition on March 16, 2020. I find that the impairment rating of Dr. Sassman is appropriate in this case. Thus, I find that as the result of the January 4, 2018 work injury, Ms. Fox sustained a 26 percent impairment of the left upper extremity, which is the equivalent of 16 percent impairment of the whole person. (Cl. Ex. 1, p. 20)

CONCLUSIONS OF LAW

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

The claimant has the burden of proving by a preponderance of the evidence that the injury is a proximate cause of the disability on which the claim is based. A cause is proximate if it is a substantial factor in bringing about the result; it need not be the only cause. A preponderance of the evidence exists when the causal connection is probable rather than merely possible. George A. Hormel & Co. v. Jordan, 569 N.W.2d 148 (Iowa 1997); Frye v. Smith-Doyle Contractors, 569 N.W.2d 154 (Iowa App. 1997); Sanchez v. Blue Bird Midwest, 554 N.W.2d 283 (Iowa App. 1996).

The question of causal connection is essentially within the domain of expert testimony. The expert medical evidence must be considered with all other evidence introduced bearing on the causal connection between the injury and the disability. Supportive lay testimony may be used to buttress the expert testimony and, therefore, is also relevant and material to the causation question. The weight to be given to an expert opinion is determined by the finder of fact and may be affected by the accuracy of the facts the expert relied upon as well as other surrounding circumstances. The expert opinion may be accepted or rejected, in whole or in part. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); IBP, Inc. v. Harpole, 621 N.W.2d 410 (Iowa 2001); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995). Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417 (Iowa 1994). Unrebutted expert medical testimony cannot be summarily rejected. Poula v. Siouxland Wall & Ceiling, Inc., 516 N.W.2d 910 (Iowa App. 1994).

Based on the above findings of fact, I conclude that the May 19, 2016 work injury resulted in an injury to Ms. Fox's body as a whole. Since claimant has an impairment to the body as a whole, an industrial disability has been sustained. Industrial disability was defined in Diederich v. Tri-City Ry. Co. of Iowa, 219 Iowa 587, 258 N.W. 899 (1935) as follows: "It is therefore plain that the legislature intended the term 'disability' to mean 'industrial disability' or loss of earning capacity and not a mere 'functional disability' to be computed in 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, but consideration must also be given to the injured employee's age, education, qualifications, experience, motivation,

loss of earnings, severity and situs of the injury, work restrictions, inability to engage in employment for which the employee is fitted and the employer's offer of work or failure to so offer. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963); Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961).

Compensation for permanent partial disability shall begin at the termination of the healing period. Compensation shall be paid in relation to 500 weeks as the disability bears to the body as a whole. Section 85.34.

Based on the above findings of fact, I conclude Ms. Fox should be compensated on an industrial disability analysis. Considering Ms. Fox's age, educational background, employment history, ability to retrain, motivation to continue her employment, length of healing period, permanent impairment, and permanent restrictions, and the other industrial disability factors set forth by the Iowa Supreme Court, I find that she has sustained a 30 percent loss of future earning capacity as a result of her 2016 work injury with the defendant employer. As such, Ms. Fox is entitled to 150 weeks of permanent partial disability. These benefits shall be paid at the stipulated weekly workers' compensation rate of two hundred six and 75/100 dollars ($206.75) and shall commence on the stipulated date of March 28, 2018. (Hearing report File Number 5063378).

We now turn permanency regarding the January 4, 2018 work injury. Based on the above findings of fact, I conclude that the following conditions are the result of the 2018 work injury: rotator cuff injury (supraspinatus and subscapularis), biceps tenotomy, and distal clavicle excision. The central dispute surrounding the 2018 injury is whether the injury should be compensated as a scheduled "shoulder" or as an unscheduled "whole body" injury.

In 2017 there were legislative changes to Iowa Code Chapter 85 which added the "shoulder" to the list of scheduled members in Iowa Code section 85.34(2)(2019). The primary issue regarding the January 4, 2018 injury surrounds whether the injury should be compensated as a shoulder under Iowa Code section 85.34(2)(n) or as an unscheduled disability under section 85.34(2)(v). Claimant contends that the injury extends beyond the left shoulder into the body as a whole. Ms. Fox argues that the affected areas from the 2018 injury are proximal to the glenohumeral joint and thus should be determined to be an unscheduled injury compensated with industrial disability pursuant to Iowa Code section 85.34(2)(v).

Claimant points out that the legislature did not define a shoulder. Based on the above findings of fact, I conclude the following are related to the January 4, 2018 rotator cuff injury (supraspinatus and subscapularis), biceps tenotomy, and distal clavicle excision.

Based on the situs of her injury, Ms. Fox contends that her injury extends proximal from the glenohumeral joint, and therefore, her injury should be compensated as a body as a whole injury. Defendants contend the 2018 injury is confined to the shoulder.

The Iowa Workers' Compensation Commissioner has issued several decisions regarding Iowa Code section 85.34(2)(n). In Deng v. Farmland Foods, File No. 5061883, (App. September 29, 2020), for the first time, the Commissioner addressed what constitutes a shoulder under the 2017 amendments. In that case the Commissioner determined the Legislature's use of "shoulder" rendered the statute ambiguous. The Commissioner ultimately determined, under section 85.34(2)9n), the term "shoulder" is not limited to the glenohumeral joint. The Commissioner also rejected the bright line rule that anything proximal to the shoulder joint should be treated as an unscheduled injury under Iowa Code section 85.34 (2)(n). Id.

The Commissioner addressed Iowa Code section 85.34(2)(n) again in Chavez v. MS Technology, LLC, File No. 5066270 (App. September 30, 2020). The Commissioner stated:

> The injury at issue in Deng was to claimant's rotator cuff – specifically the infraspinatus. Given the entwinement of the glenohumeral joint and the muscles that make up the rotator cuff and the importance of the rotator cuff to the function of the joint, I determined the muscles of the rotator cuff are included within the definition of "shoulder" under section 85.34(2)(n). Thus, I found claimant's injury in Deng should be compensated as a shoulder under section 85.34(2)(n).

(Chavez, at p. 2)

Based on the Chavez decision, I conclude that Ms. Fox's rotator cuff tear which included a full-thickness tear of the superior rotator cuff which involved the supraspinatus tendon and subscapularis tendon should be compensated as a shoulder under section 85.34 (2)(n).

Dr. Bollier performed a distal clavicle excision. Claimant argues that because the majority of the clavicle is proximal to the glenohumeral joint, the injury should be compensated as a whole person injury. However, in Deng, the Commissioner rejected the bright line rule that anything proximal to the shoulder joint should be treated as an unscheduled injury under Iowa Code section 85.34 (2)(n).

Furthermore, in Chavez, the Commissioner stated:

> Turning first to the 'acromion,' it is defined per Merriam-Webster's Medical Dictionary as 'the outer end of the spine of the scapula that protects the glenoid cavity, forms the outer angle of the shoulder, and articulates with the clavicle.' 'Acromion,' Merriam-Webster.com Medical Dictionary,

> https://www.merriam-webster.com/medical/acromion (last visited Sept. 29, 2020): see "Scapula," Britannica, https://www.britannica.com/science/scapula#ref99250 (last visited Sept. 29, 2020) (defining acromion as "a process that articulates with the clavicle, or collarbone, in front and helps form the upper part of the shoulder socket"). Because it both forms part of the shoulder socket and protects the glenoid cavity, I find the acromion is closely entwined with glenohumeral joint both in location and function.

(Chavez, at pp. 4-5)

Based on agency precedent, I conclude that none of claimant's injuries which resulted from the January 4, 2018 work injury are compensable as unscheduled, whole body injuries under section 85.34(2)(v). I conclude that the January 4, 2018 work injury should be compensated based on the 400-week schedule pursuant to section 85.34(2)(n).

Having found claimant's 2018 injuries must be compensated as a shoulder under section 85.34(2)(n), a determination must be made whether to apply the upper extremity rate or the whole person rating to the 400-week schedule. The Commissioner addressed this question in Deng. He concluded it was appropriate to apply the upper extremity impairment rating for the shoulder injury. See Deng v. Farmland Foods, Inc., File No. 5061883 (App., September 29, 2020). See also ; Chavez v. MS Technology, LLC, File No. 5066270 (App., September 30, 2020); Smidt v. JKB Restaurants, LC, File No. 506776 (App., December 11, 2020).

Based on the above findings of fact, I conclude that the rating of Dr. Sassman should be applied in this case. Dr. Sassman assigned 26 percent impairment of the left upper extremity. Pursuant to the 400-week schedule, Ms. Fox is entitled to 104 weeks of permanent partial disability for the January 4, 2018 work injury. (Cl. Ex. 1, p. 20) These benefits shall be paid at the stipulated weekly rate of two hundred eighteen and 61/100 dollars ($218.61) and commence on November 29, 2018. (Hearing Report, File No. 5068744).

In the hearing report for the January 4, 2018 date of injury, the defendants raise the issue of credit, including under 85.34(7), if applicable. (Hearing Report, File No. 5068744, numbered paragraph 10). Defendants do not specifically address this issue in their post-hearing brief.

Iowa Code section 85.34(7) was also affected by the legislative changes in 2017. Iowa Code section 85.34(7) currently reads:

> 7. Successive disabilities.
>
> An employer is liable for compensating only that portion of an employee's disability that arises out of and in the course of the employee's

> employment with the employer and that relates to the injury that serves as the basis for the employee's claim for compensation under this chapter, or chapter 85A, 85B, or 86. An employer is not liable for compensating an employee's preexisting disability that arose out of and in the course of employment from a prior injury with the employer, to the extent that the employee's preexisting disability has already been compensated under this chapter, or chapter 85A, 85B, or 86. An employer is not liable for compensating an employee's preexisting disability that arose out of and in the course of employment with a different employer or from causes unrelated to employment.

Claimant argues that apportionment is not appropriate because the changes made to section 85.34(7) stripped the section of any mechanism of apportioning any of Ms. Fox's disability. I find claimant's unrebutted argument to be persuasive.

Furthermore, the May 19, 2016 injury is compensated on an industrial disability basis because Ms. Fox sustained an injury to her body as a whole. The January 4, 2018 injury is compensated as a scheduled member injury for the left shoulder. Ms. Fox's left shoulder was not injured in the May 19, 2016 injury. Thus, the defendants have not previously compensated Ms. Fox for any preexisting disability to her left shoulder. Defendants have failed to demonstrate entitlement to any such credit pursuant to Iowa Code section 85.34(7).

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

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

Claimant seeks reimbursement for the IME conducted by Dr. Sassman. Defendants do not dispute that Ms. Fox is entitled to an IME. Defendants also acknowledge the $3,900.00 IME fee is within the range of reimbursement orders of past IMEs by the Commissioner. However, defendants argue that Ms. Fox is not entitled to the full reimbursement of the IME expense because $3,150 of the fee was to prepare reports that defendants argue were primarily directed at legal issues, rather than medical issues. Defendants do not cite any authority for their position. I find that the

prerequisites of Iowa Code section 85.39 were met in this case. I conclude that defendants shall reimburse claimant for the full amount of Dr. Sassman's IME. Defendants shall reimburse claimant in the amount of three thousand nine hundred and no/100 dollars ($3,900).

Finally, claimant is seeking an assessment of costs. (Cl. Ex. 8) Costs are to be assessed at the discretion of the Commissioner of the hearing deputy. 876 IAC 4.33. I exercise my discretion and conclude that claimant was generally successful in her claim. Thus, an assessment of costs is appropriate in this case.

Specifically, claimant seeks costs for the IME of Dr. Sassman. However, this is denied as moot because the defendants have been ordered to reimburse the claimant for the IME pursuant to Iowa Code section 85.39.

Claimant seeks costs for procuring medical records in the amount of $683.35. I find that reimbursement for medical records is not an appropriate cost under 876 IAC 4.33.

Claimant also seeks costs in the amount of $100.00 for the filing fee. I find this is an appropriate cost under 4.33(7). Thus, defendants are assessed costs in the amount of $100.00.

Claimant seeks costs in the amount of $162.80 for the deposition of the claimant. Defendants put at least a portion of this transcript into evidence. I find that this is an appropriate cost under 4.33(1). Thus, defendants are assessed costs in the amount of $162.80.

Defendants are assessed costs totaling two hundred sixty-two and 80-100 dollars ($262.80).

ORDER

THEREFORE, IT IS ORDERED:

File Number 5063378 (DOI: May 19, 2016):

All weekly benefits shall be paid at the stipulated rate of two hundred six and 75/100 dollars ($206.75).

Defendants shall pay one hundred fifty (150) weeks of permanent partial disability benefits commencing on the stipulated commencement date of March 28, 2018.

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

Defendants shall pay accrued weekly benefits in a lump sum together with interest 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.

Defendants shall reimburse claimant for the independent medical evaluation expenses.

Defendants shall reimburse claimant costs 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.

File Number 5068744 (DOI: January 4, 2018):

All weekly benefits shall be paid at the stipulated rate of two hundred eighteen and 61/100 dollars ($218.61).

Defendants shall pay one hundred four (104) weeks of permanent partial disability benefits commencing on the stipulated commencement date of November 29, 2018.

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

Defendants shall pay accrued weekly benefits in a lump sum together with interest 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.

Defendants shall reimburse claimant for the independent medical evaluation expenses.

Defendants shall reimburse claimant costs 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.

Signed and filed this _23rd_ day of April, 2021.

ERIN Q. PALS
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Emily Anderson (via WCES)

Nicholas Pellegrin (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.