BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

BRIAN BARRY,	:	
Claimant,	:	File No. 21003269.01
vs.	:	ARBITRATION DECISION
JOHN DEERE DUBUQUE WORKS OF DEERE & COMPANY,	:	
Employer, Self-Insured, Defendant.	:	Head Notes: 1100; 1400; 1600; 1701; 1800; 1801; 1803; 1803.1; 2400.

STATEMENT OF THE CASE

The claimant, Brian Barry, filed a petition for arbitration seeking workers' compensation benefits from self-insured employer John Deere Dubuque Works of Deere & Company ("Deere"). Tom Wertz appeared on behalf of the claimant. Dirk Hamel appeared on behalf of the defendant.

The matter came on for hearing on August 31, 2021, before Deputy Workers' Compensation Commissioner Andrew M. Phillips. Pursuant to an order of the Iowa Workers' Compensation Commissioner related to the COVID-19 pandemic, the hearing occurred via CourtCall. The hearing proceeded without significant difficulty.

The record in this case consists of Joint Exhibits 1-5, Claimant's Exhibit 1-8, and Defendant's Exhibits A-H. The claimant testified on his own behalf. Buffy Nelson was appointed the official reporter and custodian of the notes of the proceeding. The evidentiary record closed at the end of the hearing, and the matter was fully submitted on September 30, 2021, after briefing by the parties.

At the outset of the hearing, the undersigned was asked to take judicial notice of a decision on file in agency file number 5055977.01, which is a decision issued by the undersigned in a review-reopening proceeding. The defendant did not object to this. Accordingly, the undersigned took judicial notice.

At the conclusion of the hearing, the claimant made a motion to conform the evidence to the proof. The claimant argued that the injury date in the petition was not accurate considering the evidence presented. The defendant disagreed. The undersigned requested that the claimant either make a written motion laying out their arguments, or that the parties address their arguments in their post-hearing briefs. The undersigned took the motion under advisement at the conclusion of the hearing. A ruling on the motion is discussed in more detail below.

In their post-hearing brief, the claimant made a formal motion to conform the evidence to the proof pursuant to Iowa Rule of Civil Procedure 1.457. The claimant argues that the evidence shows that the claimant's manifestation of injury date pursuant to the injury being a cumulative trauma is August 7, 2018. The defendant argues that the claimant failed to identify an injury date in their petition, and that the motion should be denied.

Based upon the information in the record, and discussed in detail below, the motion to conform to the evidence is granted.

STIPULATIONS

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

1. There was an employer-employee relationship at the time of the alleged injury.

2. The claimant's gross earnings were nine hundred nineteen and 02/100 dollars ($919.02) per week. He was married and entitled to two exemptions. This resulted in a weekly compensation rate of five hundred ninety-nine and 21/100 dollars ($599.21).

3. That, prior to the hearing, the claimant was paid 0 weeks of compensation.

4. The costs requested by claimant have been paid.

Entitlement to temporary disability and/or healing period benefits is no longer in dispute. Entitlement to medical benefits is also no longer in dispute. The defendants waived some of their affirmative defenses. Whether the defendants are entitled to any credits is no longer in dispute.

The parties are now bound by their stipulations.

ISSUES

The parties submitted the following issues for determination:

1. Whether the affirmative defense of an untimely claim pursuant to Iowa Code section 85.26 is applicable.

2. Whether the claimant sustained an injury, which arose out of and in the course of employment on August 7, 2018.

3. Whether the claimant's injury stems from a cumulative trauma.

4. Whether the alleged injury is a cause of temporary disability during a period of recovery.

5. Whether the alleged injury is a cause of permanent disability.

6. The extent of permanent partial disability benefits, if any are awarded.

7. Whether the disability is a scheduled member disability to the bilateral shoulders, or an industrial disability.

8. Whether Iowa Code section 85.34(2)(v) applies to the alleged permanent disability.

9. Whether the defendant is entitled to a credit pursuant to Iowa Code section 85.38(2) for payment of sick pay or disability income in the amount of twenty-two thousand six hundred forty-two and 43/100 dollars ($22,642.43).

10. Whether imposition of a penalty is appropriate.

11. Whether the claimant is entitled to recover costs associated with various requests for admissions.

12. Whether the claimant is entitled to a specific taxation of costs as listed in Claimant's Exhibit 8.

FINDINGS OF FACT

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

Brian Barry, the claimant, was 63 years old at the time of the hearing. (Testimony). He currently resides in Deerfield Beach, Florida, with his wife. (Testimony). He previously worked for the defendant. (Testimony). He attended school through the twelfth grade. (Testimony). He is right hand dominant. (Testimony).

Mr. Barry began his working life by working at A & W and Bishop's Buffet. (Testimony). He then worked for Trausch/Bimbo Bakery in Dubuque, Iowa, for 31 years as a production worker. (Testimony). After leaving Trausch Bakery, Mr. Barry worked in the shipping department at Mississippi Valley Forest Products. (Testimony). This was a fencing company. (Testimony). He then moved to an ethanol plant in Dyersville, Iowa. (Testimony). Finally, for the last 10 years of his career, Mr. Barry worked for Deere. (Testimony).

The claimant worked at the Deere plant in Dubuque, which is the construction and forestry division of Deere's operations. (Testimony). He was an hourly employee, and a member of a union. (Testimony). He received benefits such as healthcare, retirement, and dental. (Testimony). He worked 40 hours per week, was paid weekly, and received overtime pay. (Testimony).

The claimant had a previous workers' compensation claim dating back to 2013. (Testimony). This claim pertained to bilateral carpal tunnel syndrome. (Testimony).

Mr. Barry has a considerable history of hand and arm pain and numbness stemming from the 2013 injury. (Testimony).

From about April of 2017 to April of 2018, Mr. Barry worked on the production line in Department 187. (Testimony). Department 187 assembled small and medium crawlers. (Testimony). Mr. Barry assembled harnesses for engine blocks and attached hydraulics. (Testimony). He also sub-assembled components, and then placed them on the engine. (Testimony). The engine block was on a cart. (Testimony). Upon completing assembly of the engine block, Mr. Barry moved the cart containing the engine block to an area with a hoist. (Testimony). The engine block would then be hoisted into the engine compartment of the machine. (Testimony). During his shift, Mr. Barry was expected to complete 8 to 10 crawlers per day. (Testimony). He moved the cart multiple times during these assemblies. (Testimony). The job necessitated work at waist level, above shoulder level, and at shoulder level. (Testimony).

After performing the job described above in Department 187 for about one year, Mr. Barry felt that his existing carpal tunnel syndrome was “irritated,” and he had constant office visits with Dr. Hunt for his carpal tunnel complaints. (Testimony). Mr. Barry complained that the pain radiated into his shoulders. (Testimony). Eventually, Dr. Hunt deemed Mr. Barry incapacitated, and placed him in a hold position. (Testimony). He was given a “challenge note” and recommended to place into a new job. (Testimony).

Mr. Barry testified in his deposition that in early April of 2018, he spoke to Jill Hunt, M.D., regarding his shoulder issues. (Defendant’s Exhibit F:22). He specified that he had experienced arm problems since 2000, but that they became a greater issue around that time. (DE F:22).

On April 27, 2018, Mr. Barry visited Jill Hunt, M.D., in the occupational health department at Deere. (Joint Exhibit 1:43). Dr. Hunt noted that the claimant has a history of bilateral chronic forearm tendinitis. (JE 1:43). Mr. Barry noted no change in pain, and Dr. Hunt observed no changes to his range of motion in his bilateral upper extremities. (JE 1:43).

Mr. Barry testified that in early May of 2018, he began to experience symptoms in his shoulders. (Testimony). However, he clarified that he had no sense of what was actually occurring in his shoulders. (Testimony). He further testified that he did not recall having any shoulder pain prior to May of 2018. (Testimony). After this time, he started making more complaints about his shoulders, as seen in the medical records. (Testimony). It was around this time that he stopped sleeping in the same bed with his wife. (DE F:22).

Dr. Hunt saw Mr. Barry again on May 9, 2018. (JE 1:43). Mr. Barry continued to perform his old job on a periodic basis, but reduced gripping and torquing. (JE 1:43). At times, he would awaken at night with shoulder pain. (JE 1:43). He also reported pain in his hands when he walks. (JE 1:43). Mr. Barry showed increased range of motion in his wrists. (JE 1:43). Dr. Hunt continued to diagnose the claimant with bilateral chronic forearm tendinitis. (JE 1:43).

On May 23, 2018, the claimant returned to Dr. Hunt for an examination. (JE 1:42). He told her that he had less pain, and increased range of motion in his wrists. (JE 1:42). He made no mention of shoulder pain during this visit. (JE 1:42).

Dr. Hunt examined Mr. Barry again on June 1, 2018. (JE 1:42). He complained of pain in his shoulders which awakened him five nights per week. (JE 1:42). He took NSAIDs as directed and used ice/heat as needed. (JE 1:42). He continued to perform his job with restrictions. (JE 1:42). Mr. Barry told Dr. Hunt that the union was pushing him to take the inspector's exam. (JE 1:42).

Eventually, in August of 2018, Mr. Barry moved to a fabrication inspector position with Deere. (Testimony). Prior to moving to this position, he had to pass a number of different tests. (Testimony). He did not pass these the first time. (Testimony). While he was waiting to pass his tests and move to the new position, he oversaw trainees and trained his replacement. (Testimony). He learned the position from the previous inspector. (Testimony).

On August 7, 2018, Mr. Barry requested an appointment with Dr. Hunt due to his shoulder pain. (JE 1:41). Dr. Hunt then saw Mr. Barry on August 8, 2018. (JE 1:41). He had no change in his range of motion or pain. (JE 1:41). He noted that he performed fewer tasks that irritate his arms, but felt some aching in his shoulders. (JE 1:41). The aching was previously intermittent. (JE 1:41). Dr. Hunt recommended that the claimant begin physical therapy for his shoulders. (JE 1:41).

Mr. Barry began physical therapy at UnityPoint Health on August 15, 2018. (JE 2:44-51). The record indicates that Mr. Barry's wrist/forearm pain began about five years prior, and that his chronic bilateral shoulder pain began about five months prior. (JE 2:44). He further stated to the therapist that he visited Dr. Hunt in April of 2018 for his shoulder pain. (JE 2:45). The therapist diagnosed Mr. Barry with bilateral shoulder pain with painful "AROM" of the bilateral shoulders, limited shoulder "IR," hypomobility of the glenohumeral joint, and muscle tenderness. (JE 2:44). Mr. Barry was working light duty, and the record indicates that he had lifting restrictions including no repetitive lifting and gripping. (JE 2:44-45). The claimant told the therapist that he believed his symptoms were due to repetitive movement as an assembler at Deere. (JE 2:45). He rated his pain 1 out of 10 in both shoulders. (JE 2:45). Upon examination, the therapist found some deficits in range of motion in both shoulders. (JE 2:46-47). The therapist noted that several impingement tests to the shoulders were positive. (JE 2:48). The therapist treated Mr. Barry with active physical therapy, and recommended he return one to two times per week for eight weeks. (JE 2:50).

Dr. Hunt examined the claimant again on August 17, 2018. (JE 1:40). Mr. Barry complained of bilateral shoulder pain but indicated that this was reduced. (JE 1:40). Physical therapy helped, but he only had one visit. (JE 1:40).

On August 24, 2018, Mr. Barry returned to visit Dr. Hunt. (JE 1:40). Mr. Barry reported no change in his shoulder pain. (JE 1:40). He continued to have aching upon awakening. (JE 1:40). The pain was worse on the left than the right. (JE 1:40). Dr. Hunt recommended that Mr. Barry continue physical therapy. (JE 1:40). Upon physical

examination, Dr. Hunt noted tenderness over the deltoid in the right upper extremity and over the long head of the biceps tendon in the left upper extremity. (JE 1:40).

One week after his previous visit, on August 31, 2018, Mr. Barry returned to see Dr. Hunt. (JE 1:39-40). He felt more pain or irritation in his arms since his recent session of physical therapy. (JE 1:39). He also reported difficulty sleeping. (JE 1:39). He described his shoulders as "aching," and indicated that he was waking up every three to four hours to put ice on his shoulders. (JE 1:39). Mr. Barry told Dr. Hunt that working as an inspector "is the best thing that's happened in many years." (JE 1:39). Upon examination, Dr. Hunt found tenderness over "both medial elbows." (JE 1:40). He had a full range of motion to both upper extremities. (JE 1:40).

On September 7, 2018, Dr. Hunt examined the claimant again. (JE 1:39). Mr. Barry complained of more pain in his shoulders due to exercises and physical therapy. (JE 1:39). The pain in his shoulders continued to awaken him after three hours of sleep. (JE 1:39). He continued to report that he needed to use ice and Tylenol to sleep six to seven hours. (JE 1:39). Physical therapy was not providing any relief. (JE 1:39). Mr. Barry indicated concern about numbness in his bilateral ring and little fingers. (JE 1:39). Since changing jobs, the aching in his hands decreased. (JE 1:39). Dr. Hunt found no issues with range of motion in either shoulder. (JE 1:39).

Mr. Barry visited Dr. Hunt on September 14, 2018. (JE 1:38). He complained of more pain after physical therapy, which he blamed on "the pulley things." (JE 1:38). His hands continued to improve with his new job. (JE 1:38).

On September 24, 2018, Dr. Hunt saw the claimant again for his bilateral shoulder pain. (JE 1:37). Dr. Hunt found no change in the claimant's range of motion in his shoulders, but Mr. Barry felt no change in pain. (JE 1:37). Mr. Barry continued to take NSAIDs and occasional Tylenol. (JE 1:37). He also used ice. (JE 1:37). He continued to note that using pulleys during physical therapy caused pain into his little fingers. (JE 1:37). Despite being off work for vacation for one week, his shoulder pain did not improve. (JE 1:37). Dr. Hunt ordered x-rays of the shoulders and discussed the results with him. (JE 1:37).

The x-rays of the left shoulder showed an intact acromioclavicular joint with no degenerative changes. (JE 2:52). The x-rays of the right shoulder showed mild degenerative glenohumeral space narrowing, but no fracture or dislocation. (JE 2:53).

In spite of 12 sessions of physical therapy, Mr. Barry reported no improvement in his shoulder pain, as of September 26, 2018. (JE 1:36). Even with moving from active range of motion based physical therapy to passive range of motion physical therapy, Mr. Barry felt no improvement. (JE 1:36). The claimant expressed concern that his shoulder pain was not improving, and that his x-rays were "only showing some arthritis in the left shoulder." (JE 1:36). As a result of this visit, Dr. Hunt ordered an MRI of the bilateral shoulders. (JE 1:37). The MRI was scheduled for October 2, 2018. (JE 1:37).

The MRI of the right shoulder on October 2, 2018, showed degenerative changes to the acromioclavicular joint with "minor inferior spurring component." (JE 2:54). The humeral head also showed "multiple cystic degenerative changes near the insertion site

of the rotator cuff." (JE 2:54). The interpreting physician also observed "[s]ignificant thickening and abnormal signal change distally near the insertion upon the greater tuberosity of the rotator cuff." (JE 2:54). This represented a "significant partial tear." (JE 2:54).

The MRI of the left shoulder on October 2, 2018, showed findings consistent with tendinopathy, along with cystic degenerative changes to the humeral head near the insertion site. (JE 2:56-57). The interpreting physician found no impingement by the acromioclavicular joint or acromion process. (JE 2:57).

On October 3, 2018, Dr. Hunt re-examined Mr. Barry for his continued bilateral shoulder pain. (JE 1:35). He complained of more pain since the MRI "was a tight fit." (JE 1:35). While in the MRI machine, he complained of numbness in his little fingers. (JE 1:35). This decreased since the MRI. (JE 1:35). Physical therapy helped. (JE 1:35). Mr. Barry indicated concern about arthritis shown on the shoulder MRI "because it would not be considered work related. (JE 1:35). On the right side, Dr. Hunt noted that the MRI showed a partial thickness supraspinatus rotator cuff tear with a hook on the AC joint pressing on the rotator cuff and cysts in the head of the humerus. (JE 1:35). The MRI showed cysts in the head of the humerus and tendinitis of the supraspinatus on the left; however, no rotator cuff injury was found. (JE 1:35). Dr. Hunt recommended that Mr. Barry see Dr. Bartelt. (JE 1:35).

On the same date, Deere completed an "incident investigation" form. (Claimant's Exhibit 4:36-38). The form listed the date of incident as September 24, 2018, but Mr. Barry clarified that this was simply the date that he switched jobs. (CE 4:36; Testimony). Mr. Barry told the investigators that he suffered corporal [*sic*] tunnel pain from his fingers to his shoulders when working in his previous department. (CE 4:36). Specifically, use of heavy gripping, tie bands, and torque guns caused him issues. (CE 4:36). The claimant noted that his condition gradually worsened. (CE 3:36-37).

Dr. Hunt saw Mr. Barry again on October 10, 2018. (JE 1:34). Mr. Barry complained that his right shoulder kept him awake for most of the last evening. (JE 1:34). He took Tylenol and used Biofreeze to alleviate the pain. (JE 1:34). He located the pain in the back of his right shoulder blade. (JE 1:34). His left shoulder was better, and Dr. Hunt noted no changes in range of motion upon examination. (JE 1:34). Mr. Barry told Dr. Hunt that physical therapy was not helping and caused him increased pain. (JE 1:34). Dr. Hunt agreed to discontinue physical therapy. (JE 1:34). Upon physical examination, Dr. Hunt found tenderness over the right AC joint. (JE 1:34).

On October 17, 2018, Mr. Barry returned to see Dr. Hunt. (JE 1:33-34). Mr. Barry complained of more pain in his left elbow and right shoulder. (JE 1:33). Dr. Hunt found him to have full range of motion in the shoulders and elbows. (JE 1:33). Mr. Barry complained of an incident in which he became dizzy, lost his balance, and fell to the ground. (JE 1:33).

Robert Bartelt, M.D., first examined Mr. Barry on October 24, 2018, with regard to Mr. Barry's bilateral shoulder complaints. (JE 4:61-62). Mr. Barry indicated that his problems began on October 1, 2013. (JE 4:61). This appears to refer to his carpal tunnel complaints. Mr. Barry told Dr. Bartelt that he had shoulder pain that was greater

on the right than the left. (JE 4:61). His pain worsened over the recent months. (JE 4:61). Dr. Bartelt noted the results of the MRI. (JE 4:61). Mr. Barry also indicated to Dr. Bartelt that he experienced numbness and tingling in his hands. (JE 4:61). Upon examination, Dr. Bartelt found that Mr. Barry had mild weakness in his external rotation on both the left and right side, which was associated with pain. (JE 4:62). Dr. Bartelt diagnosed the claimant with an incomplete tear of the right rotator cuff, tendinopathy of the left rotator cuff, trigger finger, and right hand paresthesia. (JE 4:62). Dr. Bartelt provided Mr. Barry with an injection of Marcaine and Depo-Medrol into his shoulders. (JE 4:62).

Mr. Barry continued his care with Dr. Hunt on October 26, 2018. (JE 1:32-33). Mr. Barry indicated that he had triggering of his right third and fourth digits, and numbness in his bilateral ring and little fingers. (JE 1:32). Mr. Barry noted less pain in his left shoulder, but no change to his right shoulder. (JE 1:32). He complained of issues with sleeping due to his shoulder pain. (JE 1:32). Upon examination, Dr. Hunt observed tenderness over the posterior aspect of the right shoulder. (JE 1:32-33). Dr. Hunt observed full range of motion in the shoulders and elbow. (JE 1:33). Dr. Hunt recommended that the claimant continue taking NSAIDs, performing exercises, using ice/heat, and adding Flexeril to his medication regimen. (JE 1:33).

On October 29, 2018, the claimant followed up with Dr. Hunt. (JE 1:31-32). He slept better after taking Flexeril at bedtime, including sleeping through the night. (JE 1:31). However, he did not feel like injections helped. (JE 1:32). Dr. Hunt found no change to the range of motion in Mr. Barry's shoulder. (JE 1:32).

Mr. Barry visited Dr. Hunt for continued care on November 2, 2018. (JE 1:31). He felt less pain, and took NSAIDs, as directed. (JE 1:31). The claimant expressed a concern that taking Flexeril before bed left him feeling groggy in the morning. (JE 1:31). Dr. Hunt recommended that Mr. Barry take the Flexeril earlier in the evening in order to avoid morning grogginess. (JE 1:31). Dr. Hunt provided the claimant with a refill on his prescription of Flexeril and Celebrex. (JE 1:31).

On November 12, 2018, the claimant returned to Dr. Hunt for his bilateral shoulder pain. (JE 1:30-31). Mr. Barry noted an overall reduction in pain, but told Dr. Hunt that the pain was not entirely gone. (JE 1:30). He further told Dr. Hunt that he only awakened at night occasionally, rather than nightly. (JE 1:30). He expressed concern over pain in his shoulders after swimming in Florida. (JE 1:30).

Dr. Bartelt examined the claimant again on December 5, 2018. (JE 4:63). Mr. Barry told Dr. Bartelt that his improvement was slow, although the injections helped him within a few weeks. (JE 4:63). After the injections, Mr. Barry felt 40 to 50 percent improved. (JE 4:63). Mr. Barry's diagnoses remained unchanged. (JE 4:63). On his February 11, 2019 visit with Dr. Bartelt Mr. Barry noted he continued to have problems sleeping despite some improvement. (JE 4:64). Dr. Bartelt provided the claimant with another injection in both shoulders. (JE 4:64).

On December 10, 2018, Amanda Addison, N.P., examined Mr. Barry for his shoulder complaints. (JE 1:28-29). Mr. Barry reported less pain, but indicated that the pain was not gone. (JE 1:28). He was no longer taking Flexeril every evening, and was

still sleeping better at night. (JE 1:28). The claimant reported feeling 40 percent better. (JE 1:28).

Ms. Addison examined Mr. Barry again on January 4, 2019. (JE 1:28). Mr. Barry continued to report less pain and complained that Flexeril made him groggy. (JE 1:28). He declined physical therapy due to his claim that it made "things worse." (JE 1:28). He had a full range of motion in his limbs. (JE 1:28).

On January 18, 2019, the claimant returned to John Deere Occupational Health for a repeat examination by Ms. Addison. (JE 1:27-28). Mr. Barry complained of shoulder pain and reported that everything was the same. (JE 1:27). He rated his pain 2 out of 10, but noted that sometimes he has "bad nights" during which he awakened on several occasions. (JE 1:27). Ms. Addison prescribed Skelaxin, as Mr. Barry continued to complain of issues after taking Flexeril. (JE 1:28).

Ms. Addison saw Mr. Barry again on January 25, 2019. (JE 1:27). Her note is virtually incoherent due to how it was written. (JE 1:27). Mr. Barry requested to be taken out of a prescribed sling, and also noted that he felt 50 percent better than his previous visit. (JE 1:27).

On February 13, 2019, the claimant returned to see Ms. Addison. (JE 1:25-26). He indicated that he had recently seen Dr. Bartelt on several occasions and had two cortisone shots. (JE 1:25). He reiterated Dr. Bartelt's description of his shoulder issues. (JE 1:25-26). He then indicated that he did not want to have surgery and additional physical therapy if he could manage his issues in a different way. (JE 1:26). He told Ms. Addison that he preferred taking a smaller dose of Flexeril over the previously prescribed Skelaxin. (JE 1:26). Ms. Addison recommended that he return to physical therapy. (JE 1:26).

Mr. Barry had a physical therapy evaluation at Dubuque Physical Therapy on February 14, 2019. (JE 3:58-59). Mr. Barry told the therapist that he had shoulder pain for "about a year." (JE 3:58). He reported difficulty sleeping on both sides, and reiterated his use of ice, heat, and Biofreeze. (JE 3:58). Mr. Barry reiterated his restrictions of no heavy gripping or repetitive gripping. (JE 3:58). The therapist found that Mr. Barry had decreased range of motion and strength in his shoulders. (JE 3:59). Mr. Barry's stated goals for physical therapy were to have less incidences of waking at night due to pain. (JE 3:59).

The claimant continued follow up care with Ms. Addison on February 27, 2019. (JE 1:24). He indicated that he previously attended one session of physical therapy, and that they told him that his shoulders were tight. (JE 1:24). He reported that he continued to wake up despite taking cyclobenzaprine at bedtime. (JE 1:24).

On March 13, 2019, Mr. Barry indicated to Ms. Addison that he tried to sleep without taking Flexeril the previous evening. (JE 1:23). He slept for four hours before waking and taking Tylenol for pain, which allowed him to return to sleep. (JE 1:23). He continued physical therapy and performed home stretching exercises. (JE 1:23).

Mr. Barry saw Ms. Addison again on March 27, 2019. (JE 1:22). He slept for a time the night before without the assistance of Flexeril. (JE 1:22). However, he woke with bilateral shoulder pain which he rated 4 out of 10. (JE 1:22). Mr. Barry reported that physical therapy performed "dry needling" on his shoulders, which he felt loosened them and made a "big difference." (JE 1:22). After taking Celebrex, Tylenol, and using BioFreeze the morning of his appointment with Ms. Addison, the claimant reported pain of 0 out of 10. (JE 1:22).

Dr. Bartelt examined Mr. Barry again on April 15, 2019. (JE 4:66-67). Mr. Barry reported to the doctor that his bilateral shoulder pain was "better than last time." (JE 4:66). Mr. Barry continued to awaken at night with an ache, but he also used ice packs and Tylenol. (JE 4:66). Dr. Bartelt observed that Mr. Barry had a full range of motion in his shoulders. (JE 4:66). Dr. Bartelt continued to diagnose Mr. Barry with an incomplete tear of the right rotator cuff and tendinopathy of the left rotator cuff. (JE 4:66). Mr. Barry told Dr. Bartelt that he would like to avoid surgery. (JE 4:66). Dr. Bartelt also recommended that Mr. Barry continue physical therapy and return in three months for a repeat injection. (JE 4:67).

On May 22, 2019, the claimant returned to John Deere Occupational Health, and visited Ms. Addison. (JE 1:19). Mr. Barry told her that he felt improved with physical therapy, and that he was sleeping better. (JE 1:19). He had not taken Flexeril since his last visit to Ms. Addison. (JE 1:19). Ms. Addison recommended that Mr. Barry continue with a medication regimen that worked for him, and that he continue physical therapy. (JE 1:19).

Ms. Addison examined Mr. Barry again on June 20, 2019. (JE 1:17). Mr. Barry told Ms. Addison that he felt continued improvement with physical therapy. (JE 1:17). He was sleeping up to 7 hours per night. (JE 1:17). He took Tylenol before he went to bed. (JE 1:17). He also reported that he had not had to ice his shoulders at night. (JE 1:17). Ms. Addison recommended that Mr. Barry continue taking his medication and continue his exercises and physical therapy. (JE 1:17).

By July 10, 2019, Mr. Barry attended 36 visits of physical therapy. (JE 3:60). He reported soreness over the previous few nights. (JE 3:60). He worked 12 hours the day prior, which he attributed as the reason for his difficulty sleeping. (JE 3:60). The therapist noted that Mr. Barry was afraid if he stopped therapy, he would regress. (JE 3:60). The therapist recommended that Mr. Barry continue to attend therapy one time per week to control pain. (JE 3:60). Dr. Bartelt agreed with this recommendation. (JE 3:60).

On July 16, 2019, Mr. Barry continued his care with Ms. Addison. (JE 1:14). He reported receiving an injection into his right shoulder, but that he had no treatment for his left shoulder because it was "doing good" and he did not "want to mess with it." (JE 1:14). He stopped physical therapy and proceeded with only massage therapy twice per week. (JE 1:14). He noted continued improvement with his sleep, even though he had some aches after the injection. (JE 1:14).

Mr. Barry returned to Dr. Bartelt's office on July 15, 2019, for his continued bilateral shoulder complaints. (JE 4:69-70). Mr. Barry told Dr. Bartelt that he had slow

and steady improvement and that he felt better than the last time he was in the office. (JE 4:69). He still awakened in the evening with pain in his right shoulder. (JE 4:69). Mr. Barry continued to take Celebrex and Tylenol. (JE 4:69). Dr. Bartelt examined the claimant and saw that he had full range of motion in his shoulders. (JE 4:69). Dr. Bartelt continued to diagnose Mr. Barry with an incomplete tear of the right rotator cuff, right shoulder pain, and tendinopathy of the left rotator cuff. (JE 4:69). Dr. Bartelt provided the claimant with another injection into his right shoulder. (JE 4:69-70).

Ms. Addison saw Mr. Barry again on August 14, 2019. (JE 1:13). Mr. Barry indicated that his shoulders were doing well with massage therapy. (JE 1:13). He also performed a home exercise program to "keep limber." (JE 1:13). He rarely used Tylenol and took Celebrex in the morning. (JE 1:13).

On September 17, 2019, Mr. Barry reported to Ms. Addison that his shoulders were "doing good." (JE 1:11). He continued having massage therapy. (JE 1:11). The claimant told Ms. Addison that he used Tylenol before bed and Celebrex in the morning. (JE 1:11). Ms. Addison told him to continue his medication regimen, continue his home exercises, continue massage therapy, and follow up with her in one month. (JE 1:11). She did not alter the restrictions which were in place for some time. (JE 1:11).

Ms. Addison saw the claimant again on October 23, 2019. (JE 1:10). The claimant continued to report that his shoulders were "doing good." (JE 1:10). He still performed home stretches, but if he did "extra stuff," his shoulder became irritated. (JE 1:10). He could reach behind his back with both arms, but this caused pain. (JE 1:10). Ms. Addison continued to recommend a medication regimen, home exercises, massage therapy, and to follow up with her in one month. (JE 1:10).

On November 20, 2019, Ms. Addison again examined Mr. Barry. (JE 1:9). Mr. Barry continued to report that his shoulders were "doing good." (JE 1:9). He continued to have massage therapy and cupping once per week. (JE 1:9). He also stretched on a daily basis. (JE 1:9). He continued to take Celebrex daily, and Tylenol before going to sleep. (JE 1:9). He noted that tingling in his hands never stops, especially in his right ring and pinky fingers. (JE 1:9).

The claimant continued his follow up care with Dr. Bartelt on December 16, 2019. (JE 4:71-72). Mr. Barry told Dr. Bartelt that overall his shoulders were "much better" than where he started, but that his pain persisted. (JE 4:71). His pain was worse on the right than the left. (JE 4:71). His pain increased with activities. (JE 4:71). Dr. Bartelt found normal and symmetric range of motion in Mr. Barry's shoulders. (JE 4:71). Dr. Bartelt provided repeat injections into both the right and left shoulders. (JE 4:71). Dr. Bartelt opined, "I think he may benefit from intermittent or occasional injections in either shoulder for pain control." (JE 4:71).

Ms. Addison examined the claimant again on January 13, 2020. (JE 1:7). Mr. Barry reported having bilateral cortisone injections in December of 2019. (JE 1:7). He felt very good after the injections, and rated his shoulder pain in both shoulders as 0 out of 10. (JE 1:7). He continued to have massage therapy and cupping. (JE 1:7). He also took Celebrex and Tylenol. (JE 1:7).

On February 17, 2020, Mr. Barry returned to see Ms. Addison, noting that he continued to have massage therapy. (JE 1:6). He felt "the same," but also indicated increasing discomfort in the evening. (JE 1:6). Mr. Barry expressed a desire to have another injection from Dr. Bartelt. (JE 1:6). Finally, he told Ms. Addison that he was retiring the first week of April and planned to move to Florida. (JE 1:6). Ms. Addison recommended that Mr. Barry continue his medication regimen, home exercise plan, and massage therapy. (JE 1:6). She did not change his restrictions, and recommended he return for examination in one month. (JE 1:6).

Dietmar Grentz, M.D., examined Mr. Barry on March 16, 2020, at John Deere Occupational Health. (JE 1:5). The claimant expressed a desire to receive another injection from Dr. Bartelt. (JE 1:5). His last day of work before retirement was to be April 3, 2020. (JE 1:5). Mr. Barry told the doctor that he took Celebrex in the morning, used "some" Tylenol, and also used ice/heat with Biofreeze. (JE 1:5). Dr. Grentz did not perform a physical examination of Mr. Barry. (JE 1:5).

On March 24, 2020, Thomas Schreiber, M.D. sent a note to Deere regarding the claimant's asthma. (JE 1:4-5). The note indicated that Mr. Barry's first day off work was to be March 26, 2020, due to the risk presented to him by COVID-19. (JE 1:5). Dr. Schreiber also recommended that Mr. Barry quarantine for four weeks. (JE 1:4).

The claimant continued care with Dr. Bartelt on March 25, 2020. (JE 4:73-74). The claimant requested repeat injections. (JE 4:73). Mr. Barry told Dr. Bartelt that he planned on retiring and moving to Florida, but "that will probably be on hold for a bit because of the overall economic situation and uncertainty." (JE 4:73). Dr. Bartelt provided repeat injections to both shoulders. (JE 4:73).

Dr. Grentz authored a missive to Dr. Bartelt on March 27, 2020, requesting that Dr. Bartelt provide recommendations for a doctor to treat Mr. Barry's shoulders in the Deerfield Beach, Florida, area. (JE 4:75). In response, Dr. Bartelt wrote on the letter, "I am unfamiliar with area [*sic*]." (JE 4:75).

Dr. Grentz visited with Mr. Barry via phone on March 30, 2020. (JE 1:3). Mr. Barry told the doctor that he was not going to move to Florida as soon as originally planned due to financial uncertainty surrounding COVID-19. (JE 1:3). The doctor and the claimant discussed transferring care from Dr. Bartelt to an orthopedic surgeon in the Deerfield Beach, Florida, area. (JE 1:4). The defendant subsequently denied authorization for care in Florida. (CE 5:39).

On May 27, 2020, Dr. Schreiber issued another note to Deere to keep Mr. Barry off work and self-quarantining for five weeks due to his asthma and the risk presented by COVID-19. (JE 1:2).

Dr. Schreiber examined Mr. Barry via telehealth on June 24, 2020. (JE 5:76-77). Mr. Barry told Dr. Schreiber that he was feeling "fairly well overall" and was socially isolating himself. (JE 5:76). He expressed a concern about returning to work due to a surge in COVID-19 cases. (JE 5:76). Dr. Schreiber recommended that Mr. Barry refrain from returning to work. (JE 5:76).

Dr. Schreiber issued another note to Deere on June 26, 2020. (JE 1:1). The note indicated that, due to the unique COVID-19 risk caused by his asthma, Mr. Barry should self-quarantine for 5 weeks. (JE 1:1).

On July 21, 2020, Dr. Schreiber visited with Mr. Barry via telehealth. (JE 5:78-79). Mr. Barry continued to treat for asthma, and Dr. Schreiber recommended that he remain off work. (JE 5:78). Dr. Schreiber again issued a note to Deere keeping Mr. Barry off work for an additional five weeks. (JE 1:1).

Dr. Schreiber issued another note to Deere on August 20, 2020. (JE 1:1). The note indicated that Mr. Barry continued to be at a high risk for complications from COVID-19 due to his asthma. (JE 1:1). Dr. Schreiber recommended that Mr. Barry self-quarantine for an additional four weeks. (JE 1:1).

On October 13, 2020, Mr. Barry reported to Stanley Mathew, M.D., for an independent medical examination ("IME"). (Claimant's Exhibit 1:7-12). Dr. Mathew issued a report of his findings on October 15, 2020. (CE 1:7-12). Dr. Mathew is board certified by the American Academy of Physical Medicine and Rehabilitation, the American Board of Disability Analysts, and the American Board of Pain Medicine. (CE 1:12-13). Dr. Mathew reviewed Mr. Barry's medical records, and a job description. (CE 1:7-9). Upon examination, Dr. Mathew observed some atrophy to the right shoulder girdle, tenderness to the right rotator cuff, and tenderness to the bilateral medial and lateral tendons of the elbow. (CE 1:10). Passive range of motion was within functional limits. (CE 1:10). The left shoulder exhibited a full range of motion. (CE 1:10). Mr. Barry displayed decreased sensation in the medial three fingers of both hands. (CE 1:10). Dr. Mathew's impression of Mr. Barry's condition was: bilateral carpal tunnel syndrome, status post bilateral carpal tunnel decompression surgery, bilateral forearm tendinitis, bilateral multidigit trigger finger, bilateral rotator cuff tendinitis, bilateral upper extremity weakness, and chronic pain in bilateral upper extremities. (CE 1:11).

Dr. Mathew then endeavored to answer a series of questions posed by claimant's counsel. (CE 1:11-12). Dr. Mathew agreed that there was a worsening of Mr. Barry's carpal tunnel syndrome since the December 13, 2017, arbitration decision, and provided an impairment rating regarding the bilateral carpal tunnel syndrome. (CE 1:11). Dr. Mathew opined that Mr. Barry's bilateral shoulder conditions were new and separate from the wrist issues. (CE 1:12). He further opined that, based upon his review of the medical records, Mr. Barry was not experiencing shoulder pain "of any significance necessitating treatment" prior to August of 2018. (CE 1:12). Dr. Mathew attributed Mr. Barry's shoulder injuries to his work as an assembler at Deere. (CE 1:12). Dr. Mathew provided Mr. Barry with a 10 percent impairment rating to each of the upper extremities. (CE 1:12). He recommended that Mr. Barry's permanent restrictions related to his wrists and hands apply to his bilateral upper extremities. (CE 1:12). He added recommended restrictions of no repetitive overhead lifting, pushing and pulling. (CE 1:12). For future care, Dr. Mathew recommended continuing injections to the shoulders. (CE 1:12). Dr. Mathew concluded his report by opining that Mr. Barry "would have profound difficulty sustaining gainful full time" employment outside of the accommodated position with Deere. (CE 1:12).

From August of 2018 to April of 2020, Mr. Barry worked as a fabrication inspector. (Testimony). In this role for Deere, the claimant inspected welds on machinery for completion and quality. (Testimony). He also inspected some sub-components. (Testimony). Mr. Barry was expected to complete as many inspections as he could, and had to climb in, over, and around frames. (Testimony). He testified that the inspector position irritated his shoulders.

Mr. Barry contemplated retirement in March of 2020, allegedly due to his pain. (Testimony; CE 6:43). Then the COVID-19 pandemic began. (Testimony). Deere was an essential business and was kept open during the early stages of the pandemic. (Testimony). In April of 2020, with the COVID-19 pandemic raging, Deere offered employees with high-risk conditions the opportunity to take medical leave in order to mitigate their risk of exposure to the virus. (Testimony). Mr. Barry has asthma, and was in his early 60s, which are risk factors for complications from COVID-19. (Testimony). He received an excuse from his primary care physician, and remained off work from May of 2020. (Testimony). He received weekly indemnity benefits from Deere during his time off. (Testimony; DE F:21). During this time, he and his wife sheltered at their condo in Florida. (Testimony). In January of 2021, Mr. Barry received the COVID-19 vaccine, and his primary care physician prepared to return him to work. (Testimony). On March 3, 2021, Mr. Barry retired. (Testimony; Defendant's Exhibit C:15). He has no plans to return to work. (Testimony). At the time of his retirement, Mr. Barry earned twenty-five and 72/100 dollars ($25.72) per hour as an inspector. (DE C:15). This wage increased in October of 2020. (DE C:15).

Mr. Barry received twenty-two thousand six hundred forty-two and 43/100 dollars ($22,642.43) in weekly indemnity benefits while off work during this time. (DE A:1). These benefits were awarded based upon a Deere policy, as outlined in Defendant's Exhibit B. (DE B:2-14). The policy is called "The Disability Benefit Plan for Wage Employees." (DE B:3). Part of the plan allows for payment of weekly benefits under a number of different scenarios. (DE B:3). Deere bears the cost of providing benefits under the plan, and provides benefits through an insurance company and/or fund. (DE B:3-4). The policy contains various benefit calculations. (DE B:5-7).

Mr. Barry described all of his jobs as physical in nature. (Testimony). He opined that he could likely not perform these jobs anymore, as they would require the use of his hands or arms or shoulders. (Testimony). Mr. Barry claimed during his hearing that he planned on working until he was 67.5 years old; however, his carpal tunnel syndrome and this alleged injury put a damper on those expectations. (Testimony). Mr. Barry now receives income from Social Security, his pension from the bread company, and his pension from Deere. (Testimony).

At the time of the hearing he testified that his shoulders and hands are not as irritated. (Testimony). He noted that he periodically sleeps with ice or heat on his shoulders. (Testimony). When he drives, he can feel irritation in his shoulders. (Testimony). He also noted that heavy activity will irritate his shoulders which then cause him to have issues with sleeping. (Testimony). Overhead activities also cause him pain. (Testimony). His left shoulder is not as severe as his right shoulder, but sleeping on his left side causes him more pain on that side. (Testimony). Mr. Barry

testified that he experiences numbness in both of his pinkies, and that his arms swell when he walks. (Testimony).

CONCLUSIONS OF LAW

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

Affirmative Defense Under Iowa Code section 85.26

The defendant asserts an affirmative defense of failure to timely bring a claim pursuant to Iowa Code section 85.26. Before engaging in any analysis as to any of the other disputed issues in this matter, it is important to determine whether or not the issues can even stand. Therefore, I begin my review of this case with an analysis of the defendant's asserted affirmative defense.

The alleged date of injury in this matter is August 7, 2018. The claimant asserts that he experienced a cumulative trauma, and this was the date of manifestation. In 2017, significant changes were enacted to Iowa Code Chapter 85. These changes became effective on July 1, 2017.

As revised in July of 2017, Iowa Code 85.26 states:

> An original proceeding for benefits under this chapter or chapter 85A, 85B, or 86, shall not be maintained in any contested case unless the proceeding is commenced within two years from the date of the occurrence of the injury for which benefits are claimed, or if weekly compensation benefits are paid under section 86.13, within three years from the date of the last payment of weekly compensation benefits. For the purposes of this section "*date of the occurrence of the injury*" means the date that the employee knew or should have known that the injury was work-related.

Iowa Code 85.26(1). The Iowa Supreme Court has ruled that "for discovery rule purposes, the statute of limitation on a workers' compensation claim does not begin to run until the claimant knows or should recognize the nature, seriousness, and probable compensable character of his or her injury." Baker v. Bridgestone/Firestone, 872 N.W.2d 672, 680-81 (Iowa 2015). A claimant must have knowledge, either actual or implied, of all three characteristics of the injury before the statute begins to run. Perkins v. HEA of Iowa, Inc., 651 N.W.2d 40, 45 (Iowa 2002)(citing Swartzendruber v. Schimmel, 613 N.W.2d 646, 650 (Iowa 2000); Montag v. T.H. Agri. & Nutrition Co., 509 N.W.2d 469, 470 (Iowa 1993)). The court applies the discovery rule in cases where cumulative injuries or occupational diseases developed over time. Baker, 872 N.W.2d at 681. In cases where a cumulative injury occurs, it is deemed to have occurred when it manifests. Id. Manifestation is the time when "both the fact of the injury and the causal relationship of the injury to the claimant's employment would have become plainly apparent to a reasonable person." Id. (citing Oscar Mayer Foods Corp. v. Tasler, 483 N.E.2d 824, 829 (Iowa 1992)(citation omitted)).

The first component of the discovery rule is recognition of the nature of his injury. Id. at 680-81. Mr. Barry testified in his deposition that he began to have shoulder issues in April of 2018. He later clarified that this was pain radiating into his shoulders from his carpal tunnel issues. The shoulder pain is not recognized in the records until May of 2018. When Mr. Barry began to experience symptoms in his shoulders in May of 2018, he testified that he had no sense of what was actually occurring in his shoulders. It was around this time that he stopped sleeping in the same bed as his wife because he awakened several times during the night. On May 9, 2018, Mr. Barry told Dr. Hunt that he had shoulder pain that awakened him at night. He continued to report pain in the evening and disturbance of his sleep. Finally, in August of 2018, Dr. Hunt recommended that Mr. Barry begin physical therapy for his shoulder complaints. It was not until the MRIs in October of 2018, that Mr. Barry knew the full extent of the injuries to his shoulder. Based upon my review of the evidence, Mr. Barry knew he had a shoulder injury, or shoulder issues, by May of 2018, when he first complained to Dr. Hunt.

The second component of the discovery rule is recognition of the seriousness of the injury. Id. The court noted that ". . . . the limitations period does not commence 'until the employee . . . . knows that the physical condition is serious enough to have a permanent adverse impact on the claimant's employment or employability.'" Id. at 681 (citing Herrera v. IBP, Inc., 633 N.W.2d 284, 288 (Iowa 2001)). The court further noted, "…not every ache, pain, or symptom will be understood as possibly suggesting a permanent adverse impact on a claimant's health or physical capacity for employment." Id. Mr. Barry did not know the seriousness of his injury including information possibly suggesting a permanent adverse impact on his health or physical capacity for employment until he reviewed the results of the MRI with Dr. Hunt in October of 2018. This is based both on the medical records, and his testimony.

The final aspect of the discovery rule is whether or not the individual recognizes the probable compensable nature of their injury. Id. at 680-81. The Iowa Supreme Court has previously held, "[k]knowledge is imputed to a claimant when he gains information sufficient to alert a reasonable person of the need to investigate. As of that date he is on inquiry notice of all facts that would have been disclosed by a reasonably diligent investigation." Perkins v. HEA of Iowa, Inc., 651 N.W.2d 40, 44 (Iowa 2002)(citing Ranney v. Parawax Co., Inc., 582 N.W. 2d 152, 155 (Iowa 1998)). Mr. Barry first started to report shoulder pain in May of 2018. He saw Dr. Hunt on several occasions between May of 2018 and when he commenced physical therapy in August of 2018. Based upon the evidence in the record, Mr. Barry first noticed shoulder pain which he claimed radiated from his carpal tunnel issues in April or May of 2018. He began to seek care with Dr. Hunt regarding these issues in May of 2018. This was the time that a reasonable person would have found the need to investigate.

The claimant filed his petition on August 6, 2020, with an alleged date of injury of August 7, 2018. Based upon the foregoing analysis under the discovery rule, the claimant experienced shoulder pain dating to May of 2018. A reasonable person would have felt the need to investigate at that time. Mr. Barry did not know the seriousness of his injury until sometime in October of 2018 after completing imaging studies and

consulting further with Dr. Hunt. Therefore, based upon the information in the record, the defendant failed to prove their affirmative defense.

Whether the Alleged Injury Arose Out of and In the Scope of Employment

To receive workers' compensation benefits, an injured employee must prove, by a preponderance of the evidence, that 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). 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. Id. An injury arises out of employment when a causal relationship exists between the employment and the injury. Quaker Oats Co. 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. Wills, 608 N.W.2d 1, 3 (Iowa 2000). The Iowa Supreme Court has held that an injury occurs "in the course of employment" when:

> [I]t 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., Kingsley v. Manning, 286 N.W.2d 174, 177 (Iowa 1979).

The claimant in this case alleges that his injury is the result of cumulative trauma. A personal injury contemplated by the workers' compensation law means an injury, the impairment of health or a disease resulting from an injury which comes about, not through the natural building up and tearing down of the human body, but because of trauma. The injury must be something that acts extraneously to the natural processes of nature and thereby impairs the health, interrupts or otherwise destroys or damages a part or all of the body. Although many injuries have a traumatic onset, there is no requirement for a special incident or unusual occurrence. Injuries which result from cumulative trauma are compensable. However, increased disability from a prior injury, even if brought about by further work, does not constitute a new injury. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); Ellingson v. Fleetguard, Inc., 599 N.W.2d 440 (Iowa 1999); McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985). An occupational disease covered by Iowa Code 85A is specifically excluded from the definition of personal injury. Iowa Code 85.61(4)(b); Iowa Code 85A.8; Iowa Code 85A.14.

When the injury develops gradually over time, the cumulative injury rule applies. The date of injury for cumulative injury purposes is the date on which the disability manifests. Manifestation is best characterized as that date on which both the fact of injury and the causal relationship of the injury to the claimant's employment would be plainly apparent to a reasonable person. The date of manifestation inherently is a fact based determination. The fact-finder is entitled to substantial latitude in making this determination and may consider a variety of factors, none of which is necessarily dispositive in establishing a manifestation date. Among others, the facts may include missing work when the condition prevents performing the job, or receiving significant medical care for the condition. For time limitation purposes, the discovery rule then becomes pertinent. The statute of limitations does not begin to run until the employee, as a reasonable person, knows or should know, that the cumulative injury condition is serious enough to have permanent, adverse impact on his or her employment. Herrera v. IBP, Inc., 633 N.W.2d 284 (Iowa 2001); Oscar Mayer Foods Corp. v. Tasler, 483 N.W.2d 824 (Iowa 1992); McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985).

In this matter, Mr. Barry worked at Deere for about 10 years. During the year prior to his initial complaints of shoulder pain, he worked in Department 187. While in that role, he routinely used his arms and hands. He worked above shoulder height and at shoulder height. He assembled harnesses for engine blocks and moved heavy parts and equipment using his upper extremities. Mr. Barry's duties at Deere were physically demanding, especially as they related to his upper extremities. In May of 2018, Mr. Barry first noted pain radiating from his carpal tunnel area to his shoulders. He told Dr. Hunt of his shoulder pain, and by June 1, 2018, he was awakened on a nightly basis by his shoulder pain. By August 8, 2018, Dr. Hunt recommended that Mr. Barry undertake physical therapy for his shoulder pain. On August 15, 2018, Mr. Barry had his first visit of physical therapy. Based upon the evidence in the record, and the claimant's testimony, I conclude that his bilateral shoulder issues were a cumulative injury with a manifestation date of August 8, 2018. This began Mr. Barry's significant medical care for his bilateral shoulder issues.

Causation of Temporary and Permanent Disability

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

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

Iowa employers take an employee subject to any active or dormant health problems, and must exercise care to avoid injury to both the weak and infirm and the strong and healthy. Hanson v. Dickinson, 188 Iowa 728, 176 N.W. 823 (1920). While a claimant must show that the injury proximately caused the medical condition sought to be compensable, it is well established that a cause is "proximate" when it is a substantial factor, or even the primary or most substantial cause to be compensable under the Iowa workers' compensation system. Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417 (Iowa 1994); Blacksmith v. All-American, Inc., 290 N.W.2d 348 (Iowa 1980).

Based upon the evidence in the record, Mr. Barry utilized a policy put in place by Deere allowing employees who were vulnerable to complications from COVID-19 to take a leave of absence from work. The employees were paid weekly indemnity benefits pursuant to a Deere benefit program. In this case, the claimant chose to take time off due to his asthma and age in order to avoid the possibility of acquiring COVID-19. He and his wife moved to Florida and sheltered in their condo. This is not a temporary disability caused by his shoulder condition. Mr. Barry moved positions in August of 2018, which helped alleviate some of his shoulder pain. He did not miss work due to his shoulder issues. Therefore, I find that Mr. Barry's shoulder injuries were not a cause of temporary disability.

In reviewing the evidence in the record regarding permanent disability, I would note that the only formal opinion regarding causation is from Dr. Mathew. Dr. Mathew opined that Mr. Barry's employment at Deere caused his shoulder injuries and resulting permanent impairment. None of the providers from Deere's Occupational Health team, nor Dr. Bartelt opined as to causation of permanent disability. Mr. Barry testified that he has continued pain and irritation in his shoulders. Further, Dr. Bartelt opined that Mr. Barry would benefit from intermittent or occasional injections in either of his shoulders for his pain. This is another indication that Mr. Barry sustained a permanent impairment of his shoulders. Based upon my review of the evidence in the record, I find that Mr. Barry's cumulative injuries to his shoulders caused permanent impairment.

Extent of Permanent Disability

Under the Iowa Workers' Compensation Act, permanent partial disability is compensated either for a loss of use of a scheduled member under Iowa Code 85.34(2)(a)-(u) or for loss of earning capacity under Iowa Code 85.34(2)(v). The extent of scheduled member disability benefits to which an injured worker is entitled is determined by using the functional method. Functional disability is "limited to the loss of

the physiological capacity of the body or body part." Mortimer v. Fruehauf Corp., 502 N.W.2d 12, 15 (Iowa 1993); Sherman v. Pella Corp., 576 N.W.2d 312 (Iowa 1998). The fact finder must consider both medical and lay evidence relating to the extent of the functional loss in determining permanent disability resulting from an injury to a scheduled member. Terwilliger v. Snap-On Tools Corp., 529 N.W.2d 267, 272-273 (Iowa 1995); Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417, 420 (Iowa 1994).

An injury to a scheduled member may, because of after effects or compensatory change, result in permanent impairment of the body as a whole. Such impairment may in turn be the basis for a rating of industrial disability. It is the anatomical situs of the permanent injury or impairment which determines whether the schedules in Iowa Code 85.34(a) – (u) are applied. Lauhoff Grain Co. v. McIntosh, 395 N.W.2d 834 (Iowa 1986); Blacksmith v. All-American, Inc., 290 N.W.1d 348 (Iowa 1980); Dailey v. Pooley Lumber Co., 233 Iowa 758, 10 N.W.2d 569 (1943); Soukup v. Shores Co., 222 Iowa 272, 268 N.W. 598 (1936).

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

Iowa Courts have repeatedly stated that for those injuries limited to the schedules in Iowa Code 85.34(2)(a)-(u), this agency must only consider the functional loss of the particular scheduled member involved, and not the other factors which constitute an "industrial disability." Iowa Supreme Court decisions over the years have repeatedly cited favorably language in an 85-year-old case, Soukup v. Shores Co., 222 Iowa 272, 277, 268 N.W. 598, 601 (1936), which states:

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

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

When the result of an injury is loss to a scheduled member, the compensation payable is limited to that set forth in the appropriate subdivision of Iowa Code 85.34(2). Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961). "Loss of use of a member is equivalent to "loss" of the member. Moses v. National Union Coal Mining Co., 194 Iowa 819, 184 N.W. 746 (1921). Pursuant to Iowa Code 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).

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.

The claimant argues that his injuries are to his body as a whole, and not to his shoulders. The defendant alleges that the claimant's disability is limited to his shoulders.

In 2017, the legislature made significant changes to Iowa Code Chapter 85. Among these changes, the legislature included Iowa Code section 85.34(2)(n), making the "shoulder" a scheduled member.

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

> I recognize the well-established standard that workers' compensation statutes are to be liberally construed in favor of the worker, as their primary purposes is to benefit the worker. See Des Moines Area Reg'l Transit Auth. v. Young, 867 N.W.2d 839, 842 (Iowa 2015)(citations omitted); Xenia Rural Water Dist. v. Vegors, 786 N.W.2d 250, 257 (Iowa 2010)("We apply the workers' compensation statute broadly and liberally in keeping with its humanitarian objective. . . ."); Griffin Pipe Prods. Co. v. Guarino, 663 N.W.2d 862, 865 (Iowa 2003)("[T]he primary purpose of chapter 85 is to benefit the worker and so we interpret this law liberally in favor of the employee."). This liberal construction, however, cannot be performed in a vacuum. As discussed above, several of the principles of statutory construction indicate the legislature did not intend to limit the definition of "shoulder" under section 85.34(2)(n) to the glenohumeral joint. For these reasons, I conclude "shoulder" under section 85.34(2)(n) is not limited to the glenohumeral joint.
>
> Claimant's injury in this case was to the infraspinatus muscle. As discussed, the infraspinatus is part of the rotator cuff, and the rotator cuff's main function is to stabilize the ball-and-socket joint. As noted by both Dr. Bansal and Dr. Bolda, the rotator cuff is generally proximal to the joint. However, because the rotator cuff is essential to the function of the glenohumeral joint, it seems arbitrary to exclude it from the definition of "shoulder" under section 85.34(2)(n) simply because it "originates on the

> scapula, which is proximal to the glenohumeral joint for the most part." (Def. Ex. A, [Depo. Tr., 27]). In other words, being proximal to the joint should not render the muscle automatically distinct.
>
> Given the entwinement of the glenohumeral joint and the muscles that make up the rotator cuff, including the infraspinatus, and the importance of the rotator cuff to the function of the joint, I find the muscles that make up the rotator cuff are included within the definition of "shoulder" under section 85.34(2)(n). Thus, I find claimant's injury to her infraspinatus should be compensated as a shoulder under section 85.34(2)(n). The deputy commissioner's determination that claimant's infraspinatus injury is a whole body injury that should be compensated industrially under section 85.34(2)(v) is therefore respectfully reversed.

Deng at 10-11.

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

> [C]laimant's subacromial decompression was performed to remove scar tissue and fraying between the supraspinatus and the underside of the acromion. As discussed above, the acromion forms part of the socket and helps protect the glenoid cavity, and as such, I found it is closely interconnected with the glenohumeral joint in both location and function. And as discussed in Deng, I found the supraspinatus – a muscle that forms the rotator cuff – to be similarly entwined with the glenohumeral joint. Thus, claimant's subacromial decompression impacted two anatomical parts that are essential to the functioning of the glenohumeral joint; in fact, the procedure was actually performed to improve function of the joint. As such, I find any disability resulting from her subacromial decompression should be compensated as a shoulder under section 85.34(2)(n).
>
> I therefore find none of claimant's injuries are compensable as unscheduled, whole body injuries under section 85.34(2)(v). The deputy commissioner's finding that claimant sustained an injury to her body as a whole is therefore respectfully reversed.

Chavez at 6.

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

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

1. The definition of a "shoulder" is ambiguous in Section 85.34(2)(n). Deng at 4.

2. There is no "ordinary" meaning of the word shoulder. Deng at 5.

3. The appropriate way to interpret the statute is to examine the legislative history. Deng at 5.

4. The legislature did not intend to limit the definition of a "shoulder" to the glenohumeral joint. Rather, the legislature intended to include the entwinement of the glenohumeral joint and the muscles that make up the rotator cuff. Deng at 11.

See e.g. Retterath v. John Deere Waterloo Works, File No. 5067003 (Arb. Dec. 22, 2020); Derrickson v. Securitas Security Services USA, Inc., File No. 1646401.01 (Arb. Dec. Aug. 5, 2021).

In this case, Dr. Bartelt diagnosed Mr. Barry with an incomplete tear of the right rotator cuff, and tendinopathy of the left rotator cuff. The MRIs performed to Mr. Barry's shoulders in October of 2018 showed degenerative changes to the acromioclavicular joint and rotator cuff in the right shoulder, and tendinopathy of the left shoulder. Based upon the ruling in Deng, the injuries to the claimant involve the shoulders and not the body as a whole. Therefore, permanent impairment is considered based upon functional impairment to the scheduled members pursuant to Iowa Code section 85.34(2)(n).

This case is unique in that it represents a disability to two scheduled members. Iowa Code section 85.34(2) sets compensation for the loss of both arms, both hands, both feet, both legs, both eyes, or "any two thereof, caused by a single accident," at 500 weeks, unless the employee is permanently and totally disabled. The compensation for these injuries continues to be functional in nature, and is not based upon industrial disability or loss of earning.

When statutory revisions were made in 2017, the Iowa Legislature did not include language as to how an injury to both shoulders, caused by a single accident, should be compensated. Based upon the language of the statute, and with the understanding that the Iowa Legislature certainly could have included shoulder along with the other scheduled members mentioned in Iowa Code section 85.34(2)(t), I find that Iowa Code section 85.34(2)(t) does not apply to injuries involving permanent disability to the bilateral shoulders. This does not mean that the permanent disability is then interpreted as an industrial disability. Each shoulder shall be addressed separately. See e.g. Lund v. Mercy Medical Center, File No. 5066398 (Arb. March 9, 2021).

I am limited by Iowa Code section 85.34(2)(x) to only consider impairment pursuant to the guides to the evaluation of permanent impairment, as published by the American Medical Association, and as adopted by the Iowa Workers' Compensation Commissioner. I cannot utilize lay testimony or agency expertise in assessing loss or percentage of permanent impairment pursuant to Iowa Code section 85.34(2)(a) through (u) when determining functional disability. Iowa Code section 85.34(2)(x).

The only impairment ratings provided in this case relating to Mr. Barry's bilateral shoulders were 10 percent to the left shoulder and 10 percent to the right shoulder, as assessed by Dr. Mathew. It seems odd that the left shoulder, without a tear would have the same impairment as the right shoulder, which showed a partial rotator cuff tear; however, I am bound by the statute. Based upon the fact that Dr. Mathew is the only medical professional to use the Guides to the Evaluation of Permanent Impairment, Fifth Edition, I find that Mr. Barry sustained a 10 percent impairment to the left shoulder and a 10 percent impairment to the right shoulder. The loss of a shoulder is compensated based upon four hundred weeks. Iowa Code section 85.34(2)(n). Therefore, Mr. Barry is entitled to 40 weeks of compensation for each shoulder.

Commencement Date for Benefits

Iowa Code 85.34(1) provides that healing period benefits are payable to an injured worker who has suffered permanent partial disability until: (1) the worker has returned to work; (2) the worker is medically capable of returning to substantially similar employment; or, (3) the worker has achieved maximum medical recovery. The first of the three items to occur ends a healing period. See Waldinger Corp. v. Mettler, 817 N.W.2d 1 (Iowa 2012); Evenson v. Winnebago Indus. Inc., 881 N.W.2d 360 (Iowa 2012); Crabtree v. Tri-City Elec. Co., File No. 5059572 (App., Mar. 20, 2020). Compensation for permanent partial disability shall begin at the termination of the healing period. Teel v. McCord, 394 N.W.2d 405 (Iowa 1986).

I previously determined that Mr. Barry's cumulative trauma injuries manifested on August 8, 2018. Mr. Barry never missed work due to his shoulder injuries. Therefore, the first item to occur was that Mr. Barry returned to work on August 8, 2018. This is the commencement date of permanent partial disability benefits.

Credit Pursuant to Iowa Code section 85.38(2)

The defendant claims a credit of twenty-two thousand six hundred forty-two and 43/100 dollars ($22,642.43) for payments made pursuant to sick pay or disability income. The burden of proving an entitlement to a credit falls on the employer. See e.g. Albertsen v. Benco Manufacturing, File No. 5010764, 2007 WL 2216397 (App. July 27, 2007).

Iowa Code section 85.38(2)(a) allows for an employer to claim a credit if the claimant received benefits under a group plan covering non-occupational disabilities, provided the plan is wholly or partially contributed to by the employer, and if those benefits should not have been payable because of a right to reimbursement pursuant to Iowa Code chapter 85. The commissioner in Albertsen broke down the elements of the statutory entitlement to a credit into four parts: "1) that benefits were received under a group plan, 2) contribution to that plan was made by the employer, 3) the benefits should not have been paid if workers' compensation benefits were received, 4) the amounts to be credited or deducted from payments made or owed under Chapter 85." Id.

In this matter, Mr. Barry was paid benefits pursuant to Deere's "Disability Benefit Plan for Wage Employees." This is a group plan. The cost of providing benefits under

the plan is borne by Deere, with no contribution from the employee. (DE B:3). Mr. Barry received these benefits because he was off work. The claimant's personal doctor provided notes to Deere indicating that Mr. Barry's pre-existing asthma presented an increased health risk should he acquire COVID-19. Mr. Barry was not paid these benefits because of his shoulder injuries, but was paid due to his asthma and the danger presented to him should he acquire COVID-19. I determined that Mr. Barry was not owed temporary total disability benefits, and he would not have been paid workers' compensation benefits during the time he was off work. Therefore, the defendant is not entitled to a credit pursuant to Iowa Code section 85.28(2)(a).

Penalty

Iowa Code 86.13(4) provides the basis for awarding penalties against an employer. Iowa Code 86.13(4) states:

> (a) If a denial, a delay in payment, or a termination of benefits occurs without reasonable or probable cause or excuse known to the employer or insurance carrier at the time of the denial, delay in payment, or termination of benefits, the workers' compensation commissioner shall award benefits in addition to those benefits payable under this chapter, or chapter 85, 85A, or 85B, up to fifty present of the amount of benefits that were denied, delayed, or terminated without reasonable or probable cause or excuse.
>
> (b) The workers' compensation commissioner shall award benefits under this subsection if the commissioner finds both of the following facts:
>
> (1) The employee has demonstrated a denial, delay in payment, or termination of benefits.
>
> (2) The employer has failed to provide a reasonable or probable cause or excuse for the denial, delay in payment, or termination of benefits.
>
> (c) In order to be considered a reasonable or probable cause or excuse under paragraph "b", an excuse shall satisfy all of the following criteria:
>
> (1) The excuse was preceded by a reasonable investigation and evaluation by the employer or insurance carrier into whether benefits were owed to the employee.
>
> (2) The results of the reasonable investigation and evaluation were the actual basis upon which the employer or insurance carrier contemporaneously relied to deny, delay payment of, or terminate benefits.

(3) The employer or insurance carrier contemporaneously conveyed the basis for the denial, delay in payment, or termination of benefits to the employee at the time of the denial, delay, or termination of benefits.

If weekly compensation benefits are not fully paid when due, Iowa Code 86.13 requires that additional benefits be awarded unless the employer shows reasonable cause or excuse for the delay or denial. Robbennolt v. Snap-On Tools Corp., 555 N.W.2d 229 (Iowa 1996). Delay attributable to the time required to perform a reasonable investigation is not unreasonable. Kiesecker v. Webster City Custom Meats, Inc., 528 N.W.2d 109 (Iowa 1995).

It is also not unreasonable to deny a claim when a good faith issue of law or fact makes the employer's liability fairly debatable. An issue of law is fairly debatable if viable arguments exist in favor of each party. Covia v. Robinson, 507 N.W.2d 411 (Iowa 1993). An issue of fact is fairly debatable if substantial evidence exists which would support a finding favorable to the employer. Gilbert v. USF Holland, Inc., 637 N.W.2d 194 (Iowa 2001). An employer's bare assertion that a claim is fairly debatable is insufficient to avoid imposition of a penalty. The employer must assert facts upon which the commissioner could reasonably find that the claim was "fairly debatable." Meyers v. Holiday Express Corp., 557 N.W.2d 502 (Iowa 1996).

If an employer fails to show reasonable cause or excuse for the delay or denial, the commissioner shall impose a penalty in an amount up to 50-percent of the amount unreasonably delayed or denied. Christensen v. Snap-On Tools Corp., 554 N.W.2d 254 (Iowa 1996). The factors to be considered in determining the amount of the penalty include: the length of the delay, the number of delays, the information available to the employer, and the employer's past record of penalties. Robbennolt, 555 N.W.2d at 238.

For purposes of determining whether an employer has delayed in making payments, payments are considered "made" either (a) when the check addressed to a claimant is mailed, or (b) when the check is delivered personally to the claimant by the employer or its workers' compensation insurer. Robbennolt, 555 N.W.2d at 235-236; Kiesecker, 528 N.W.2d at 112).

Penalty is not imposed for delayed interest payments. Schadendorf v. Snap-On Tools Corp., 757 N.W.2d 330, 338 (Iowa 2008); Davidson v. Bruce, 594 N.W.2d 833, 840 (Iowa 1999).

The claimant argues that a penalty is appropriate because Deere's denial of the claimant's workers' compensation claim based upon an asserted statute of limitation affirmative defense is not a reasonable cause or excuse to deny benefits. I disagree. Based upon the information in the record, Deere's liability was fairly debatable. Deere asserted a statute of limitations affirmative defense, and argued the same at the arbitration hearing and in the posthearing briefs. There were viable arguments by both parties regarding the statute of limitations defense. Therefore, the issue was fairly debatable, and imposition of a penalty would not be appropriate.

Costs for Requests for Admission

The claimant alleges that Deere should be assessed appropriate attorney's fees as allowed by the Iowa Rules of Civil Procedure due to a denial of certain requests for admissions by Deere.

876 Iowa Administrative Code 4.35 applies the Iowa Rules of Civil Procedure to govern the contested case proceedings before the workers' compensation commissioner, unless those rules conflict with the Iowa Administrative Code or Iowa Code chapters 85, 85A, 85B, 86, 87, and 17A, or are obviously inapplicable to the workers' compensation commissioner.

Iowa Rule of Civil Procedure 1.510 pertains to requests for admissions. It provides the legal framework for the requests for admissions. For example, the rule lays out the number of requests for admissions allowed, the time for and content of responses, and the impact of an objection.

The claimant cites in their posthearing brief to Iowa Rule of Civil Procedure 37(c)(2). In 2002, the Iowa Court Rules were renumbered. They have subsequently been renumbered. It appears that the claimant is citing to Iowa Rule of Civil Procedure 1.517(3)(b), which states:

> *Expenses on failure to admit*. If a party fails to admit the genuineness of any document or the truth of any matter as requested under rule 1.510, and if the party requesting the admission thereafter process the genuineness of the document or the truth of the matter, the requesting party may move for an order requiring the other party to pay the reasonable expenses incurred in making that proof, including reasonable attorney's fees. The court shall make the order unless it finds any of the following:
>
> (1) The request was held objectionable pursuant to rule 1.510.
> (2) The admission was sought was of no substantial importance.
> (3) The party failing to admit had reasonable grounds to believe that the party might prevail on the matter.
> (4) There was other good reason for the failure to admit.

The claimant notes that this Agency has previously awarded costs, such as attorney's fees, associated with requests for admissions.

Specifically, the claimant points to Deere's denial to Requests for Admission 1, 2, 10, 12, 13, and 14. (CE 3). I will examine each of the requests and their responses individually in conjunction with the standard considered in the rule.

The disputed requests for admission and their answers are as follows:

1. That Claimant suffered an injury to both shoulders arising out of his employment with John Deere Dubuque Works of Deere & Company on or about August 7, 2018.

Any injuries to the Claimant's bilateral shoulders occurred prior to August 6, 2018. The Claimant's Petition was not filed until August 6, 2020. No weekly benefits were paid in this case. Therefore, the Claimant's cause of action is barred pursuant to Iowa Code §85.26.

2. That claimant suffered an injury both [*sic*] shoulders in the course of his employment with John Deere Dubuque Works of Deere & Company on or about August 7, 2018.

   Any injuries to the Claimant's bilateral shoulders occurred prior to August 6, 2018. The Claimant's Petition was not filed until August 6, 2020. No weekly benefits were paid in this case. Therefore, the Claimant's cause of action is barred pursuant to Iowa Code §85.26.

10. That Claimant sustained permanent physical impairment from his August 7, 2018, work injury.

    Any injuries to the Claimant's bilateral shoulders occurred prior to August 6, 2018. The Claimant's Petition was not filed until August 6, 2020. No weekly benefits were paid in this case. Therefore, the Claimant's cause of action is barred pursuant to Iowa Code §85.26.

12. That Claimant sustained industrial disability from his August 7, 2018, bilateral shoulder injury.

    Any injuries to the Claimant's bilateral shoulders occurred prior to August 6, 2018. The Claimant's Petition was not filed until August 6, 2020. No weekly benefits were paid in this case. Therefore, the Claimant's cause of action is barred pursuant to Iowa Code §85.26.

    Additionally, the Claimant returned to work and was offered work for which the employer received and would receive the same or greater salary, wages, or earnings than the employee received at the time of the injury.

    Further, shoulder injuries are scheduled injuries pursuant to Iowa Code §85.32(2)(n).

13. That Dr. Robert Bartelt is an authorized medical provider.

14. That defendants have paid all invoices related to medical treatment of bilateral shoulders provided by Dr. Bartelt.

With the exception of request for admission 14, Deere denied the various requests for admission above. The first exceptions regarding imposition of a sanction pursuant to Iowa Rule of Civil Procedure 1.517(3)(b) clearly does not apply to any of the above disputed requests for admission insofar as none of the requests have been held objectionable pursuant to Iowa Rule of Civil Procedure 1.510. Further, requests 1, 2, 10 and 12 are not requests "of no substantial importance," as they seek information

pertaining to key issues of this matter. However, whether Dr. Bartelt is an authorized medical provider is of no substantial importance, and request 14 was admitted.

Simply because a court makes a finding that denied matters were true does not mean that a party "unreasonably denied" such matters. Koegel v. R Motors, Inc., 448 N.W.2d 452, 456 (Iowa 1989). When looking at whether a party had reasonable ground to believe that they may prevail on an issue, there are two points to examine. Id. at 457. The first is whether the party denying the issue had reasonable grounds based upon what the party knew at the time of the denial. Id. The second is that what constitutes a reasonable ground is a factual determination. Id. In coming to the factual determination, the supreme court provided an objective test: "could a person in the denying party's position, armed with the information available at the time, reasonably believe there was a basis to deny the request?" Id.

With regard to request for admission 1, 2, 10, and 12, the claimant sought admissions from Deere that relate to an alleged and pled August 7, 2018, date of injury. Based upon the certificate of service, the requests were returned to the claimant on April 21, 2021. (CE 3:32). While I previously held that the claimant proved that Mr. Barry suffered a cumulative injury with a manifestation date of August 8, 2018, he had complaints of shoulder pain dating to April or May of 2018. He also stopped sleeping in a bed with his wife around this time. During his deposition on October 15, 2020, Mr. Barry noted complaints of shoulder pain dating to April of 2018. (DE F).

The claimant argues that the defendant denied permanency benefits "based upon a bogus statute of limitations defense for a cumulative trauma . . . ." but this is simply a blustering argument and does not take into account the standard. (See Claimant's Posthearing Brief). I previously held that the defendant did not meet their burden in asserting an affirmative defense pursuant to Iowa Code section 85.26. This does not mean that the defendant did not have reasonable grounds to believe that they might prevail on the matter based upon what they knew at the time they answered the requests for admission. Based upon the evidence in the record, I find that the defendant had reasonable grounds to believe that they might succeed on their statute of limitations defense. Therefore, I decline to award costs for attorney's fees related to the requests for admissions.

Costs

Claimant seeks the award of costs as outlined in Claimant's Exhibit 8. Costs are to be assessed at the discretion of the deputy commissioner hearing the case. See 876 Iowa Administrative Code 4.33; Iowa Code 86.40. 876 Iowa Administrative Code 4.33(6) provides:

> [c]osts taxed by the workers' compensation commissioner or a deputy commissioner shall be (1) attendance of a certified shorthand reporter or presence of mechanical means at hearings and evidential depositions, (2) transcription costs when appropriate, (3) costs of service of the original notice and subpoenas, (4) witness fees and expenses as provided by Iowa Code sections 622.69 and 622.72, (5) the costs of doctors' and practitioners' deposition testimony, provided that said costs do not exceed

the amounts provided by Iowa Code sections 622.69 and 622.72, (6) the reasonable costs of obtaining no more than two doctors' or practitioners' reports, (7) filing fees when appropriate, including convenience fees incurred by using the WCES payment gateway, and (8) costs of persons reviewing health service disputes.

Pursuant to the holding in Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839 (Iowa 2015), only the report of an IME physician, and not the examination itself, can be taxed as a cost according to 876 IAC 4.33(6). The Iowa Supreme Court reasoned, "a physician's report becomes a cost incurred in a hearing because it is used as evidence in lieu of the doctor's testimony," while "[t]he underlying medical expenses associated with the examination do not become costs of a report needed for a hearing, just as they do not become costs of the testimony or deposition." Id. (noting additionally that "[i]n the context of the assessment of costs, the expenses of the underlying medical treatment and examination are not part of the costs of the report or deposition"). The commissioner has found this rationale applicable to expenses incurred by vocational experts. See Kirkendall v. Cargill Meat Solutions Corp., File No. 5055494 (App. Dec., December 17, 2018); Voshell v. Compass Group, USA, Inc., File No. 5056857 (App. Dec., September 27, 2019).

The claimant requests one hundred and 00/100 dollars ($100.00) for the filing fee, forty-eight and 40/100 dollars ($48.40) for the transcription of the claimant's deposition, and two thousand two hundred sixty-eight and 87/100 dollars ($2,268.87) for Dr. Mathew's IME. I award the claimant one hundred and 00/100 dollars ($100.00) for the filing fee and forty-eight and 40/100 dollars ($48.40) for the transcription fee.

Based upon the holding in Young, only a physician's report can be taxed as a cost. In this matter, Dr. Mathew broke down his invoice to "Chart review" and "IME." Neither of these is clear as to whether or not it is for the costs of Dr. Mathew's report. As such, I cannot award costs for Dr. Mathew's IME.

ORDER

THEREFORE, IT IS ORDERED:

That the claimant shall take nothing for temporary total disability.

That the defendant shall pay the claimant eighty (80) weeks of permanent partial disability benefits at the agreed upon rate of five hundred ninety-nine and 21/100 dollars ($599.21) per week commencing on August 8, 2018.

That the defendant is not entitled to a credit based upon Iowa Code section 85.38(2)(1).

That there is no imposition of a penalty.

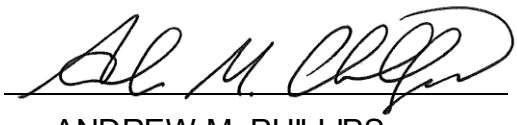
That the claimant shall take nothing by way of costs related to the disputed requests for admissions.

That the defendant shall reimburse the claimant one hundred forty-eight and 40/100 dollars ($148.40) in costs.

That the defendant shall pay accrued weekly benefits in a lump sum together with interest. All interest on past due weekly compensation benefits shall be payable at an annual rate equal to the one-year treasury constant maturity published by the federal reserve in the most recent H15 report settled as of the date of injury, plus two percent. See Gamble v. AG Leader Technology, File No. 5054686 (App. Apr. 24, 2018).

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

Signed and filed this 29th day of November, 2021.



ANDREW M. PHILLIPS
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Thomas Wertz (via WCES)

Dirk Hamel (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.