BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

IRIS RIVERA, Claimant, vs. SMITHFIELD FOODS, INC., Employer, and SAFETY NATIONAL CASUALTY CORP., Insurance Carrier, Defendants.	:	File No. 5066964 A R B I T R A T I O N D E C I S I O N Head Note Nos.: 1803, 1100, 1108, 1803 1803.1, 2500

STATEMENT OF THE CASE

Iris Rivera claimant, filed a petition in arbitration seeking workers' compensation benefits against Smithfield Foods, Inc., employer, and Safety National Casualty Corp, insurer, both as defendants for an accepted work injury date of March 2, 2018.

The hearing was conducted on December 13, 2019, in Des Moines, Iowa. The case was considered fully submitted on January 10, 2020, upon the simultaneous filing of briefs.

The record consists of Joint Exhibits 1-6; claimant's exhibits 1-7; defendants exhibits A-G, and the testimony of claimant.

ISSUES

1. Whether the stipulated injury extends into claimant's neck or cervical spine or is isolated in her shoulder;
2. Whether claimant is entitled to temporary benefits from October 26, 2018 through January 21, 2019;
3. The extent of claimant's permanent partial disability benefits, if any;
4. The appropriate commencement date for permanent partial disability benefits, if any are awarded;
5. Whether claimant is entitled to reimbursement under Iowa Code section 85.39

6. Whether claimant is entitled to industrial benefits if it is found that her injury is industrial if her salary wages and earnings are the same or greater at hearing than at the time of the injury
7. Taxation of costs.

STIPULATIONS

The parties stipulate the claimant sustained injury arising out of and in the course of her employment on March 2, 2018. While the parties dispute claimant's entitlement to temporary benefits, they agree the claimant was off work from October 26, 2018 through January 21, 2019. At all times material hereto, the claimant's gross earnings were $1,034.46 per week, she was married and entitled to three exemptions. Based on the foregoing, the weekly benefit rate is $662.74.

The defendants waive any affirmative defenses.

FINDINGS OF FACT

At the time of the hearing, claimant was a 50-year-old Spanish-speaking immigrant from El Salvador. She attended 12 years of school in El Salvador but does not have postsecondary education. She speaks some English and understands some English words but is unable to converse fluently in the language. There is an interpreter at the plant that she utilizes when she needs to communicate with company employees. She is not familiar with a computer and does not type.

Her past work history includes work at a printing company who specialized in the printing of phone directories. Each of the telephone books weighed approximately 10 pounds or less and they would, at times, have to be lifted over her head to be placed onto a pallet. She does not believe she could do that work today because of her injury and her current restrictions.

Through a staffing agency, she packed clothes, unloaded trailers and placed labels on products. Her past job duties included lifting boxes of clothes weighing 35 to 50 pounds and placing them on a conveyor belt. She does not believe that she could return to this position and execute the essential tasks of her job given her current physical condition and restrictions.

For approximately six months, claimant worked at a meat processing plant. Her position involved packing ribs which weighed approximately 30 pounds. Given the lifting requirements of this position, claimant does not believe that she would be able to undertake these tasks today.

There is no medical history of any significance. Prior to her beginning work for the defendant employer in May 2005, claimant had no problems or injuries with respect to her neck or shoulders. She did complain and receive treatment for migraines in

January 2016. (JE 2:8-10) The migraine pain, when symptomatic, runs from the front of her head to the back of her neck.

At some point, claimant developed Trigeminal neuralgia as a result of a tooth extraction years ago. This pain primarily presented in the left jaw and cheek area. (JE 2:12-13) She receives treatment for this from Michael Luft, D.O. From time to time the pain from the neuralgia is severe enough for her to miss work. (E.g. JE 2:14, JE3:77) Dr. Luft prescribes meloxicam for treatment. According to the claimant, this medication is also used to alleviate pain in the shoulder and neck.

She maintains that the pain in her neck from her work injury is different than that caused by the pain from the neuralgia or the migraines. The pain she developed through the repetitive work motions is located at the left side of her neck and radiates into the shoulder and down into the shoulder blade and the left biceps.

After being cleared by a pre-employment physical examination, claimant began working for the defendant employer in May 2005. She worked in a variety of positions in rotation including separating tripe, using the whizard knife to cut fat off the pig as well as lifting and placing heads. All three positions required repetitive movement of her hands and arms. She would often be looking down at her work, as well as reaching and lifting above her head. Claimant would process between 1000 and 2400 pieces per day. Over time, she began to develop pain in her shoulder, neck and shoulder blades on the left side. The pain would wax and wane. At times she would report this pain to her supervisors who would send her to the company nurse. She received treatment from the company nurse but was not sent to an outside doctor until 2018. (JE 4:89) Treatment included heat and massage point therapy to the left upper back and shoulder. (JE 4:89) Her job responsibilities included carrying, lifting, lowering, pushing and pulling heavy or awkward objects or loads, as well as lifting and lowering objects of up to 60 pounds. (Joint Exhibit 2:31)

While she was working the heads rotation position, she felt a constant and strong pain in her shoulder. On March 2, 2018, she reported this to her supervisor who again referred claimant to a nurse. She testified that she was told to mark on the pain drawing where the pain was the strongest. She marked the shoulder but did not include the neck. (JE 4) She testified that she complained of pain in her left shoulder, left trapezius, neck on the left side, and left shoulder blade. (CE. 4: 28-30)

On March 30, 2018, claimant underwent an MRI which revealed irregular heterogeneous thickening of the subscapularis tendon suggesting sequela of at least severe partial tear, tendinopathy of the supraspinatus and infraspinatus tendons with articular surface fraying, tendinopathy of the biceps tendon with bicipital tenosynovitis, and mild glenohumeral and acromioclavicular joint degenerative changes. (JE 1:2)

She was then seen on April 3, 2018 by Todd A. Woollen, M.D., an authorized medical provider. (JE 3:79) Dr. Woollen noted that conservative care had failed. The MRI showed evidence of a severe partial tear that had partially healed, as well as

tendinopathy in the left shoulder; therefore, orthopedic surgery referral was recommended. (JE 3:79) Claimant was moved to a lighter duty job at this time.

On May 4, 2018, claimant was seen by Dr. Luft for well woman exam. (JE 2:15) All of her symptoms were normal except for the neurological exam wherein she reported pain and numbness and tingling. (JE 2:16) Her major source of concern was the trigeminal neuralgia. (JE 2:17) Dr. Luft filled out the paperwork for an FMLA request associated with the trigeminal neuralgia. (JE 2:19) Claimant did not report shoulder, neck, shoulder blade or arm pain in that document.

Claimant was seen by Bradley A. Lister, M.D., on May 21, 2018, who noted her chief complaint was shoulder pain that started several years ago. (JE 3:81-83) Dr. Lister diagnosed claimant with tendonitis of the left rotator cuff and pain in the left shoulder. (JE 3:81-83) He kept her previous restriction of 20 pounds lifting and no overhead activities on the left, performed an injection of Kenalog 120 mg to the left shoulder and recommended ice and stretching. (JE 3:81-83)

On June 11, 2018, claimant returned to Dr. Lister's office for follow up care. (JE 3:84) She reported that the cortisone injection relieved her shoulder pain by over 75 percent and that she was continuing to work with restrictions of no lifting over 20 pounds and no overhead activities. (JE 3:84) However, despite the good results from the injection and the lifting restrictions, claimant was developing more discomfort over the left scapula. (JE 3:84) Another injection was administered and claimant was referred to physical therapy. (JE 3:85)

Claimant was seen on June 19, 2018 for therapy at the Crawford County Memorial Hospital. (JE 1:3) Her subjective complaints included pain located at the top of the shoulder, varying in intensity. Sometimes, the pain woke her at night, and extended use increased the pain. (JE 1:3) The pain chart filled out indicated pain on the shoulder, shoulder blade and biceps. (JE 1:5) There was no notation of neck pain.

During the objective portion of the examination, claimant had flexion active range of motion to 150 degrees, reduced range of passive motion by 10 degrees, 30 percent loss of extension motion with end range pain, 30 percent of loss of internal motion with pain at 150 degrees, full range of external motion with end range pain. (JE 1:3) She was tender to palpation over the supraspinatus. Id. Small range of motion exercises were conducted with the therapist concluding that the claimant's symptoms were more consistent with biceps tendinopathy than rotator cuff tendinopathy. The plan was to continue to treat her with physical therapy for the next four weeks. (JE 1:4)

Claimant was seen for seven treatment sessions between June 19, 2018 and July 12, 2018. (JE 1:6) The notes recorded improvement that was eroded when claimant returned to work. Brian Koeppen, the therapist, noted that the symptoms had been going on for several years. (JE 1:6) Mr. Koeppen observed that claimant's pain was reduced when she kept the functional activities below the shoulder and felt that

claimant would have benefited from more physical therapy but that her doctor, Dr. Lister, did not refer claimant back for continued treatment. (JE 1:6)

Dr. Lister saw claimant on July 18, 2018, for the left shoulder pain. (JE 3:87) This time, the trigger point injections did not help. (JE 3:87) Dr. Lister determined there was no more that he could do for her and discharged claimant with permanent work restrictions of no lifting over 20 pounds with the left shoulder, no overhead or over the shoulder work on the left side, no repetitive pushing or pulling. (JE 3:87) She was advised to keep her work at waist to chest only. (JE 3:87)

She was told by the defendant employer that she had 60 days to find a job within the restrictions of Dr. Lister. She initially bid on a job referred to as “clean bungs” but defendants determined the job did not fit within her restrictions and the job was denied. In early October 2018, she bid on a job called scrape lard despite reservations she had about it being within her restrictions. The position required her to lift her left arm to open a carcass and then use a whizard knife in her right hand to cut or trim from above the shoulder level to below her knee. After a few days on the job, the pain in her left shoulder and left shoulder blade increased. She informed her supervisor of the pain and was moved back to light duty work.

Claimant was seen on October 24, 2018, by Dr. Luft. (JE 2:24) This time, she specifically requested a review of her continuing left shoulder pain and completion of an FMLA form related to left shoulder pain. (JE 2:24) Dr. Luft filled out the paper work, reviewed claimant’s history and continued claimant with her current restrictions. (JE 2:26) The basis for the FMLA request was due to claimant’s chronic left shoulder pain. When it flared up, she was not able to continue use of her left arm and needed rest. (JE 2:28)

On October 26, 2018, claimant was removed from the plant due to not being able to perform the duties of her job. She filed for unemployment which she received for three months until the defendant employer returned claimant to work on January 2019, at a lower wage than she had been earning at the time of her discharge in October 2018. She was returned to the scrape lard position but it continued to hurt her and ultimately she was moved to the “removing the thyroid gland” job. This position requires standing on a platform and reaching for meat on a conveyor belt that is approximately located at waist level. She cuts and removes the thyroid gland. There is no lifting and the work is at or below shoulder level. It complies with the restrictions from both Dr. Lister and Dr. Bansal and claimant desires to continue working this position.

Claimant had another round of shoulder injections for her pain on November 2, 2018. (JE 3:83)

On November 13, 2018, claimant underwent an IME with Dr. Bansal. (CE 1) Dr. Bansal diagnosed claimant with cervical myofascial pain syndrome with symptoms and Left rotator cuff tear. (CE 1:6) Dr. Bansal assigned 5 percent permanent impairment to Ms. Rivera's whole person as a result of her cervical/neck injury, and 6 percent

permanent impairment to her left upper extremity for her shoulder, along with permanent restrictions of no lifting more than 10 pounds occasionally, 5 pounds frequently, with her left arm, no lifting above shoulder level with her left arm occasionally, and no frequent reaching with her left arm. (CE 1-6) He causally related Ms. Rivera's permanent neck injury to overuse syndrome from the cumulative effect of her repetitive work in having to look down or to the side, and her left shoulder from overuse as well. (Ex. 1, pp. 6-10.) He recommended avoidance of work or activities that required repeated neck motion or placed her neck in a postural flexed position for an appreciable duration of time along with no lifting greater than 10 pounds occasionally or five pounds frequently with the left arm and no lifting above shoulder level with the arm other than occasionally. (CE 1:10) His report was $564.00 for the examination and $2,004.00 for the report. (CE 1:11) In a subsequent review of the records and expert reports, Dr. Bansal renewed his opinions that claimant sustained neck strain as a result of repetitive motion at work. (CE 1:17)

On January 18, 2019, claimant returned to Dr. Luft's office where she was seen by Kelli Borkowski, ARNP, for stomach upset and diarrhea symptoms. (JE 2:32) In the musculoskeletal portion of the examination, it is noted that claimant had full range of motion. There was no mention of claimant's chronic shoulder or neck pain. (JE 2:33)

Claimant's left-sided facial neuralgia caused her to seek treatment on February 9, 2019. (JE 2:36) She was found to have an abscess in a tooth and was prescribed Clindamycin. (JE 2:38)

On March 21, 2019, claimant presented at Dr. Luft's office and was seen by Sara Luft, ARNP for continued issues with her left shoulder pain that was radiating down to the left rib cage. (JE 2:40) Claimant reported being given nothing for her left shoulder pain by authorized treating physician Dr. Lister and wanted a second opinion. (JE 2:40) Claimant also reported left-sided sciatica. (JE 2:41) A trigger point injection for the sciatica was administered. (JE 2:42)

On April 25, 2019, defendants returned claimant to Dr. Lister for an evaluation of her shoulder. (JE 3:88) Dr. Lister noted he assigned her permanent restrictions on July 18, 2018, and those remained unchanged. Dr. Lister assigned a 8 percent upper extremity impairment rating for the left shoulder issues and suggested that claimant will need to use over-the-counter medications to treat her pain, as well as creams as needed. (JE 3:88)

After claimant's IME with Dr. Bansal and his recommendation to follow up with her personal care physician, claimant returned to Dr. Luft's office and was seen by Dr. Luft on June 10, 2019 for the ongoing neck and shoulder pain. (JE 2:44) Dr. Luft ordered imaging studies for the cervical pain. (JE 2:46) The MRI was conducted on June 17, 2019. (JE 1:7) There were minor disc bulging at C3-4, small central disc protrusion at C4-5, while the remainder of the cervical spine was normal. (JE 1:7) The following day, claimant returned to Dr. Luft's office requesting FMLA paperwork be filled

out for the facial neuralgia and neck pain. (JE 2:48) Dr. Luft started claimant on meloxicam. (JE 2:50)

Claimant started physical therapy again on June 26, 2019, but this time treatment included both neck and left shoulder pain. (JE 5:96) Despite the treatment in 2018, claimant's pain was greater in 2019 and she was having difficulty sleeping. (JE 5:96) New goals were discussed and therapeutic exercises and maneuvers were initiated. (JE 5:96) After six visits, she reported improvement of her neck pain but the pain in her shoulder was extending into her hand. (JE 5:99)

On July 19, 2019, claimant was again seen at Dr. Luft's office for the tendinitis of the left rotator cuff and she was referred to physical therapy. (JE 2:53) On August 9, 2019, she presented with a migraine and requested treatment. (JE 2:55) No changes were made to her medication and she was advised to rest and adequately hydrate?. (JE 2:57)

Three days later she reported to Dr. Luft's office with complaints of increased left shoulder pain spreading into her left arm. She had been doing physical therapy but the condition was not improving and the meloxicam was not reducing her pain. (JE 2:59) Claimant was referred to neurosurgery for an evaluation. (JE 2:61)

On August 27, 2019, she was seen by John D. Hain, M.D., at the Nebraska Spine Center. (JE 6:101) Claimant described throbbing and burning pain with numbness and tingling down into her fingers. (JE 6:101) On examination, she exhibited tenderness on palpation to the cervical spine along with pain upon movement. (JE 6:103) Dr. Hain diagnosed claimant with intervertebral disc disorder with radiculopathy. The MRI was consistent with the claimant's symptoms and Dr. Hain recommended a series of injections at C4-C6. (JE 6:105) Before the injections started, however, claimant's condition was reviewed by Matt West, M.D., a spine and musculoskeletal specialist who recommended an EMG to further delineate the levels of involvement of the cervical spine. (JE 6:116) In the pain drawing, claimant filled in nearly the entirety of the upper left extremity, shoulder, left neck, shoulder blade and chest region. (JE 6:117) EMG results were normal and on October 25, 2019, claimant was referred to orthopedic surgery for her shoulder and elbow complaints. (JE 6:118) Matthew West, M.D., believed that the primary component of claimant's pain was in the shoulder and elbow given the results of the EMG. (JE 6:121)

Upon a referral by Dr. Luft's office, claimant was seen by Julie Nielsen, ARNP, on October 24, 2019 for depression. (JE 2:62) Claimant expressed feeling down, depressed and hopeless having trouble falling asleep or staying asleep or sleeping too much, reduced energy, and anxiety. (JE 2:62) She was diagnosed with fatigue and a cervical discogenic pain syndrome. (JE 2:64) An EMG was scheduled for the ongoing cervical spine issues. (JE 2:64)

On November 4, 2019, claimant was seen again by Ms. Nielsen for ongoing left shoulder pain. (JE 2:74) Ms. Nielsen prescribed Gabapentin and recommended claimant seek treatment with a chiropractor. (JE 2:75)

Claimant was sent to Douglas W. Martin, M.D., on April 17, 2019, an occupational medicine doctor who determined that claimant suffered only a left shoulder injury and that she would only need temporary restrictions, but more care. (DE G:45-47) Nonetheless, despite her condition and the reports of other medical professionals including Dr. Lister, Dr. Martin concluded claimant's problems were all degenerative in nature and unrelated to any work. Dr. Martin's opinions regarding the severity of claimant's injury did not align with any other medical professional's opinions and thus, his opinion is given low weight.

In a letter dated October 29, 2019, Dr. Luft responded to a checklist of questions written by the counsel for the claimant. (JE 2:72 through 73) In this opinion letter, Dr. Luft opined that claimant's left rotator cuff tendinitis with the partial tear, the cervical myofascial pain syndrome involving the left trapezius, left scapular area and base of neck were the cumulative effect of her repetitive upper extremity and upper body work for the defendants coming to fruition on March 2018. (JE2:72) He further agreed that the claimant sustained some type of permanent impairment as a result of her left rotator cuff and neck injuries and that she would need ongoing pain management in the future. (JE 2:73) He agreed that restrictions including no lifting greater than 10 pounds occasionally and 5 pounds frequently with the left arm along with no lifting above the shoulder level with the right arm and no lifting above shoulder level with the left arm occasionally and no frequent reaching with the left arm were appropriate for her left rotator cuff injury. (JE 2:73) For the neck problems, claimant was advised to avoid work or activities that required repeated neck motion or placed her neck in a posteriorly flexed position for more than 15 minutes at a time. (JE 2:73)

On November 25, 2019, Dr. West signed a letter drafted by the defendants' counsel wherein he agreed that claimant does not need further treatment for her cervical spine and that her ongoing symptoms and complaints were not related to her neck or cervical spine but rather her left shoulder and elbow. (JE 6:123)

At the time of her injury, claimant was earning $17.75 per hour. (Ex. C: 21) Her pay grade was Grade II and her work scheduled was 6:00 a.m. to 5:30 p.m. She worked six days a week. Following the March 2018, injury, she was place in an unassigned light-duty position and her pay grade was Grade I. In October 2018, she bid on and was awarded the scrape lard position for which she was paid $18.00. However, due to her pain, she was not able to continue with this job. She filed a union grievance to obtain the "clean bung" job. During this process, there was an agreement for her to return to the scrape lard position. When she returned to the scrape lard position in January 2019, she earned $17.70 per hour as a Grade I employee. By March 2019, her pay grade was raised to Grade II and her hourly earnings increased to $18.10 per hour. She then moved into the thyroid position earning $18.40 per hour. (Ex. D)

CONCLUSIONS OF LAW

The party who would suffer loss if an issue were not established has the burden of proving that issue by a preponderance of the evidence. Iowa R. App. P. 6.14(6).

The claimant has the burden of proving by a preponderance of the evidence that the alleged injury actually occurred and that it both arose out of and in the course of the employment. Quaker Oats Co. v. Ciha, 552 N.W.2d 143 (Iowa 1996); Miedema v. Dial Corp., 551 N.W.2d 309 (Iowa 1996). The words "arising out of" referred to the cause or source of the injury. The words "in the course of" refer to the time, place, and circumstances of the injury. 2800 Corp. v. Fernandez, 528 N.W.2d 124 (Iowa 1995). An injury arises out of the employment when a causal relationship exists between the injury and the employment. Miedema, 551 N.W.2d 309. The injury must be a rational consequence of a hazard connected with the employment and not merely incidental to the employment. Koehler Electric v. Wills, 608 N.W.2d 1 (Iowa 2000); Miedema, 551 N.W.2d 309. An injury occurs "in the course of" employment when it happens within a period of employment at a place where the employee reasonably may be when performing employment duties and while the employee is fulfilling those duties or doing an activity incidental to them. Ciha, 552 N.W.2d 143.

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).

Defendants take great issue with the lack of complaints made by the claimant when she initially reported the injury even going so far as arguing that she should be bound by the pain drawing she filled out on March 2, 2018. The case defendants cited in support of this was a 1924 Iowa Supreme Court case involving an action in equity, as

opposed to law, regarding a series of promissory notes and ultimate foreclosure on real estate property. Midland Mortg Co v. Rice, 198 N.W. 24 (Iowa 1924) It has no precedential value on determining whether a pain drawing that an employee filled out at the behest of a company nurse should be binding in a later workers' compensation case. It is unnecessary to go into all the ways in which the cases and fact patterns differ but suffice to say that the employee and the company nurse are not equals to a contract agreement with a bargained for consideration.

While claimant may have reported neck pain to the nurse, it was not documented nor did claimant make not of it on the pain drawing. The initial reports of pain to the health care officials were focused on claimant's left shoulder, shoulder blade region, and upper left extremity. Pain in her neck did not arise until after claimant had undergone her MRI with Dr. Bansal. There was one mention of pain up her neck during a physical therapy appointment in June 2018, but the primary complaints recorded by the multiple medical professionals who saw claimant including her own personal physician, Dr. Luft, was to the shoulder. Claimant maintains that she repeatedly told her physicians and caregivers about her neck issues, but that they were never recorded or addressed. It does not seem credible that claimant's neck complaints were ignored by repeated physicians including her own physician, Dr. Luft, who did not start treating claimant's neck pain until June 2019.

Dr. Luft was asked to fill out FMLA paperwork for claimant on October 24, 2018, and the physical issue that Dr. Luft noted was left shoulder tendinitis and pain. There was no reference to any neck or cervical symptoms in the FMLA paperwork neither was there any notation of neck pain or range of motion issues pertaining to claimant's neck.

Claimant was off work for three months, returning in January 2019. She moved to the thyroid position in March 2019 and she has worked there since. She testified that it is within her restrictions.

After claimant was alerted to the possibility of cervical injuries by Dr. Bansal, she returned to her personal physician, Dr. Luft. It was not until June 2019 that Dr. Luft started treating claimant for pain in her neck. The pain in her neck led to MRI testing which showed small to moderate central disc protrusions but subsequent EMG testings were normal leading Dr. West, a neurologist, to conclude that the claimant's pain originated in her shoulder and elbow.

Dr. Luft and Dr. Bansal both concluded claimant suffers from cervical myosfascial pain syndrome involving the left trapezius. The claimant also urges the undersigned to rely on the diagnostic findings of Dr. Hain who noted that the symptoms that claimant reported of neck pain with radiation down the left upper extremity in the C5-C6 distribution and the radiation of pain in the muscular axiom down to scapular insertion "could very well match" the MRI findings. (JE 6:101-109)

Dr. Hain's examination revealed no muscle spasm with full range of motion although there was some pain elicited by motion. Dr. Hain referred claimant to Dr. West

for a diagnostic injection but ultimately, based on examination, Dr. West was not convinced the cervical spine was the origination of pain complaints. Because the EMG results came back negative, he concluded that the pain symptoms stemmed from claimant's shoulder and elbow.

Dr. Luft is a family practice doctor and Dr. Bansal is a public medicine doctor whereas Dr. West is a neurologist trained in the study of the spinal cord. Dr. West is a medical provider chosen by the claimant and not by workers' compensation. Dr. West's conclusions were not solely based on EMG as Dr. Bansal suggested but on the collection of data from the examination he performed which revealed full range of motion, equal strength, and no tenderness on palpation.

Based on the foregoing, Dr. West's conclusions are given more weight. Given the length of time between the initial injury date and the neck complaints, the intervening time off of work, the opinion of the neurologist chosen by the claimant, it is determined that claimant has sustained a left upper extremity injury only.

Because of this finding, claimant is not entitled to temporary benefits from October 26, 2018 through January 21, 2019, which was the healing period related to claimant's neck and back.

Healing period compensation describes temporary workers' compensation weekly benefits that precede an allowance of permanent partial disability benefits. Ellingson v. Fleetguard, Inc., 599 N.W.2d 440 (Iowa 1999). Section 85.34(1) provides that healing period benefits are payable to an injured worker who has suffered permanent partial disability until the first to occur of three events. These are: (1) the worker has returned to work; (2) the worker medically is capable of returning to substantially similar employment; or (3) the worker has achieved maximum medical recovery. Maximum medical recovery is achieved when healing is complete and the extent of permanent disability can be determined. Armstrong Tire & Rubber Co. v. Kubli, Iowa App., 312 N.W.2d 60 (Iowa 1981). Neither maintenance medical care nor an employee's continuing to have pain or other symptoms necessarily prolongs the healing period.

The commencement date of permanent partial disability benefits would be the date that Dr. Lister released claimant from his care for the left shoulder injury on July 18, 2018. Since that date, she has had only palliative care to her left shoulder and has not seen any improvement. She was under the same work restrictions at the hearing that Dr. Lister set forth on July 18, 2018. Defendants argue that Dr. Lister did not release claimant formally until April 25, 2019, however, there was no change in the care that Dr. Lister ordered previously on July 18, 2018, nor was there a change in diagnosis or restrictions. The appropriate commencement date is July 18, 2018.

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

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

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

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

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

Evidence considered in assessing the loss of use of a particular scheduled member may entail more than a medical rating pursuant to standardized guides for evaluating permanent impairment. A claimant's testimony and demonstration of difficulties incurred in using the injured member and medical evidence regarding general loss of use may be considered in determining the actual loss of use compensable. Soukup, 222 Iowa 272, 268 N.W. 598. Consideration is not given to what effect the scheduled loss has on claimant's earning capacity. The scheduled loss system created by the legislature is presumed to include compensation for reduced capacity to labor and to earn. Schell v. Central Engineering Co., 232 Iowa 421, 4 N.W.2d 339 (1942).

The right of a worker to receive compensation for injuries sustained which arose out of and in the course of employment is statutory. The statute conferring this right can also fix the amount of compensation to be paid for different specific injuries, and the employee is not entitled to compensation except as provided by statute. Soukup, 222 Iowa 272, 268 N.W. 598.

Dr. Lister assessed claimant's loss of function as 8 percent and Dr. Bansal 6 percent. The percentage impairment either doctor assigned for the left shoulder does not adequately match her restrictions. Her restrictions include no lifting over 20 pounds with the left shoulder, waist to chest level work only, no overhead or over shoulder work activities on the left and no repetitive pushing and pulling. The inability to repetitive push or pull, no lifting over 20 pounds with the left shoulder and waist to shoulder work only is functionally limiting. Based on the restrictions assigned by Dr. Lister, claimant's functional loss to her left shoulder is 40 percent.

The last issue is whether claimant is entitled to reimbursement of Dr. Bansal's report under Iowa Code section 85.39. Under Iowa Code section 85.39, an employee is entitled to an examination by a physician of the employee's choice and be reimbursed by the employer for the reasonable fee of the examination, plus transportation expenses if the evaluation by the physician retained by the employer includes a permanent disability rating and the employee believes this evaluation to be too low. Des Moines Area Reg'l Transit Auth. v. Young, 867 N.W.2d 839, 843 (Iowa 2015)

Defendants argue that there was no triggering opinion because Dr. Lister did not provide a formal impairment rating until April 25, 2019. There is no requirement that the opinion of the employer-retained doctor be a formal one. Dr. Lister released claimant from his care on July 18, 2018, and said he had nothing else to offer her. While an actual number was not assigned to claimant's impairment until 2019, a no impairment rating is the same as a zero impairment rating. Pella Corp. v. Marshall, 883 N.W.2d 538 (Iowa Ct. App. 2016) (citing the long-standing agency precedent with approval). Thus, Dr. Lister's release of claimant with permanent restrictions but no impairment rating triggered her right to an 85.39 examination.

Defendants further argue that should claimant did not prevail on her neck injury, claimant's request for reimbursement should be only one-half of Dr. Bansal's report costs which is $2,004.00.

Taxation of costs is within the discretion of the agency. Iowa Administrative Code rule 876–4.33. Neither party fully prevailed in this matter, however, claimant is entitled to more than what the defendants' previously paid. Based on that finding, claimant's costs are awarded including the examination of Dr. Bansal pursuant to the framework set forth in Des Moines Area Reg'l Transit Auth. v. Young, 867 N.W.2d 839 (Iowa 2015).

ORDER

THEREFORE, it is ordered:

That defendants are to pay unto claimant one hundred (100) weeks of permanent partial disability benefits at the rate of six hundred sixty-two and 74/100 dollars ($662.74) per week from July 18, 2019.

That defendants shall pay accrued weekly benefits in a lump sum.

That defendants shall pay interest on unpaid weekly benefits awarded herein as set forth in Iowa Code section 85.30.

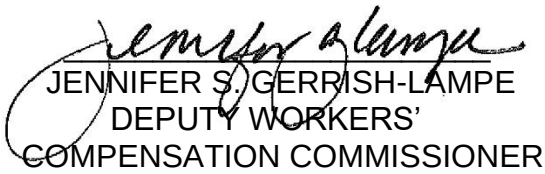
That defendants are to be given credit for benefits previously paid.

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

That claimant is entitled to reimbursement of Dr. Bansal's examination.

That defendant shall pay the costs of this matter pursuant to rule 876 IAC 4.33, including the transcript and the cost of Dr. Bansal's report.

Signed and filed this __14th__ day of April, 2020.



JENNIFER S. GERRISH-LAMPE
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

James Byrne (via WCES)

Michael Miller (via WCES)

Right to Appeal: This decision shall become final unless you or another interested party appeals within 20 days from the date above, pursuant to rule 876-4.27 (17A, 86) of the Iowa Administrative Code. The notice of appeal must be filed via Workers' Compensation Electronic System (WCES) unless the filing party has been granted permission by the Division of Workers' Compensation to file documents in paper form. If such permission has been granted, the notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 150 Des Moines Street, Des Moines, Iowa 50309-1836. The notice of appeal must be received by the Division of Workers' Compensation within 20 days from the date of the decision. The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or legal holiday.