

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

TROY HUDSON,

FILED

Claimant,

JUL 10 2018

vs.

WORKERS COMPENSATION

File No 5063522

QUALITY MANUFACTURING
CORPORATION,

ARBITRATION DECISION

Employer,

and

EMCASCO INSURANCE COMPANY,

Insurance Carrier,
Defendants.

Head Note Nos.: 1402.30, 1803, 1803.1

Claimant Troy Hudson filed a petition in arbitration on April 6, 2017, alleging he sustained injuries to his right elbow, right shoulder, and bilateral carpal tunnel syndrome while working for the defendant, Quality Manufacturing Company ("Quality"), on January 21, 2016. Quality and its insurer, the defendant EMCASCO Insurance Company ("EMCASCO"), filed an answer on April 25, 2017.

An arbitration hearing was held on April 30, 2018, at the Division of Workers' Compensation in Des Moines, Iowa. Attorney Jeffrey Lipman represented Hudson. Hudson appeared and testified. Attorney D. Brian Scieszinski represented Quality and EMCASCO. Nathaniel Cloe and Samuel Huffman appeared and testified on behalf of Quality and EMCASCO. Becky Buch with The Waldinger Corporation appeared on behalf of Quality and EMCASCO, but did not testify. Joint Exhibits ("JE") 2 through 8, Exhibits 1 and 1A, and A through D were admitted into the record. The record was held open through June 7, 2018, for the receipt of post-hearing briefs. The briefs were received and the record was closed.

Before the hearing the parties prepared a hearing report, listing stipulations and issues to be decided. Quality and EMCASCO waived all affirmative defenses.

STIPULATIONS

1. An employer-employee relationship existed between Quality and Hudson at the time of the alleged injury.
2. Hudson sustained an injury on January 21, 2016, which arose out of and in the course of his employment with Quality.
3. The alleged injury is a cause of temporary disability during a period of recovery.
4. The alleged injury is a cause of permanent disability.
5. At the time of the alleged injury Hudson's gross earnings were \$1,360.98 per week, he was married and entitled to two exemptions, and the parties believe the weekly rate to be \$837.61.
6. Prior to the hearing Hudson was paid twenty weeks of compensation at the rate of \$836.22 per week.
7. Costs have been paid.

ISSUES

1. What is the nature of the injury?
2. Has Hudson sustained a scheduled member or an industrial disability?
3. Is Hudson entitled to a running award of temporary benefits from December 9, 2016, and continuing?
4. If Hudson is at maximum medical improvement, what is his extent of disability?
5. If Hudson is at maximum medical improvement, what is the commencement date for permanency?
6. Is Hudson entitled to alternate medical care for his right shoulder?
7. Should costs be assessed against either party?

FINDINGS OF FACT

Hudson lives in Ankeny, Iowa. (Transcript, page 9) Hudson graduated from high school in Ankeny in 1990. (Tr., p. 9) Hudson earned mostly A grades while in school. (Tr., p. 81) Hudson was expelled from high school for fighting, and after he was

expelled and returned to school his grade point average dropped from a 3.8 to a 3.4 when he received an F in a course. (Tr., pp. 81-82) Hudson has not completed any post-secondary education. (Tr., p. 9) Hudson is right-hand dominant. (Ex. 1, p. 1; Tr., p. 9) At the time of the hearing he was forty-six. (Tr., p. 9)

Hudson has performed manual labor since graduating from high school. (Tr., p. 10) Hudson has experience working in construction, as a laborer, operating cranes and boom truck, auto body restoration and repair, fabrication, and welding. (Tr., p. 10) Hudson briefly worked in sales for Home Depot and Wheeler Lumber. (Tr., pp. 10-11)

Quality hired Hudson in October 2011, as a welder/fabricator. (Tr., pp. 11-12) Quality manufactures agricultural equipment for John Deere. (Tr., pp. 12-13) Hudson put raw parts into a welding fixture, and following an inspection to determine if the dimensions were appropriate, he would weld the parts into place. (Tr., pp. 16-17) Hudson used vibratory grinders and wire wheels on a daily basis. (Tr., pp. 17-18) Hudson testified he would work on thirty-six parts and tighten and loosen clamps for each part, requiring him to grip and grasp with his hands. (Tr., p. 22)

Hudson reported approximately eighteen months before his work injury his duties increased at Quality when Quality eliminated the welder assistant positions. (Tr., pp. 37-38, 46) The welder assistants or cleaners performed all of the wire wheeling and grinding. (Tr., p. 46)

Hudson testified in the months prior to his work injury Quality placed him on a turret crane, which he reported "that's different than a – a bridge crane. So a turret crane, as you swing it, it's – it's somewhat difficult to start and stop the momentum as you swing it. It's more difficult to use, and it's more time-consuming to use. It's not as fluid as a bridge crane is." (Tr., p. 38) With respect to his right shoulder, Hudson relayed:

[t]he first time I remember noticing pain was – it was shortly after that job. I was in the same area. It was a smaller job. It was something that I wouldn't have thought would be significant, but we set up our work areas so that we can rotate and try to get the product to flow from one point and flow out the work area.

So in order to do that, you have to kind of put things as close as you can so you don't waste steps, but in order to not waste steps, sometimes you reach, and what I did was I had my holster on a table adjacent to me, and I reached out to put my gun in the holster, and my shoulder kind of gave out.

That was – that was the most significant thing that I can think of that – I don't know if that was the straw that broke the camel's back or what it was, but that's the only time that I can remember that my shoulder hurt.

That was the day that it started hurting, and it was a week after that – I got – I made it through that day, and the next couple of days it progressively got better, and by about the third day, it didn't hurt too bad so -- .

(Tr., pp. 40-41) Hudson testified he reported his shoulder "kind of gave out" that day to his supervisor. (Tr., pp. 41-42) Hudson relayed the incident happened "roughly three to five weeks before [he] went to the doctor." (Tr., p. 42) Hudson testified his immediate supervisor, the team lead, asked him if he wanted to report it and he responded "[n]o. Let's just see if it quits hurting, you know." (Tr., p. 42) Hudson testified he did not immediately complain of having pain in his right shoulder because he has had aches and pains throughout his career and if the pain persists enough, then he will go to the doctor. (Tr., p. 34)

Hudson was involved in a motor vehicle accident in 1992 and he experienced pain in his right shoulder. (Tr., pp. 29-30) Hudson relayed after a period of months to up to a year his pain resolved. (Tr., pp. 30-32)

Hudson stated he experienced pain at work depending on the job. (Tr., p. 41) Hudson relayed he knew his pain was not going away. (Tr., p. 42) Hudson reported an individual named Nate Cloe, a human resources specialist for Quality, approached him and told him Quality's insurance carrier would be involved "so we have to – we have to do what we can to make this better for you," and a couple days later Quality took him off the job he was working and put him on a different job. (Tr., p. 44) Hudson reported he was terminated approximately a year and a half later. (Tr., pp. 48-49)

Hudson testified on January 20, 2016, he told Quality he needed to see the doctor. (Tr., p. 45) Quality made an appointment for Hudson with Jon Yankey, M.D., an occupational medicine physician on January 21, 2016. (Tr., p. 45) During his appointment Hudson complained of bilateral hand pain and numbness, bilateral arm pain and numbness, and right shoulder pain. (JE 2, p. 1) Hudson relayed he had been experiencing pain and numbness for approximately two years, which has worsened over time and he could not recall a date of onset of his symptoms or a specific incident, injury, or activity he can relate to his symptoms. (JE 2, pp. 1-3) Dr. Yankey assessed Hudson with bilateral hand and arm pain and numbness and right shoulder pain, and recommended electromyography testing and full duty work. (JE 2, pp. 2-3)

Hudson reported Quality terminated his employment the next day. (Tr., p. 43) Hudson relayed he received a telephone call from Cloe, and Cloe told him, "I know you're going to think that this is because you went to the doctor yesterday afternoon, but it's not. It's because of your - - your production issues." (Tr., p. 43) Hudson reported he believed his work was comparable to his coworkers, but his hands bothered him every day making it difficult to use them. (Tr., pp. 43-44) Hudson relayed his shoulder bothered him as well if he worked above chest level.

Hudson testified he did not have any problems with his production rate when he started with Quality. (Tr., pp. 78-79) Hudson reported,

I started to have problems with my production when they – probably about the time they took away our cleaners, if I had to put a time frame on it.

Essentially that's in large because they had a time based on – the times really weren't based on any time study. They had – they could throw whatever number they wanted to at any particular job, so – so if a guy did a job in, say, 15 minutes apart and he had a cleaner, there's no – there's no data to – to show whether he had a cleaner or a helper or not.

So if Joe had a cleaner and he welded it in 15 minutes and I'd go over there the next week and the job comes back up and it takes me 22 minutes but I didn't have a cleaner, there's nothing there, no data to show the difference or why there was a difference.

So you're expected to still weld it in the time, produce it in the time that Joe did, but he had a cleaner.

(Tr., pp. 79-80) Hudson acknowledged any rate problems he had the first year would not have been related to any physical problems. (Tr., p. 81)

Hudson testified he did not inform Cloe he was having symptoms in his shoulder before he went to the doctor. (Tr., p. 96) Hudson had informed Cloe about the problems with his hands before he went to the doctor. (Tr., p. 96)

Irving Wolfe, D.O., conducted electromyography testing on Hudson on February 11, 2016. (JE 3) Dr. Wolfe listed an impression of

1) Moderate dysfunction of the right and left sided Median nerves at the level of the wrists consistent with bilateral Carpal Tunnel Syndrome. (Electrically left worse than the right). 2) Mild dysfunction of the right and left Median nerves at the level of the forearms consistent with bilateral bilateral [*sic*] Pronator Syndrome. (Electrically left worse than right.)

(JE 3, p. 2)

Hudson returned to Dr. Yankey on February 17, 2016, complaining of bilateral wrist pain, bilateral hand numbness, bilateral arm pain, and right shoulder pain. (JE 2, p. 4) Dr. Yankey noted electromyography testing was consistent with bilateral carpal tunnel syndrome and bilateral pronator syndrome. (JE 2, p. 4) Dr. Yankey assessed Hudson with bilateral carpal tunnel syndrome, bilateral pronator syndrome, right elbow medial epicondylitis, and a right shoulder strain, and ordered physical therapy and modified work duties. (JE 2, pp. 4-5)

Hudson attended six physical therapy sessions with Aaron Christiansen. (JE 4, p. 1) On March 4, 2016, Christiansen noted Hudson's grip strength measurements showed a ten percent improvement on the right compared to the initial evaluation. (JE 4, p. 1)

On March 9, 2016, Hudson attended a follow-up appointment with Dr. Yankey, reporting he received improvement with physical therapy. (JE 2, pp. 6-7) Hudson reported his right shoulder was twitching. (JE 2, p. 6) Dr. Yankey observed "a very superficial minimal, 'twitching' there at times." (JE 2, p. 6) Dr. Yankey ordered additional physical therapy, icing, and modified work duties. (JE 2, p. 7)

Dr. Yankey referred Hudson to Kary Schulte, M.D., an orthopedic surgeon with Iowa Ortho. (JE 5, p. 1) On May 5, 2016, Dr. Schulte examined Hudson, reviewed magnetic resonance imaging and x-rays of Hudson's right shoulder, and opined "[h]is shoulder examination today was essentially unremarkable and I saw nothing on his examination for which further intervention was warranted," released Hudson to return to full duty without restrictions, and recommended he proceed with a home exercise program to work on rotator cuff and scapular stabilizer strengthening and to progress to full activity. (JE 5, p. 2)

Hudson was referred to ZeHui Han, M.D., an orthopedic surgeon with Iowa Ortho, for treatment of bilateral carpal tunnel syndrome. (JE 7, p. 1) Dr. Han performed a right carpal tunnel release on June 14, 2016, and a left carpal tunnel release on August 9, 2016. (JE 7, p.3) Dr. Han prescribed occupational therapy. (JE 7, p. 3) Dr. Han released Hudson to return to work without restrictions on November 7, 2016. (JE 7, p. 1) Dr. Han found Hudson was at maximum medical improvement on December 19, 2016, and released him to return to work without restrictions. (JE 7, p. 4)

Hudson returned to Dr. Schulte on January 5, 2017, reporting he had undergone a bilateral carpal tunnel release, and complaining of nonspecific right shoulder symptoms with occasional pain radiating over the superior and lateral shoulder, with his entire right arm going numb. (JE 5, p. 4) Dr. Schulte examined Hudson, reviewed his imaging, and opined his shoulder examination was "essentially normal" and released him to full duty work and activities without restriction. (JE 5, p. 4)

Dr. Han issued an opinion letter on January 22, 2017, noting he had diagnosed Hudson with bilateral carpal tunnel syndrome, and he performed right and left carpal tunnel releases on Hudson. (JE 7, p. 3) Using the Guides to the Evaluation of Permanent Impairment (AMA Press, 5th Ed. 2001) ("AMA Guides"), Dr. Han assigned Hudson a permanent impairment rating of three percent to the right and left upper extremities. (JE 7, p. 3)

On February 1, 2017, Hudson attended an appointment with Steven Aviles, M.D., an orthopedic surgeon with Iowa Ortho. (JE 8, pp. 1-3) Dr. Aviles examined Hudson, reviewed his imaging, recommended a magnetic resonance imaging arthrogram, and

released Hudson to return to work without restrictions regarding his right shoulder pain. (JE 8, pp. 1-3)

Hudson attended a follow-up appointment with Dr. Aviles on February 22, 2017. (JE 8, p. 4) Dr. Aviles noted the arthrogram showed "a high-grade partial-thickness tear of the supraspinatus posteriorly. It measures about 60-70 percent of the rotator cuff." (JE 8, p. 4) Dr. Aviles assessed Hudson with an incomplete tear of the right rotator cuff, right shoulder pain, recommended a right shoulder arthroscopy with rotator cuff repair and possible subacromial decompression and possible biceps tenotomy, and released Hudson to return to work without restrictions. (JE 8, pp. 5-6)

Dr. Aviles issued an opinion letter on March 29, 2017, which states:

Mr. Hudson had claimed to have developed a work-related injury and described a remote history of placing his welder in his holster and developing pain in that fashion. This is not a clear mechanism of injury for right shoulder rotator cuff tear. I do not feel that the rotator cuff tearing that I have been treating him for is in any way related to a work-related injury, and I can state this with a reasonable degree of medical certainty.

(Ex. A, p. 1)

Mark Taylor, M.D., an occupational medicine physician, conducted an independent medical examination for Hudson on April 12, 2017. (Ex. 1) Dr. Taylor examined Hudson and reviewed his medical records. (Ex. 1) Dr. Taylor diagnosed Hudson with bilateral carpal tunnel syndrome, status post bilateral carpal tunnel release procedures, and right shoulder impingement/bursitis and partial rotator cuff tearing. (Ex. 1, p. 7)

Dr. Taylor opined Hudson's activities at work represented a substantial contributing factor to his right shoulder bursitis, impingement, and partial tearing, noting Hudson performed tasks at work at or above shoulder level approximately twenty percent of the time and had to perform tasks that involved

reaching out away from his body with the arms, and in particular the right arm which was generally the arm used to perform the welding activities. The welding gun and "whip" weighed about 10 pounds. The further he had to reach out or up, the heavier it became. He also lifted, pushed, and pulled heavy items. There were hoists that could be used but in order to maintain his pace, he tended to move the items by hand as opposed to using a hoist unless the items were particularly heavy.

....

As far as the right shoulder, and as noted above, Mr. Hudson engaged in heavy lifting, as well as forceful pushing and pulling. He performed

work tasks reaching out with the right arm out away from the body in flexion, abduction and elevation. He also performed overhead activities. Many of these tasks were performed while holding onto the welding gun. There was one particular incident when he abducted the arm out to his side at 90 degrees in order to place the welding gun and "whip" into the holster. The holster was not simply something at his side that he just had to place the welding gun into but rather he had to elevate/abduct the arm to 90 degrees while holding onto the equivalent of one and a half gallons of milk or so out to his side and his shoulder "gave out".

(Ex. 1, pp. 7-8) Dr. Taylor agreed Hudson reached maximum medical improvement with respect to his bilateral carpal tunnel syndrome on December 19, 2016, but opined he had not reached maximum medical improvement with respect to his right shoulder condition. (Ex. 1, p. 8) Dr. Taylor recommended restrictions of using vibratory or power tools on an occasional basis, avoiding repetitive gripping and grasping while using vibratory tools, lifting forty pounds up to chest level, and twenty pounds above shoulder or chest level, rare to occasional overhead reaching with the right arm with minimal to no added weight, and to keep the right arm as close to the body as possible. (Ex. 1, p. 9)

Using the AMA Guides, Dr. Taylor assigned a five percent permanent impairment rating to each upper extremity, finding Hudson's symptoms had not resolved, which he converted to a three percent whole person impairment. (Ex. 1, p. 8) Using the combined values chart on page 604 of the AMA Guides, Dr. Taylor combined the impairment ratings, and opined Hudson had sustained a six percent whole person impairment. (Ex. 1, pp. 8-9)

Counsel for Quality and EMCASCO sent a letter to Dr. Aviles on November 8, 2017, providing opinion statements as follows:

[b]ased on our conversation, I understand you have the following opinions regarding Troy Hudson:

1. Troy Hudson's shoulder condition is not related to any specific injury occurring while working at Quality Manufacturing Corporation.
2. You discussed with Mr. Hudson the physical requirements of his job. Based on your examination and the information provided by the patient, Mr. Hudson's shoulder condition is not related to any cumulative activities at Quality Manufacturing Corporation.
3. During your last examination of Mr. Hudson, you did not provide any medical restrictions. You do not expect Mr. Hudson will need any permanent restrictions based upon your last examination of him.

(Ex. A, p. 2) Dr. Aviles signed the letter on November 15, 2017, without providing any written comments. (Ex. D, pp. 2-3)

On February 20, 2018, Joe Hawk, M.D., a family practice physician specializing in sports medicine and urgent care, conducted an independent medical examination of Hudson for Quality and EMCASCO. (Ex. B, pp. 1-3) Dr. Hawk examined Hudson and reviewed his medical records. (Ex. B, p. 1) Dr. Hawk assessed Hudson with bilateral carpal tunnel syndrome and agreed with Dr. Han that Hudson reached maximum medical improvement on December 19, 2016. (Ex. B, p. 3) Dr. Hawk noted Hudson continues to demonstrate residual carpal tunnel syndrome following surgery. (Ex. B, p. 3) Using the AMA Guides, Dr. Hawk opined:

[i]f we use the instructions under carpal tunnel syndrome on page 495 scenario 2 states that "an impairment rating not to exceed 5% of the upper extremity may be justified." I think [it] is reasonable given Mr. Hudson's physical exam findings and reported cold intolerance to assign him 5% of the right upper extremity and 5% of the left upper extremity. I would refer to table 16-3 on page 439; a 5% upper extremity converts to 3% impairment of the whole person. We would then utilize the combined values chart on page 604 combining the values of 3% of the whole person and 3% of the whole person to reach a final value of 6% of the whole person impairment rating.

(Ex. B, p. 3) Dr. Hawk found he could not rate Hudson's right shoulder pain because he is not at maximum medical improvement, and opined with respect to causation:

[t]here is some question as to the timing and the surrounding conditions to when this alleged incident occurred as Mr. Hudson did not have an exact time or date of the shoulder injury. I am well versed in conditions of welding growing up on a farm and welding myself. I was familiar with the whip that Mr. Hudson was referring to. I did have the unique opportunity to visit the actual work site and welding bays at Quality Manufacturing. I watched multiple employees on multiple orders/jobs. The site is set up remarkably well from an ergonomic standpoint. Most work is done at waist level and occasionally as high as the chest level. They have electronic hoists for every bay to lift any of the metal pieces for the worker. The hoists have a magnet system that will quickly attach the metal piece as to not loose [sic] time hooking up chains. During my time I did not see a single worker required to work above their head or shoulder level. I personally maneuvered the welding gun and whip in question. I did not weigh the unit but I would estimate this to be around 10 pounds of weight. I holstered the unit on the holster/stand. I did bring a tape measure, the holster is 40 inches from the ground. I am 5'9" tall and this motion brought my hand to waist/hip level. I have a right shoulder tendonitis, this did not irritate my shoulder. Mr. Hudson is 6'0" tall. This would have been an

even lower holstering for a man of his size. It is my medical opinion that Mr. Hudson's right shoulder injury is NOT related to his work activities at Quality Manufacturing. It would be more likely related to old football/wrestling injuries or even more likely his work driving and wrenching on race cars.

(Ex. B, p. 3) Hudson was not present when Dr. Hawk went to the workplace. (Tr., p. 49) Hudson acknowledged he rarely welded above his head. (Tr., p. 105)

Hudson testified that during his appointment with Dr. Hawk, Dr. Hawk said to him, "I bet you played sports. I bet you wrestled and played football" and Hudson told him yes. (Tr., pp. 35) Hudson denied that he was ever injured while wrestling or playing football in high school. (Tr., pp. 35-36) He also denied injuring his shoulder racing or working on race cars. (Tr., p. 36)

Counsel for Hudson provided Dr. Taylor with a copy of Dr. Hawk's report. (Ex. 1A) Dr. Taylor sent a response letter on April 27, 2018, which provides:

[a]s indicated in my IME report of May 12, 2017, Mr. Hudson denied prior right shoulder injuries other than a limited injury clear back in 1992 associated with a car accident. Mr. Hudson's job functions were also described in my IME report. Prior to the incident with his shoulder, he was reportedly not having issues. Old imaging studies were not available for comparison. Based on my understanding of the job and what transpired, I am still of the opinion that his work activities represented a significant contributing factor to his shoulder injury. Even if there were pre-existing radiographic abnormalities (which can't be proven either way), he was not symptomatic. As such, there are multiple ways this could be viewed from a causation standpoint. First, a direct and causal relationship with partial tearing, tendonitis, and bursitis. Another way to look at it is as an aggravation of a pre-existing condition (such as minimal to no tearing that then progresses as the result of an injury). Last (and once again assuming a previously asymptomatic pre-existing radiographic abnormality), this could be viewed as a "lighting up". He sustained the worsened symptoms and then returned to an asymptomatic state, then it might have been viewed as a temporary aggravation.

(Ex. 1A)

Hudson testified he continues to have symptoms in his hands when he works with vibratory tools. (Tr., p. 21) Hudson relayed his hands hurt, swell, and he has extreme cold intolerance now. (Tr., p. 21) Before his work injury Hudson worked outside for several employers and he never had a problem tolerating the cold. (Tr., p. 21) Hudson relayed the pain in his shoulder is a dull ache and his right hand is slightly swollen, "but otherwise I don't have any pain currently in my hands." (Tr., p. 52)

Hudson relayed all welding jobs require him to use vibratory tools, which is something he can no longer tolerate. (Tr., pp. 21-22) Hudson testified his work as a welder required him to clamp and unclamp thirty-six parts, which required repetitive grasping and gripping, which are activities he cannot tolerate. (Tr., pp. 22-23) Hudson also relayed that he would not be able to return to work at Quality because his position requires the ability to lift fifty pounds and Dr. Taylor has imposed a lifting restriction of forty pounds up to chest level. (Tr., pp. 51-52) During cross-examination Hudson acknowledged there were many times when he worked for Quality where he was not lifting more than fifteen pounds. (Tr., p. 82)

Hudson has not worked since he was terminated by Quality. (Tr., p. 47) Hudson testified he has not worked because "[i]t's near impossible to obtain employment with a preexisting condition, and my -- and my -- my injury keeps me from doing the things that I'm proficient at." (Tr., pp. 47-48) During cross-examination Hudson admitted that since he was terminated by Quality he has "done a couple of small drywall repair jobs," but he has not been on a payroll. (Tr., p. 70) Hudson relayed he has performed drywall work above shoulder level in the past, but testified "I haven't since my accident." (Tr., p. 73) Hudson testified he did some wall patching for his mother-in-law and her friend both below shoulder level. (Tr., p. 100)

Hudson formed a limited liability company, Modern Renovation, for his construction business on January 14, 2011. (Tr., p. 75) Hudson reported he "reinstated" his limited liability company shortly after Quality terminated his employment. (Tr., pp. 75-76) Hudson denied he performed any side work while he was employed by Quality. (Tr., p. 76)

Hudson entered a guilty plea to operating while intoxicated after he had a positive test for methamphetamine in 2011, prior to his employment with Quality. (Tr., pp. 56-58) Hudson has filed for bankruptcy in the past. (Tr., p. 70)

Hudson has been fired by other employers. (Tr., p. 71) Hudson was fired by Dickman's Supply following a dispute with the delivery trucks. (Tr., p. 71) He worked for his stepfather at Lumbermans and he was terminated for failing to report an accident. (Tr., p. 72) Hudson was also fired by Home Depot and Wheeler Lumber. (Tr., p. 72)

Hudson received unemployment insurance benefits while he was receiving healing period benefits. (Tr., p. 89) Hudson should not have been receiving both at the same time and he owes Iowa Workforce Development \$5,500.00 for benefits he was not entitled to receive. (Tr., p. 89)

Hudson relayed he has put out "feelers" in the construction field, but in the last year Hudson has not applied for any positions. (Tr., pp. 89-90) Hudson has not looked for any work outside of the construction industry. (Tr., p. 90) Hudson has not requested

assistance from Iowa Workforce Development or Iowa Vocational Rehabilitation Services in looking for work. (Tr., pp. 90-91)

Hudson has been involved in five to seven motor vehicle accidents. (Tr., p. 92) In one accident he received a settlement in 1992 after he injured his right shoulder. (Tr., pp. 93-94) Hudson was involved in IMCA hobby stock car racing from 2003 until 2010. (Tr., p. 94) Hudson was involved in accidents related to his racing. (Tr., p. 94)

Cloe has been a human resources specialist for Quality since October 2011. (Tr., p. 109) Cloe testified Hudson's production during his employment with Quality was below average. (Tr., p. 110) Cloe relayed Quality has developed quoted times for jobs and has data to compare production rates. (Tr., p. 110) Cloe relayed Hudson's job required he be able to lift fifty pounds. (Tr., p. 11)

Cloe testified that in 2014, Hudson reported he was having pain and Cloe asked him if he wanted to see a doctor. (Tr., p. 112) Cloe reported Hudson informed him he wanted to keep an eye on things, he went on vacation, and when he returned he did not pursue any medical treatment. (Tr., p. 112) Hudson continued to perform his normal duties and did not report any problems performing his job. (Tr., p. 112)

Cloe testified he learned Hudson was experiencing physical problems on January 21, 2016, the last day he worked for Quality. (Tr., pp. 112-13) Hudson's manager informed Cloe Hudson believed he had sustained a work injury. (Tr., p. 113) Quality conducted an accident investigation that day and sent Hudson to the doctor to be examined. (Tr., p. 113)

Cloe testified before Hudson's termination on January 21, 2016, Hudson was aware he had ongoing issues with meeting his quote times, which were addressed on three evaluations, and in a disciplinary action on January 18, 2016, when Hudson received a written warning for failing to meet his quote times and for being argumentative with his supervisors when they tried to work with him to increase his production. (Tr., p. 114) Cloe reported Quality had made a decision to terminate Hudson's employment before he reported his work injury. (Tr., p. 116) Cloe relayed Hudson did not perform work at or above shoulder level very often, but he from did time to time. (Tr., p. 119)

Cloe reported when Dr. Hawk visited the site it was a usual day. (Tr., p. 120) There were approximately fifty welders working that day. (Tr., p. 121) Quality has disciplined employees for not using hoists. (Tr., p. 122)

Huffman, the safety manager for Quality, testified he had observed welders in the area Hudson worked on a day-to-day basis at Quality. (Tr., p. 132) Based on his investigation and observations, Huffman relayed Hudson's job required him to work at or above shoulder level typically one percent of the time maximum, and the remainder of the time he would be working below shoulder level. (Tr., p. 133)

CONCLUSIONS OF LAW

I. Nature of the Injury

The parties stipulated Hudson sustained work injuries to his right and left upper extremities, carpal tunnel syndrome. Hudson also avers he sustained a work injury to his right shoulder. Quality and EMCASCO deny he sustained a work injury to his right shoulder.

To receive workers' compensation benefits, an injured employee must prove, by a preponderance of the evidence, the employee's injuries arose out of and in the course of the employee's employment with the employer. 2800 Corp. v. Fernandez, 528 N.W.2d 124, 128 (Iowa 1995). An injury arises out of employment when a causal relationship exists between the employment and the injury. Quaker Oats v. Ciha, 552 N.W.2d 143, 151 (Iowa 1996). The injury must be a rational consequence of a hazard connected with the employment, and not merely incidental to the employment. Koehler Elec. v. Willis, 608 N.W.2d 1, 3 (Iowa 2000). The Iowa Supreme Court has held, an injury occurs "in the course of employment" when:

it is within the period of employment at a place where the employee reasonably may be in performing his duties, and while he is fulfilling those duties or engaged in doing something incidental thereto. An injury in the course of employment embraces all injuries received while employed in furthering the employer's business and injuries received on the employer's premises, provided that the employee's presence must ordinarily be required at the place of the injury, or, if not so required, employee's departure from the usual place of employment must not amount to an abandonment of employment or be an act wholly foreign to his usual work. *An employee does not cease to be in the course of his employment merely because he is not actually engaged in doing some specifically prescribed task, if, in the course of his employment, he does some act which he deems necessary for the benefit or interest of his employer.*

Farmers Elevator Co. v. Manning, 286 N.W.2d 174, 177 (Iowa 1979) (quoting Bushing v. Iowa Ry. & Light Co., 208 Iowa 1010, 1018, 226 N.W.719, 723 (1929)).

The claimant bears the burden of proving the claimant's work-related injury is a proximate cause of the claimant's disability and need for medical care. Ayers v. D & N Fence Co., Inc., 731 N.W.2d 11, 17 (Iowa 2007); George A. Hormel & Co. v. Jordan, 569 N.W.2d 148, 153 (Iowa 1997). "In order for a cause to be proximate, it must be a 'substantial factor.'" Ayers, 731 N.W.2d at 17. A probability of causation must exist, a mere possibility of causation is insufficient. Frye v. Smith-Doyle Contractors, 569 N.W.2d 154, 156 (Iowa Ct. App. 1997). The cause does not need to be the only cause, "[i]t only needs to be one cause." Armstrong Tire & Rubber Co. v. Kubli, 312 N.W.2d 60, 64 (Iowa 1981).

The question of medical causation is “essentially within the domain of expert testimony.” Cedar Rapids Cmty. Sch. Dist. v. Pease, 807 N.W.2d 839, 844-45 (Iowa 2011). The deputy 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).

It is well-established in workers’ compensation that “if a claimant had a preexisting condition or disability, aggravated, accelerated, worsened, or ‘lighted up’ by an injury which arose out of and in the course of employment resulting in a disability found to exist,” the claimant is entitled to compensation. Iowa Dep’t of Transp. v. Van Cannon, 459 N.W.2d 900, 904 (Iowa 1990). The Iowa Supreme Court has held,

a disease which under any rational work is likely to progress so as to finally disable an employee does not become a “personal injury” under our Workmen’s Compensation Act merely because it reaches a point of disablement while work for an employer is being pursued. It is only when there is a direct causal connection between exertion of the employment and the injury that a compensation award can be made. The question is whether the diseased condition was the cause, or whether the employment was a proximate contributing cause.

Musselman v. Cent. Tel. Co., 261 Iowa 352, 359-60, 154 N.W.2d 128, 132 (1967).

A. Credibility

Quality and EMCASCO challenged Hudson’s credibility at hearing. When assessing witness credibility, the trier of fact “may consider whether the testimony is reasonable and consistent with other evidence, whether a witness has made inconsistent statements, the witness’s appearance, conduct, memory and knowledge of the facts, and the witness’s interest in the [matter].” State v. Frake, 450 N.W.2d 817, 819 (Iowa 1990). The timing of Hudson’s reported work injury and inconsistencies in his medical records raise questions concerning Hudson’s credibility.

Hudson was terminated the week he reported his work injury. Hudson testified he was an average employee who did not have any production problems until his January 2016 work injury. (Tr., pp. 42-44) Cloe testified Hudson had ongoing performance problems. (Tr., p. 114) On January 18, 2016, before he reported his work injury, Quality issued Hudson a written warning for failing to meet his quote times and for being argumentative with his supervisors when they tried to work with him to

increase his production. (Tr., p. 114) Hudson's testimony is not reasonable and consistent with the other evidence I believe. While Cloe has an interest in this case because he still works for Quality, he did not make inconsistent statements, and his conduct, memory, and knowledge of the facts was clear.

Moreover, at hearing Hudson testified he did not have right shoulder symptoms during his four years of employment with Quality until the end of his employment in 2016, or three to five weeks before he was terminated. (Tr., pp. 33, 42) This is contrary to his medical records. During his first appointment with Hudson Dr. Yankey documented

[t]he patient reports that he has also noted pain in his right shoulder intermittently over the past 2 years. He describes a "cracking" sensation in his right shoulder at times. He notes his right shoulder pain especially when he is handling the welding gun, including when he is extending his arm and holding the gun out or putting the gun into its holster. He states that he occasionally awakens at night with the right shoulder pain which shoots down the right arm to his hand.

(JE 2, p. 1) During his appointment with Dr. Aviles on February 1, 2017, Dr. Aviles documented Hudson "claims to have developed a work-related injury approximately two years ago" and "describes a remote history of placing his welder in its holster and developing pain that way." (JE 8, p. 1) The inconsistencies between Hudson's testimony and his medical records is concerning. I do not find Hudson to be a credible witness.

B. Causation with Respect to the Right Shoulder

Three physicians have provided causation opinions on Hudson's right shoulder condition, Dr. Aviles, a treating orthopedic surgeon, Dr. Taylor, an occupational medicine physician who performed an independent medical examination for Hudson, and Dr. Hawk, a family practice physician specializing in sports medicine and urgent care who performed an independent medical examination for Quality and EMCASCO. I find the opinion of Dr. Aviles, the treating orthopedic surgeon, supported by Dr. Hawk's opinion, to be the most persuasive. Dr. Aviles has advanced, superior training to that of Drs. Taylor and Hawk. Dr. Aviles has treated Hudson over a period of time. Dr. Aviles found the remote history of placing a welder in a holster is "not a clear mechanism of injury for right shoulder rotator cuff tear." (Ex. A, p. 1) Dr. Aviles's opinion is further supported by Dr. Hawk, who observed individuals performing work similar to that of Hudson at Quality. (Ex. B, p. 3) Hudson has not established his right shoulder condition is causally related to the work injury.

II. Extent of Disability

The parties stipulated Hudson sustained a permanent impairment to his bilateral upper extremities, but disagree on the extent of disability. Permanent partial disabilities are divided into scheduled and unscheduled losses. Iowa Code § 85.34(2) (2015). If the claimant's injury is listed in the specific losses found in Iowa Code section 85.34(2)(a)-(t), the injury is a scheduled injury and is compensated by the number of weeks provided for the injury in the statute. Second Injury Fund v. Bergeson, 526 N.W.2d 543, 547 (Iowa 1995). "The compensation allowed for a scheduled injury 'is definitely fixed according to the loss of use of the particular member.'" Id. (quoting Graves v. Eagle Iron Works, 331 N.W.2d 116, 118 (Iowa 1983)). If the claimant's injury is not listed in the specific losses in the statute, compensation is paid in relation to 500 weeks as the disability bears to the body as a whole. Id.; Iowa Code § 85.34(2)(u). "Functional disability is used to determine a specific scheduled disability; industrial disability is used to determine an unscheduled injury." Bergeson, 526 N.W.2d at 547.

Three physicians have provided permanent impairment ratings regarding Hudson's bilateral upper extremities, Dr. Han, the treating orthopedic surgeon, and Dr. Taylor, an occupational medicine physician retained to conduct an independent medical examination for Hudson, and Dr. Hawk, a family practice physician specializing in sports medicine who performed an independent medical examination for Quality and EMCASCO. All three physicians agree Hudson reached maximum medical improvement on December 16, 2016, with respect to his bilateral upper extremities. Dr. Han assigned a three percent permanent impairment rating to each upper extremity. Drs. Hawk and Taylor assigned a five percent permanent impairment to each upper extremity.

I find the opinion of Dr. Hawk, supported by the opinion of Dr. Taylor most persuasive. Drs. Hawk and Taylor most recently examined Hudson. Dr. Han refers to Tables 16-10 and 16-50 in reaching his opinions. There is a Figure 16-50 in the AMA Guides, not a Table 16-50. Dr. Han's report does not mention any ongoing symptomatology. Both Dr. Hawk and Dr. Taylor opined Hudson remains symptomatic. Dr. Han did not convert his impairment ratings to the whole person. Drs. Hawk and Taylor converted the five percent impairment rating for each upper extremity to three percent of the whole person, and using the combined values chart at page 604 of the AMA Guides combined the values, for a six percent whole person impairment.

The schedule provides a maximum award of 500 weeks for an injury to both arms, both hands, both feet, both legs, or both eyes as the result of a single accident. Iowa Code § 85.34(2)(s). Under the schedule, Hudson is entitled to thirty weeks of permanent partial disability benefits, at the rate of \$837.61, commencing on December 19, 2016. The record does not support a deviation from the schedule. Considering all of the evidence, lay and medical, the record establishes Hudson has sustained a six percent impairment of the whole person.

III. Costs

At hearing Hudson reported he was seeking costs. Attached to Exhibit 1 is a bill from Taylor. Taylor's bill is itemized. (Ex. 1) Taylor charged Hudson \$1,401.50 for his examination, \$550.00 for motor and sensory nerve testing, and \$1,508.50 for his report. Iowa Code section 86.40, provides, "[a]ll costs incurred in the hearing before the commissioner shall be taxed in the discretion of the commissioner." Rule 876 IAC 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, (8) costs of persons reviewing health service disputes.

After receiving an injury, the employee, if requested by the employer is required to submit to examination at a reasonable time and place, as often as reasonably requested to a physician, without cost to the employee. Iowa Code § 85.39. If an evaluation of permanent disability has been made by a physician retained by the employer and the employee believes the evaluation is too low, the employee "shall, upon application to the commissioner and upon delivery of a copy of the application to the employer and its insurance carrier, be reimbursed by the employer the reasonable fee for a subsequent examination by a physician of the employee's own choice" Id. Dr. Taylor's independent medical examination occurred after Dr. Han issued his impairment rating.

In the case of Des Moines Area Regional Transit Authority v. Young, the Iowa Supreme Court held:

[w]e conclude section 85.39 is the sole method for reimbursement of an examination by a physician of the employee's choosing and that the expense of the examination is not included in the cost of a report. Further, even if the examination and report were considered to be a single, indivisible fee, the commissioner erred in taxing it as a cost under administrative rule 876-4.33 because the section 86.40 discretion to tax costs is expressly limited by Iowa Code section 85.39.

867 N.W.2d 839, 846-47 (Iowa 2015). Dr. Taylor's bill is itemized. Hudson is entitled to recover \$1,401.50 for Dr. Taylor's examination, \$550.00 for the motor and sensory nerve testing, and \$1,508.50 for Dr. Taylor's report.

ORDER

IT IS THEREFORE ORDERED, THAT:

Defendants shall pay the claimant thirty (30) weeks of permanent partial disability benefits, at the rate of eight hundred thirty-seven and 61/100 dollars (\$837.61) per week, commencing on December 19, 2016.

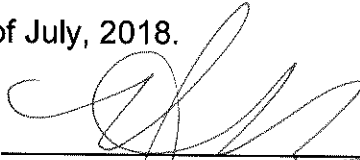
Defendants shall take credit for all benefits previously paid.

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 Tech., File No. 5054686 (App. Apr. 24, 2018).

Defendants are assessed one thousand four hundred one and 50/100 dollars (\$1,401.50) for Dr. Taylor's examination, five hundred fifty and 00/100 dollars (\$550.00) for the motor and sensory nerve testing, and one thousand five hundred eight and 50/100 dollars (\$1,508.50) for Dr. Taylor's report.

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

Signed and filed this 10th day of July, 2018.


HEATHER L. PALMER
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

Copies to:

Jeffrey M. Lipman
Attorney at Law
1454 - 30th St., Ste. 205
West Des Moines, IA 50266-4307
lipmanlawfirm@aol.com

D. Brian Scieszinski
Attorney at Law
801 Grand Ave., Ste. 3700
Des Moines, IA 50309-8004
scieszinski.brian@bradshawlaw.com

HLP/srs

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