BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

SANDRA CALDERON, Claimant, vs. SMITHFIELD FOODS, INC., Employer, and SAFETY NATIONAL CASUALTY CO., Insurance Carrier, Defendants.	File No. 5068837 ARBITRATION DECISION Head Notes: 1100; 1108.50; 1402.20; 1402.30; 1402.40; 1804; 2907

STATEMENT OF THE CASE

Claimant, Sandra Calderon, filed a petition in arbitration seeking workers' compensation benefits against Smithfield Foods, Inc., employer, and Safety National Casualty Corporation, insurer, for an alleged work injury date of January 6, 2018. The case came before the undersigned for an arbitration hearing on July 13, 2021. This case was scheduled to be an in-person hearing occurring in Des Moines. However, due to the outbreak of a pandemic in Iowa, the Iowa Workers' Compensation Commissioner ordered all hearings to occur via video means, using CourtCall. Accordingly, this case proceeded to a live video hearing via CourtCall with all parties and the court reporter and interpreter appearing remotely. The hearing proceeded without significant difficulties.

The parties filed a hearing report prior to the commencement of the hearing. On the hearing report, the parties entered into numerous stipulations. Those stipulations were accepted and no factual or legal issues relative to the parties' stipulations will be made or discussed. The parties are now bound by their stipulations.

The evidentiary record includes Joint Exhibits 1 through 13, Claimant's Exhibits 1 through 7, and Defendants' Exhibits A through J.

Claimant testified on her own behalf, through interpreter Ernest Nino-Murcia. Heather Adams was present at hearing on behalf of the employer, but did not testify. The evidentiary record closed at the conclusion of the evidentiary hearing on July 13,

2021. The parties submitted post-hearing briefs on August 9, 2021, and the case was considered fully submitted on that date.

ISSUES

1. Whether claimant has sustained an injury to her neck and body as a whole arising out of and in the course of employment, on January 6, 2018; [1]

2. The nature and extent of claimant's permanent disability, if any;

3. Payment of claimant's independent medical examination under Iowa Code section 85.39; and

4. Taxation of costs.

FINDINGS OF FACT

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

Claimant's testimony was consistent as compared to the evidentiary record, and her demeanor at the time of hearing gave the undersigned no reason to doubt her veracity. Claimant is found credible.

At the time of hearing, claimant was a 53-year old person. (Hearing Transcript, p. 9) She is originally from El Salvador, and is a native Spanish speaker. She does speak and understand certain words and short phrases in English, and has taken some English classes at a local community college. (Tr., pp. 9-10; 53-54) Claimant lives in Denison, Iowa, with her husband of 20 years. (Tr., p. 8) Claimant has four children, only one of whom was still a dependent at the time of her injury in 2018. (Tr., pp. 8-9)

Claimant attended school in El Salvador through the eleventh grade, at which time she moved to the United States. (Tr., p. 9) She does not know how to type or use a computer. (Tr., pp. 10-11) Claimant is right-hand dominant. (Tr., p. 13) When she moved to the U.S. in 1987, she first lived in Los Angeles, California. Her first job was cleaning houses. (Tr., p. 13; Claimant's Exhibit 3, p. 54) After about a year, she got a job as a waitress. She worked as a waitress for about one year, and then got a job at Kass Engineering, also in Los Angeles. (Tr., p. 15; Cl. Ex. 3, p. 54) The company made plastic products, and claimant's job was to cut the products, place them into a box, and stack the boxes, which weighed between 25 and 30 pounds. (Tr., p. 15) Claimant worked at that job for about another year, and then moved to Iowa. (Tr., p. 15) Claimant does not believe she would be able to perform any of the jobs she held in Los Angeles due to her current physical condition. (Tr., pp. 13-15)

[1] The parties stipulate that claimant sustained an injury to her right shoulder, arising out of and in the course of her employment, on January 6, 2018.

In approximately 1992, after moving to Iowa, claimant began working at IBP, later known as Tyson, as a "membrane skinner." (Tr., pp. 15-16) Her job involved taking individual pieces of meat off a line and placing them into a machine that would peel off the membrane or fat. (Tr., p. 16) Claimant does not believe she would be able to perform the repetitive work of the membrane skinner position any longer due to her current physical condition. (Tr., p. 16) Claimant worked at Tyson until 1998, at which time she started working at Farmland, now known as Smithfield Foods. (Tr., pp. 16-17) At the time of hearing, claimant was still employed at Smithfield. (Tr., p. 17)

When claimant first started at Smithfield, she was in a position called "final trim" in the ham bone department. (Tr., p. 17; Defendants' Exhibit H, pp. 69-70) The final trim position consisted of a rotation throughout the day of three different jobs, involving three different portions of meat. (Tr., pp. 17-18) The first job was inner shank, in which claimant stood at the line with a knife in her right hand and a hook in her left hand. (Tr., p. 18) As the meat came down the line, she would cut each piece and then throw the piece to another line above shoulder level. Each piece weighed about one-half to one pound, and the job was fast-paced, as claimant would work through about six pieces of meat per minute. (Tr., pp. 18-19) Claimant does not believe she would be able to perform this job any longer because of her permanent restrictions. (Tr., p. 19)

The second position in claimant's rotation involved "cleaning the cushion." (Tr., p. 20) In this position, claimant cut the fat off meat coming down the line at about stomach level. Again, claimant worked through about six pieces per minute. The job did not require any lifting but claimant did have to look down the entire time she was working. (Tr., p. 20) Claimant testified that she believes she would be able to perform this particular job in her current condition if it were available. (Tr., p. 21)

The third position in claimant's rotation was called "throwing faces," which involved pieces of meat that weighed about two and one-half to three pounds. (Tr., p. 21) This position did not involve any cutting, but claimant would put each piece of meat onto a different line to her right that was at shoulder level. The position involved looking up and down, and repetitive reaching. (Tr., pp. 21-22) Claimant does not believe she would be able to perform this job in her current physical condition. (Tr., p. 22)

Claimant has alleged a cumulative injury to her right shoulder and neck/body as a whole due to her work at Smithfield. Defendants have accepted the right shoulder injury, but deny claimant sustained a neck/body as a whole injury. Claimant testified that in November or December of 2017, she started to have pain in her right shoulder and neck. (Tr., p. 23) Prior to that time, she only recalled having shoulder pain once before, when she started working at Smithfield in 1998. At that time, she had one injection, and the pain resolved. Claimant believed her repetitive work was causing her shoulder and neck pain, and it continued to get worse. (Tr., pp. 23-24) It finally became so intense that on January 6, 2018, claimant reported it to one of her supervisors. (Tr., p. 25) With her limited English, claimant told the supervisor "pain in shoulder and neck," and he sent her to the nurses' station. (Tr., pp. 25-26)

Claimant first spoke to someone named Marsha at the nurses' station, and again said "pain in my shoulder, neck" in English. (Tr., p. 26) Claimant said Marsha responded with "oh, shoulder" first, and directed her to fill out a report. Claimant then saw Nurse Criselda "Cris" Zamago, who speaks Spanish. (Tr., pp. 26-27) Claimant testified that she told Cris that she had a lot of pain in her shoulder, but the pain in her neck was very mild. (Tr., p. 27) Cris told claimant to put in the report only where her pain was most intense. Claimant testified that she only completed the portion of the report in Spanish, and the portion in English appears to have been completed by Cris. (Tr., p. 27; Def. Ex. F, p. 26) As part of the report, claimant completed a pain diagram. (Def. Ex. F, p. 26) On the diagram, claimant only marked the right shoulder, and indicated swelling. Cris also translated the narrative portion of the report from what claimant wrote in Spanish to English. (Def. Ex. F, pp. 23-24) The translation states: "I was working on the line and I started to feel a small pain and I moved to the table to trim faces and I felt better but sometimes in the AM my shoulder is swollen." (Def. Ex. F, p. 24) Claimant testified that she only documented the right shoulder complaints because she was specifically told to put down where she had the worst pain, and at that time it was her shoulder. (Tr., pp. 28; 58-59)

Claimant initially treated for right shoulder pain with Todd Woollen, M.D. (Joint Exhibit 5, p. 63) Claimant testified that she told Dr. Woollen that both her shoulder and her neck hurt, and he said her neck pain was probably related to her shoulder. (Tr., pp. 29-30) Dr. Woollen's records make no mention of neck pain. (Jt. Ex. 5) After conservative treatment, including physical therapy, failed to improve her symptoms, Dr. Woollen ordered an MRI of the right shoulder. (Jt. Ex. 5, p. 65) The MRI was completed on March 15, 2018, and showed a full-thickness tear involving anterior fibers of the distal supraspinatus tendon, with retraction of torn fibers up to 1.5 centimeters. (Jt. Ex. 5, p. 66) The MRI further showed degenerative narrowing of the acromioclavicular joint. Based on the findings of the MRI, Dr. Woollen referred claimant to orthopedics. (Jt. Ex. 5, p. 66)

Claimant saw Bradley Lister, M.D., on April 2, 2018. (Jt. Ex. 5, p. 66) Dr. Lister reviewed the MRI, and recommended surgery. (Jt. Ex. 5, p. 67) Dr. Lister's record makes no mention of neck complaints. Claimant testified that she did tell Dr. Lister about her neck pain, and like Dr. Woollen, he said it was probably coming from her shoulder. (Tr., p. 31)

Claimant had right shoulder surgery on May 3, 2018. (Jt. Ex. 6, pp. 101-111) Dr. Lister performed rotator cuff tendon tear reconstruction, as well as subacromial decompression with irrigation debridement of the right acromioclavicular joint osteophytes and excision of the downward tilting right acromion. (Jt. Ex. 6, p. 101) Following surgery, claimant was placed in a shoulder immobilizer, but was able to return to light duty work on May 14, 2018. (Jt. Ex. 5, p. 74) Claimant continued post-operative care with Dr. Lister, and eventually began physical therapy. (Jt. Ex. 5, pp. 74-78) She was allowed to discontinue use of the shoulder immobilizer on June 18, 2018, but was still to wear a sling at work. (Jt. Ex. 5, p. 77) She was allowed to discontinue use of the

sling on July 2, 2018. (Jt. Ex. 5, p. 79) Dr. Lister's records note she continued to complain of pain, and was progressing slowly with physical therapy. (Jt. Ex. 5, pp. 74-82)

Claimant testified that her neck pain got worse following surgery. (Tr., p. 34) At her August 16, 2018 follow-up appointment with Dr. Lister, claimant noted increased shoulder pain since her last physical therapy appointment. (Jt. Ex. 5, p. 82) Dr. Lister noted that claimant "complains of neck and arm pain with any movement of her shoulder," and noted significant inflammation and irritation of the shoulder. (Jt. Ex. 5, p. 82) His record also notes that Smithfield had decided to change claimant's physical therapy to a different facility.

Claimant was sent back to the original physical therapy facility that treated her prior to surgery. The record of her August 21, 2018 session does not include any mention of neck pain. (Jt. Ex. 4, pp. 38-40) She continued to progress slowly in physical therapy. (Jt. Ex. 5, p. 83) She was allowed to begin using her right arm/shoulder at work on September 13, 2018, but with a five-pound lifting restriction, and no work over shoulder level. (Jt. Ex. 5, p. 84) At her October 4, 2018 physical therapy session, she reported pain in both her shoulder and neck muscles, with movement of her shoulder. (Jt. Ex. 4, p. 50) She continued with physical therapy, and Dr. Lister noted he anticipated maximum medical improvement (MMI) in December of 2018. (Jt. Ex. 5, p. 87)

Claimant continued with physical therapy. At her December 3, 2018 follow-up with Dr. Lister, he noted that she had made no functional improvement over the prior six weeks, so physical therapy would be stopped. (Jt. Ex. 5, p. 90) She continued to have limited range of motion in her right shoulder, and complained of "globalized pain of her shoulder." Dr. Lister recommended a functional capacity evaluation (FCE) prior to issuing permanent restrictions. (Jt. Ex. 5, p. 90) Claimant was then discharged from physical therapy on December 5, 2018, with the therapist recommending a second opinion for her shoulder due to her continued difficulty regaining function. (Jt. Ex. 4, p. 61)

Claimant had an FCE at Excel Physical Therapy on December 20, 2018. (Jt. Ex. 8) On the pain diagrams that claimant completed, she indicated pain on the right side of her neck, down her right shoulder, and down her right arm. (Jt. Ex. 8, pp. 154; 157) Prior to testing, claimant reported continued pain complaints in her right shoulder, "at times extending to her right neck or right upper arm." (Jt. Ex. 8, p. 161) The results of the FCE were considered valid, and claimant demonstrated the ability to work in the light to medium physical demand category. (Jt. Ex. 8, p. 167) It was recommended she be restricted to 10 pounds occasionally and 5 pounds frequently for lifting objects to shoulder level; no overhead lifting with the right upper extremity; and no work above shoulder level with the right upper extremity. She was found capable of frequent forward reaching with both upper extremities, however. (Jt. Ex. 8, p. 167)

After the FCE, claimant returned to Dr. Lister on January 4, 2019. (Jt. Ex. 5, p. 92) Dr. Lister adopted the restrictions of the FCE, placed claimant at MMI, and provided a 13 percent upper extremity rating, which is equal to 8 percent of the whole person. (Jt. Ex. 5, p. 93; see also Jt. Ex. 3, p. 21) With respect to future medical care, Dr. Lister recommended claimant use ibuprofen or Aleve as needed, and ice the right shoulder as needed for inflammation and swelling. Defendants voluntarily paid 40 weeks of permanent partial disability benefits based on Dr. Lister's rating. (See Hearing Report)

Based on her permanent restrictions, claimant was notified that she would have 60 days to find a "bid job" at Smithfield consistent with her restrictions. (Jt. Ex. 3, p. 23) After the 60 day period, if claimant had not found a job, the company would no longer provide "make work" for her, and she would be placed on leave. Claimant testified that she was able to secure a bid job within her restrictions due to her seniority. (Tr., p. 36) She described the new job as working at a table where pieces of meat would drop down, she would clean each piece, and then move it down. (Tr., pp. 28-29; 36)

Claimant had an independent medical evaluation (IME) with Sunil Bansal, M.D., on April 18, 2019. (Cl. Ex. 1) Dr. Bansal reviewed the medical records and met with claimant. Claimant explained her pre-injury job duties, and told Dr. Bansal that the job that caused her the most pain in her neck and shoulder was trimming shanks. (Cl. Ex. 1, p. 6) He further noted she developed neck pain from constantly looking down when trimming and up with tossing, but had no specific treatment for her neck pain to that point. (Cl. Ex. 1, p. 7) At the time of her IME, she reported continued pain in her right shoulder, difficulty reaching with her right arm, and difficultly rotating her shoulder. She also reported numbness in her entire right hand. (Cl. Ex. 1, p. 7) With respect to her neck, she reported right-sided neck pain with tightness, radiating to her right shoulder blade area and upper arm, particularly when turning her head to the right. She also said since surgery, her right hand had been inflamed. (Cl. Ex. 1, p. 7)

With respect to her neck, Dr. Bansal diagnosed cervical myofascial pain syndrome, with examination characteristic of cervical disc pathology. (Cl. Ex. 1, p. 9) Regarding causation, Dr. Bansal opined that claimant's job duties caused a cumulative overuse injury to claimant's right shoulder. He further opined that she incurred an injury to her cervical spine, due to years of repetitive flexion from looking up and down. (Cl. Ex. 1, p. 10) He stated that cumulatively, "this would greatly stress the cervical spine, likely leading to some level of disc bulging." (Cl. Ex. 1, p. 10) Dr. Bansal provided a 13 percent upper extremity impairment rating, the same as Dr. Lister. (Cl. Ex. 1, p. 11) With respect to the neck, he provided a 5 percent whole person impairment rating, based on radicular complaints, guarding, and loss of range of motion. For permanent restrictions, Dr. Bansal agreed with the FCE, but suggested the added restriction of limiting forward reaching to an occasional basis. (Cl. Ex. 1, p. 11)

Claimant testified that she continued to complain to the nurses at work about pain in her shoulder and neck. (Tr., pp. 37-38) She said the nurses would tell her it was normal for her neck to hurt because of her arm. (Tr., p. 38) On October 31, 2019, Dr. Lister documented a telephone conversation between himself and defense counsel

regarding claimant's neck. (Jt. Ex. 5, p. 89) Dr. Lister noted that over the course of his treatment of claimant, the right shoulder was the prime anatomic pathology and symptom, and claimant did not complain to him of any significant cervical spine symptoms or demonstrate cervical spine problems, neurologic deficits, or significant dysfunctions. (Jt. Ex. 5, p. 89)

Claimant continued to have complaints of pain, as well as numbness and tingling in her right upper extremity. She was sent for an EMG with Blanca Marky, M.D., on November 11, 2019. (Jt. Ex. 9, p. 171) Dr. Marky found evidence of right radial mononeuropathy, most likely coming from the medial cord in the brachial plexus. (Jt. Ex. 9, p. 172) Dr. Marky recommended a brachial plexus MRI to look for compression at the level of the shoulder. The MRI took place on January 3, 2020, and showed no acute abnormalities. (Jt. Ex. 6, p. 128)

On January 6, 2020, Dr. Bansal issued a supplement to his IME. (Cl. Ex. 1, p. 14) He had reviewed the correspondence between defense counsel and Dr. Lister from November 8, 2019. Dr. Bansal notes that a "reported lack of mention" of neck pain to Dr. Lister does not negate or dismiss claimant's neck complaints. (Cl. Ex. 1, p. 15) He noted that during the December 20, 2018 FCE, claimant clearly documented neck pain on the pain diagram. As such, Dr. Bansal stood by all opinions in his IME report. (Cl. Ex. 1, p. 16)

Claimant was sent to Christopher Vincent, M.D., for a second opinion regarding her shoulder. She first saw Dr. Vincent on January 14, 2020, and reported constant right shoulder pain. (Jt. Ex. 10, p. 191) She reported feeling worse since surgery in May 2018. She had good range of motion prior to surgery, but had limited range of motion at that time. She reported inflammation, heaviness, numbness, and tingling into the arm. There is no mention of neck pain in Dr. Vincent's record, and on physical examination, he notes active, pain-free range of motion of the cervical spine. (Jt. Ex. 10, p. 192) Claimant testified that she did tell Dr. Vincent that she also had neck pain, but he advised her that he only works on shoulders. (Tr., p. 40)

Dr. Vincent's assessment was that claimant "clearly" had a bad outcome from her prior shoulder surgery, as she continued to have significant shoulder dysfunction. (Jt. Ex. 10, pp. 192-193) His examination demonstrated severe postoperative arthrofibrosis with quite severe capsulitis. (Jt. Ex. 10, p. 193) Claimant had very severe restriction to passive range of motion, which Dr. Vincent thought was most likely related to postoperative adhesive capsulitis. Dr. Vincent also noted the recent EMG, which demonstrated findings of brachial plexopathy. Dr. Vincent recommended a postoperative MRI of the shoulder, as well as a referral to a physical medicine and rehab physician who specializes in brachial plexus injuries. Dr. Vincent also noted that this far out from surgery, claimant's range of motion loss would be a difficult problem to correct, and would likely require surgery. (Jt. Ex. 10, p. 193)

Claimant saw Kurt Smith, D.O., on February 5, 2020. (Jt. Ex. 10, p. 196) Only the patient status report from that date is in the record, but claimant testified that Dr. Smith

prescribed gabapentin, but told her it may be too late for him to treat her nerves. (Tr., p. 42) Claimant testified that the gabapentin helped a little, as she has less pain when she takes it. (Tr., p. 42) Claimant returned to Dr. Smith on April 8, 2020. (Jt. Ex. 10, p. 197) At that time, she reported her pain was improving, but aggravated by movement. She reported spasms, tingling in the arms, and weakness. Dr. Smith noted that claimant continued to have pain in the right shoulder region, but her nerve symptoms had improved with gabapentin. (Jt. Ex. 10, p. 198) As such, he placed her at MMI with respect to the brachial plexopathy.

Claimant had an MRI of the right shoulder on June 16, 2020. (Jt. Ex. 10, pp. 201-202) The MRI revealed findings "suspicious for recurrent supraspinatus full-thickness tear with mild retraction." (Jt. Ex. 10, p. 202) She returned to Dr. Vincent on June 30, 2020. (Jt. Ex. 10, p. 204) Dr. Vincent reviewed the MRI, and noted a recurrent tear of the supraspinatus, along with severe postoperative adhesive capsulitis and loss of range of motion. (Jt. Ex. 10, p. 205) He recommended right shoulder diagnostic arthroscopy, lysis of adhesions with manipulation under anesthesia, and possible revision rotator cuff repair. (Jt. Ex. 10, p. 205)

Claimant followed up with Dr. Smith on July 8, 2020. (Jt. Ex. 10, pp. 208-209) Dr. Smith continued her gabapentin pending surgery with Dr. Vincent. Claimant's surgery with Dr. Vincent took place on August 18, 2020. (Jt. Ex. 11, p. 257) He performed a revision of the right rotator cuff reconstruction, revision of the subacromial decompression, and right shoulder arthroscopic lysis of adhesions, reconstruction of the subacromial space, and extensive debridement of the shoulder with manipulation under anesthesia. (Jt. Ex. 11, p. 257) At her first postoperative follow-up on September 1, 2020, claimant reported her pain had greatly improved since surgery. (Jt. Ex. 10, p. 212) She was to continue with physical therapy. (Jt. Ex. 10, p. 213)

Claimant next followed up with Dr. Vincent on October 6, 2020. (Jt. Ex. 10, p. 215) He noted claimant was "pretty stiff," which did not surprise him given her range of motion restrictions prior to surgery. (Jt. Ex. 10, p. 216) He told claimant to discontinue use of the sling and begin active range of motion with physical therapy. At her next follow up on December 1, 2020, her shoulder pain had continued to improve, but she was concerned about nerve pain and damage in her hand. (Jt. Ex. 10, p. 220) She requested to see Dr. Smith again for her brachial plexus injury. (Jt. Ex. 10, p. 221)

Claimant saw Dr. Smith on December 7, 2020. (Jt. Ex. 10, p. 223) She reported pain in her right upper arm, as well as numbness and tingling in her right arm. Dr. Smith noted that claimant had chronic neuropathic pain in the right upper extremity, and that she remained at MMI as stated in April of 2020. (Jt. Ex. 10, p. 224) He had no further treatment for the nerve injury, and advised claimant to follow up with orthopedics for her shoulder. (Jt. Ex. 10, p. 224)

On December 31, 2020, claimant had a second IME with Dr. Bansal. (Cl. Ex. 1, p. 17) She reported continuing pain in her shoulder, although she did say the second surgery helped. (Cl. Ex. 1, p. 23) At that time, she was having more pain in her elbow,

arm, and fingers. Dr. Bansal noted swelling over her right upper arm. Claimant also noted her upper arm was progressively becoming more tender, and she continued to have difficulty raising her arm overhead, reaching behind her back, and reaching in front of her. She also reported continued pain in her neck that radiated into her right shoulder blade and down her arm to her hand. She said it was difficult to look down for long periods of time. Most of her pain was occurring in her entire arm, and she was dropping objects after holding them for a long time. She reported a prickling sensation over her forearm and a burning sensation across the top of her shoulder. (Cl. Ex. 1, p. 23)

Dr. Bansal noted that claimant's second rotator cuff surgery had helped her shoulder condition, but she continued to have "neck symptomatology overlay." (Cl. Ex. 1, p. 25) He noted the brachial plexopathy diagnosis, and stated it is not an uncommon finding after shoulder surgery. He pointed out that the brachial plexus is a network of nerves formed by the spinal nerves of the lower cervical nerves (C5 though C8), and continued to endorse a cervical component to her overall pathology.

With respect to impairment, Dr. Bansal's rating for the right shoulder, based on range of motion, was reduced to 10 percent of the upper extremity. (Cl. Ex. 1, pp. 25-26) However, he added a 5 percent impairment due to "radial nerve sensory and motor deficits." (Cl. Ex. 1, p. 26) Combined, he provided a 15 percent upper extremity impairment. The neck impairment remained the same, at 5 percent of the whole person. He also recommended an MRI of the cervical spine.

Also around the end of December, claimant began to notice increased pain after physical therapy. (Jt. Ex. 12, pp. 269-272) Due to the ongoing numbness and tingling in claimant's arm, she was returned to Dr. Marky on January 18, 2021. (Jt. Ex. 9, p. 173) Dr. Marky noted that claimant had continued numbness in the distribution of the right radial nerve, as well as tingling and burning. She did not have any sensory deficit in the ulnar or median distribution in the right hand. Claimant returned to Dr. Marky on January 26, 2021 for a repeat EMG. (Jt. Ex. 9, p. 177) The EMG was normal, except for "absent radial sensory potential." Dr. Marky indicated the findings suggested plexopathy as before, and recommended a right shoulder MRI. There was no evidence of mononeuropathy, polyneuropathy, radiculopathy, or myopathy. (Jt. Ex. 9, pp. 177; 181)

Claimant returned to Dr. Vincent on February 9, 2021. (Jt. Ex. 10, p. 229) Dr. Vincent noted claimant still had an extensive amount of adhesive capsulitis and limited range of motion both actively and passively. (Jt. Ex. 10, p. 230) He recommended a cortisone injection to the subacromial space, with the hope of improving her range of motion over the following six weeks. The injection was completed, and at her physical therapy appointment the next day, she reported feeling more pain in her neck. (Jt. Ex. 12, p. 282) However, she also reported the injection had already helped a little with her shoulder pain. (Jt. Ex. 12, p. 283) By February 22, 2021, claimant reported to physical therapy that her shoulder was feeling a little better, and the shot she received also made her neck feel a little better. (Jt. Ex. 12, p. 285) She continued to have trouble with repetitive activities, however.

Claimant's final physical therapy session took place on March 8, 2021. (Jt. Ex. 12, p. 288) Claimant expressed that the more she used her shoulder, the more it would swell and give her pain. She was still very concerned about the shoulder, and was unable to do any overhead reaching. She also reported that her neck muscles were sore, and the more she used her arm, the more sore they became. (Jt. Ex. 12, p. 288)

On March 12, 2021, Dr. Smith authored a letter to defense counsel, in response to his inquiry. (Jt. Ex. 10, p. 234) Dr. Smith reviewed claimant's most recent EMG study, and noted all findings were normal. As such, Dr. Smith opined that claimant did not sustain any permanent disability with respect to the right upper extremity related to the nerve injury, and there were no permanent restrictions or future treatment related to the nerve injury as it had resolved. (Jt. Ex. 10, p. 234)

Claimant returned to Dr. Vincent on March 30, 2021. (Jt. Ex. 10, p. 235) Claimant reported continued pain down her arm. Dr. Vincent felt her ongoing pain was from her nerve injury, and noted she had a known brachial plexopathy as a result of her surgery. (Jt. Ex. 10, p. 236) Claimant requested to see a new nerve specialist, and Dr. Vincent noted she had brought in a note from Dr. Blanco (*sic*)[2] and that she had been seen by Dr. Smith. From an orthopedic standpoint, Dr. Vincent placed claimant at MMI. He recommended she continue her home exercises, and released her from care. (Jt. Ex. 10, p. 236) Her only permanent restriction was no work above shoulder level with the right arm. (Jt. Ex. 10, p. 237)

Smithfield eliminated the Ham/Night Bone Department on August 31, 2020. (Def. Ex. H, p. 69) Shortly before Dr. Vincent released her with permanent restrictions, claimant bid into the job of "final trim," which she won based on seniority. Claimant has been working in that position since the spring of 2021. (Tr., p. 48)

On April 15, 2021, Dr. Marky responded to a letter authored by claimant's attorney. (Jt. Ex. 9, p. 182) Dr. Marky agreed with that statement that while the January 26, 2021 EMG study was normal, such studies are not definitive or conclusive, and claimant's clinical exam exhibited findings and credible symptoms of ongoing brachial plexus dysfunction into her right radial nerve distribution. (Jt. Ex. 9, p. 184) As such, she maintained the diagnosis of brachial plexopathy. She further agreed that given the duration of claimant's symptoms, her brachial plexus dysfunction is likely permanent in nature, and will require ongoing care. (Jt. Ex. 9, p. 184)

On April 19, 2021, Dr. Vincent issued an impairment rating. (Jt. Ex. 10, p. 238) He noted claimant's continued restriction to range of motion, and reiterated her inability to work over shoulder level with the right arm. He also noted the resolution of claimant's previously diagnosed brachial plexopathy supported by the most recent EMG. Using the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, he provided a 9 percent rating to the upper extremity, based on lost range of motion. (Jt. Ex. 10, p. 239)

[2] It appears Dr. Vincent is referring to Dr. Blanca Marky.

Also on April 19, 2021, Dr. Vincent authored a letter to defense counsel, in response to a conversation regarding claimant. (Jt. Ex. 10, p. 240) Dr. Vincent explained that at the time of his initial evaluation of claimant, and throughout his course of treatment, "she did not complain specifically of neck complaints." He noted the findings of brachial plexus neuropathy, but noted the EMG demonstrated the plexopathy distal and below the level of the cervical spine with no apparent involvement of the cervical spine. Dr. Vincent further stated that during his evaluation and review of systems on multiple occasions, claimant "specifically denied neck pain." As such, he opined that claimant's work injury did not involve an injury to her neck. However, because of Dr. Bansal's opinion that claimant did sustain a neck injury, Dr. Vincent felt claimant might benefit from an evaluation by a cervical spine specialist in order to determine if there is neck involvement related to the work injury. (Jt. Ex. 10, p. 240)

Claimant's attorney arranged for her to have a second FCE, which took place on April 27, 2021. (Cl. Ex. 2, p. 40) The FCE results were valid, and placed claimant in the sedentary to light physical demand category. (Cl. Ex. 2, pp. 41-42) It was recommended claimant limit bilateral elevated work and/or reaching at shoulder height and higher to a rare basis, and avoid elevated work and/or reaching with her right upper extremity alone.

Based on Dr. Vincent's opinion, defendants sent claimant to see Brett Rosenthal, M.D., for evaluation of her neck pain. (Jt. Ex. 10, p. 242) Claimant first saw Dr. Rosenthal on May 4, 2021. Claimant reported pain in her bilateral posterior neck, right shoulder, and right arm. She reported neck pain that radiated into the right upper extremity. According to Dr. Rosenthal, claimant stated that after her first rotator cuff surgery she "always had neck pain and headaches." He further states that she denied neck pain or right arm radiating pain prior to the shoulder surgery "in May of 2010." It is unclear whether this was a typographical error, but claimant testified that she actually told Dr. Rosenthal that she had mild neck pain prior to the first surgery in May 2018, and that the pain had gotten worse after the first surgery. (Tr., pp. 46-47) Dr. Rosenthal also notes that claimant reported that her shoulder swelling after surgery increased her radiating pain, and that her entire arm hurts, especially with any neck motion. (Jt. Ex. 10, p. 242)

On physical examination, Dr. Rosenthal noted some reproduction of right neck pain with extremes of range of motion of the right shoulder. (Jt. Ex. 10, p. 244) Claimant had full active range of motion of her cervical spine. (Jt. Ex. 10, p. 245) Dr. Rosenthal noted again that claimant believes her neck pain was "precipitated" by her first surgery, and that she "reportedly woke up with worsening symptoms in her neck and arm." (Jt. Ex. 10, p. 246) Due to the chronicity of symptoms and the right upper extremity pain, Dr. Rosenthal ordered an MRI of the cervical spine.

Claimant underwent an MRI of the cervical spine on May 13, 2021. (Jt. Ex. 6, pp. 132-133) She followed up with Dr. Rosenthal on May 18, 2021. (Jt. Ex. 10, p. 250) In this note, he put the date of onset as May of 2018, and surgery as August 18, 2020. He reviewed the MRI, and noted multilevel degenerative changes present, with very mild

right neural foraminal stenosis at C4-5. (Jt. Ex. 10, p. 251) Dr. Rosenthal noted that claimant was predominantly complaining about her shoulder, and her most recent EMG was without any evidence of radiculopathy. The MRI showed only "very mild stenosis at C4-5, certainly not enough to explain 10 years of right arm radiating pain symptoms." Dr. Rosenthal felt her symptoms were better explained by her prior brachial plexus injury, and did not believe she needed any surgical intervention or restrictions related to her spine. He also referred claimant back to Dr. Vincent in order to discuss her restrictions further. (Jt. Ex. 10, p. 251)

On May 14, 2021, defendants had claimant attend a third FCE. (Jt. Ex. 13, p. 294) The FCE was deemed valid, and placed claimant in the light to medium physical demand category. It was recommended that claimant restrict lifting objects to shoulder level to an occasional basis with 8 pounds or less; avoid overhead lifting with the right upper extremity; and avoid work above shoulder level with the right upper extremity. The FCE specifically noted that claimant is capable of forward reaching on a frequent basis with both upper extremities. (Jt. Ex. 13, p. 294)

On May 26, 2021, Dr. Smith authored a letter to defense counsel regarding claimant's brachial plexus injury. (Jt. Ex. 10, p. 253) He noted that he questions whether claimant had brachial plexopathy because in claimant's EMG testing, the contralateral side was never tested to confirm the diagnosis. On examination, Dr. Smith did not see any findings consistent with a radial nerve injury. She had normal strength, other than decreased shoulder strength after surgery. Finally, she had no sensory changes on examination. As such, he questions whether she had a brachial plexus injury. Dr. Smith provided a zero percent impairment rating, with normal strength and normal sensation. He further indicated that at no time during his examinations or discussions with claimant did she mention neck pain or talk about a neck injury, and EMG findings did not demonstrate any evidence of cervical radiculopathy. (Jt. Ex. 10, p. 253)

On May 27, 2021, Dr. Bansal issued a supplement to his prior IME reports. (Cl. Ex. 1, pp. 28-35) He reviewed claimant's updated medical records since he last saw her. He noted that since his prior examinations, claimant had undergone a cervical spine MRI with "significant" findings between C5 and C7. (Cl. Ex. 1, p. 33) He interpreted the MRI findings as indicating moderate neural foraminal stenosis between C5 and C7, which he opined was "certainly significant enough to cause the symptomatic radicular manifestations" that claimant experienced. (Cl. Ex. 1, p. 33) Dr. Bansal also reiterates that he believes claimant should limit forward reaching with the right arm to an occasional basis, and notes that the two most recent FCE reports were conflicting on that restriction. (Cl. Ex. 1, p. 34) Dr. Bansal stated that as claimant has compromise of her subacromial space, she risks considerable injury to her rotator cuff from continued forward reaching. (Cl. Ex. 1, p. 35) After his review of the additional records, Dr. Bansal again stood by all opinions as stated in his prior IME reports and addendums. (Cl. Ex. 1, p. 35)

Also on May 27, 2021, Dr. Marky responded to a letter authored by defense counsel. (Jt. Ex. 9, pp. 185-186) Dr. Marky agreed with the statement that while the

January 26, 2021 EMG was normal, there were findings suggestive of "absent radial sensory potential." (Jt. Ex. 9, p. 185) That finding could explain claimant's numbness in her posterior arm and hand below shoulder level. Dr. Marky agreed, however, that claimant did not have any motor issues with respect to her right upper extremity. Dr. Marky also agreed that nerves heal at the rate of 1 millimeter per month. As such, over time, claimant will continue to recover and nerve issues and numbness would hopefully resolve. Finally, Dr. Marky deferred to Dr. Vincent with respect to restrictions for claimant's shoulder. (Jt. Ex. 9, p. 185)

On June 1, 2021, Dr. Rosenthal responded to a letter authored by defense counsel. (Jt. Ex. 10, pp. 254-256) Dr. Rosenthal agreed with the statement that in his opinion, claimant did not sustain an injury to her cervical spine/neck, and her symptoms are not coming from her cervical spine/neck. (Jt. Ex. 10, pp. 254-255) Rather, it is his opinion that claimant's ongoing symptoms are traceable to her right shoulder injury. (Jt. Ex. 10, p. 255) He agreed that there is no permanent impairment related to claimant's cervical spine, and no restrictions required relative to the cervical spine. With respect to future medical treatment, Dr. Rosenthal agreed that claimant does not need any treatment related to her neck, and the fact that claimant's neck pain is reproduced with movement of her shoulder is not indicative of an injury to the neck/cervical spine. (Jt. Ex. 10, p. 256) Finally, Dr. Rosenthal provided a handwritten statement, concluding that he agrees with defense counsel's statements in the letter, and claimant's complaints "appear to be stemming from her shoulder, not her cervical spine. No work-related injury to her spine has occurred." (Jt. Ex. 10, p. 256)

On June 18, 2021, Dr. Marky responded to a letter authored by claimant's attorney. (Jt. Ex. 9, pp. 187-190) Dr. Marky confirmed that she stands by her medical conclusions set forth in her April 15, 2021 response, including her diagnosis of brachial plexopathy, and that the condition is likely permanent in nature. (Jt. Ex. 9, p. 189) She further agreed that the statement that claimant's nerves will continue to improve over time was speculative in nature, and given the duration of claimant's symptoms, they are likely permanent. She agreed that brachial plexus dysfunction anatomically "represents an injury to, and originates from, the neck, at the C5-T1 level(s) of the cervical spine, with resultant symptoms down the nerve distribution in the right arm." (Jt. Ex. 9, p. 190) Finally, she agreed that she would defer to the FCE results from the three separate FCEs regarding appropriate restrictions. (Jt. Ex. 9, p. 190)

On June 24, 2021, Dr. Marky responded to a letter authored by defense counsel. (Def. Ex. A) She agreed that she treated claimant for a "very minor" lesion to the radial nerve of the brachial plexus. (Def. Ex. A, p. 1) She agreed that claimant's brachial plexus condition is limited to the radial nerve, and that the median and ulnar nerves were completely normal. (Def. Ex. A, p. 2) Finally, she agreed that with respect to the most recent letter from claimant's attorney, she only intended to agree that the brachial plexus does originate from the C5-T1 levels of the spine. She did not intend to agree that claimant sustained an injury to her neck or cervical spine. In fact, she agreed that claimant did not sustain any injury to her cervical or thoracic spine. Dr. Marky added a handwritten note that says "[t]he cervical spine is not related the lesion is totally

peripheral." (Def. Ex. A, p. 2) Dr. Marky agreed that she does not know how claimant's brachial plexus condition occurred, when it occurred, or what caused the condition. She was unable to causally relate the radial nerve lesion to claimant's work or the medical treatment provided for her shoulder injury. (Def. Ex. A, p. 3) She agreed that the brachial plexus condition would not result in permanent disability or permanent restrictions, and agreed that any restrictions or limitations from claimant's FCE studies would be related to the shoulder injury. (Def. Ex. A, pp. 3-4) Finally, she did not recommend any additional medical treatment, and agreed that any additional treatment would most likely result in side effects worse than any potential improvement. (Def. Ex. A, p. 4) Again, she added a handwritten note that states, "[t]here is no treatment just wait for the nerve to regenerate." (Def. Ex. A, p. 4) She deferred to Dr. Vincent with respect to permanent impairment, restrictions, MMI, and future medical care for the shoulder. (Def. Ex. A, p. 5) She agreed that while the brachial plexus does originate in the cervical and thoracic spine, levels C5 though T1, claimant's brachial plexus condition does not affect her neck, is not an injury to the neck, and would not cause symptoms to the neck. Finally, she agreed that claimant's minor radial nerve lesion has not affected her motor function or caused a motor deficit. She again added a handwritten note that states, "[s]he (claimant) only has sensory symptoms." (Def. Ex. A, p. 5)

After careful review and consideration of the evidence in the record, I find the greater weight of evidence supports defendants' position that claimant did not sustain an injury to her neck/cervical spine. When looking at the evidence as a whole, every medical professional to whom claimant initially reported mild neck pain opined it was likely coming from or related to her shoulder injury. Additionally, when claimant was sent to Dr. Rosenthal, a spine specialist, he noted her predominant complaints were actually related to her shoulder pain. (Jt. Ex. 10, p. 251) While Dr. Rosenthal's initial record contains some errors in the history, the cervical MRI showed only "very mild stenosis at C4-5." (Jt. Ex. 10, p. 251) Dr. Rosenthal, like the other treating physicians, opined that claimant's neck symptoms are more likely than not related to her right shoulder injury. (Jt. Ex. 10, p. 256)

No treating physician has opined that claimant's neck pain is the result of an injury to her neck. The only physician who has opined that claimant sustained a neck injury is Dr. Bansal. Unfortunately, Dr. Bansal's opinion is not supported by the remainder of the medical evidence. Dr. Bansal concluded that claimant sustained a neck injury after his first IME, without the benefit of any diagnostic testing. After diagnostic testing was performed, and the results were largely normal, Dr. Bansal's opinion did not change. Additionally, while Dr. Bansal classified claimant's cervical spine degeneration as moderate and significant enough to cause claimant's radicular symptoms, Dr. Rosenthal classified the degeneration as mild, and said her symptoms were more likely related to her shoulder injury. As an orthopedic spine specialist, Dr. Rosenthal's opinion carries more weight. Additionally, when viewing the record as a whole, none of the multiple treating providers found any injury to claimant's cervical spine. Claimant did not meet her burden to prove she sustained an injury to her

neck/cervical spine arising out of and in the course of employment. As such, her work injury is limited to her right shoulder.

With respect to permanent impairment, after claimant's second shoulder surgery, her condition improved. Dr. Vincent provided a 9 percent upper extremity impairment rating, while Dr. Bansal provided a 15 percent rating. (Jt. Ex. 10, p. 239; Cl. Ex. 1, pp. 25-26) Dr. Bansal's rating, based on his December 31, 2020 examination, is based on lost range of motion, with an additional 5 percent based on "radial nerve sensory and motor deficits." (Cl. Ex. 1, p. 26) However, both of the physicians who treated claimant's brachial plexus condition opined that claimant had no permanent impairment related to that injury. (Def. Ex. A, pp. 3-4; Jt. Ex. 10, p. 253) Dr. Marky further noted that claimant had no motor deficits, which was part of the basis for Dr. Bansal's upper extremity rating. (Def. Ex. A, p. 5)

Dr. Vincent's rating took place after claimant had completed additional physical therapy, and had received a cortisone injection into the subacromial space. (Jt. Ex. 10, pp. 230; 239) Comparing the range of motion measurements Dr. Vincent took after that additional treatment with Dr. Bansal's measurements months before, it is clear claimant had some improvement in her range of motion. (Compare Cl. Ex. 1, p. 25 and Jt. Ex. 10, p. 238) Given the timing and his treatment relationship with claimant, I find Dr. Vincent's rating to be a more accurate representation of claimant's permanent impairment. As such, claimant is entitled to 9 percent permanent partial impairment of the right shoulder.

CONCLUSIONS OF LAW

The first issue to determine is whether claimant's injury is limited to her right shoulder, or if she has also sustained an injury to her neck/body as a whole. The party who would suffer loss if an issue were not established ordinarily has the burden of proving that issue by a preponderance of the evidence. Iowa R. App. P. 6.904(3)(e).

The claimant has the burden of proving by a preponderance of the evidence that the alleged injury actually occurred and that it both arose out of and in the course of the employment. Quaker Oats Co. v. Ciha, 552 N.W.2d 143, 150 (Iowa 1996); Miedema v. Dial Corp., 551 N.W.2d 309, 311 (Iowa 1996). The words "arising out of" refer to the cause or source of the injury. The words "in the course of" refer to the time, place, and circumstances of the injury. 2800 Corp. v. Fernandez, 528 N.W.2d 124, 128 (Iowa 1995). An injury arises out of the employment when a causal relationship exists between the injury and the employment. Miedema, 551 N.W.2d at 311. 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); Miedema, 551 N.W.2d at 311. An injury occurs "in the course of" employment when it happens within a period of employment at a place where the employee reasonably may be when performing employment duties and while the employee is fulfilling those duties or doing an activity incidental to them. Ciha, 552 N.W.2d at 150.

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

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

I found that claimant did not prove that she sustained an injury to her neck arising out of and in the course of her employment. While I believe that claimant experiences some level of neck pain, all of the treating physicians have opined that her neck symptoms are most likely related to her shoulder injury. Pain alone does not extend an injury from a scheduled member to the body as a whole. Lagos v. IBP, Inc., File No 5000782, (Arb., May 17, 2004); Brown v. Schoon Construction, Inc., File No. 913559 (App., December, 1992). Pain that is not substantiated by clinical findings is not a substitute for impairment. Waller v. Chamberlain Manufacturing, II Iowa Industrial Commissioner Report 419, 425. It is the situs of the impairment resulting from an injury that determines whether it is a scheduled member injury or a body as a whole injury. The anatomical situs of the impairment, not the situs of the injury, governs whether or not an injury is to the body as a whole. Payton v. Sheller-Globe Corp., File No. 895808 (App., April 30, 1993).

In this case, while claimant complains of pain in her neck, there is no credible medical evidence to support an injury extending beyond her shoulder and into her neck. The only doctor who provided an opinion that claimant sustained an injury and permanent impairment to her neck is Dr. Bansal. I did not find his opinion to be supported by the weight of the medical evidence. Claimant bears the burden of proof. She has not carried that burden. Claimant's injury is confined to her shoulder.

Claimant did not provide argument in her brief that her shoulder injury alone extends to the body as a whole, but defendants correctly note that the parts of claimant's shoulder that were injured and subsequently surgically repaired have been

found to be part of the shoulder. See Mary Deng v. Farmland Foods, Inc., File No. 5061883 (App., Sept. 29, 2020); Rosa Chavez v. MS Technology, LLC, File No. 5066270 (App., Sept. 30, 2020). Therefore, the issue of industrial disability is moot. Under Iowa Code section 85.34(2)(n), a shoulder injury is compensated based on a maximum of 400 weeks. I found Dr. Vincent's 9 percent upper extremity rating to be the most accurate representation of claimant's permanent partial impairment. As such, claimant is entitled to 36 weeks of permanent partial disability benefits.

The next issue to determine is reimbursement of the full cost of claimant's IME with Dr. Bansal. Claimant has requested reimbursement in the amount of $2,971.00 related to Dr. Bansal's first IME report, and $2,467.00 related to Dr. Bansal's second report. (Cl. Ex. 1, pp. 13, 27; Cl. Ex. 7, pp. 84, 86, 91) Defendants argue that they have provided reimbursement for one-half of the cost of the initial IME, which is the pro rata portion associated with obtaining the right shoulder rating. However, defendants argue that claimant is not entitled to reimbursement for obtaining opinions related to claimant's alleged neck injury.

The Iowa Workers' Compensation Commissioner has noted that the Iowa Supreme Court adopted a strict and literal interpretation of Iowa Code section 85.39 in Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839 (Iowa 2015). See Cortez v. Tyson Fresh Meats, Inc., File No. 5044716 (App., December 22, 2015). The Commissioner has taken a similar strict interpretation of the pre-requisites set forth in Iowa Code section 85.39. The Commissioner has held that there must be a permanent impairment rating rendered by a physician selected by the defendants before claimant qualifies for an independent medical evaluation pursuant to Iowa Code section 85.39. Reh v. Tyson Foods, Inc., File No. 5053428 (App., March 26, 2018).

Claimant's first IME with Dr. Bansal took place on April 18, 2019. (Cl. Ex. 1, p. 1) At that time, no employer-retained physician had provided an impairment rating related to claimant's neck. Dr. Rosenthal did not provide his rating until June 1, 2021. (Jt. Ex. 10, p. 255) Additionally, under Iowa Code section 85.39, an employer is only liable to reimburse claimant for the cost of an examination if the injury for which the employee is being examined is found to be compensable. I did not find claimant's alleged neck injury to be compensable. As such, claimant is not entitled to reimbursement for the remainder of Dr. Bansal's initial IME report under section 35.39.

Dr. Bansal's second IME took place on December 31, 2020; well before any employer-retained physician provided an updated impairment rating on claimant's shoulder, and still prior to Dr. Rosenthal's zero percent neck rating. (Cl. Ex. 1, p. 17; Jt. Ex. 10, p. 239). As such, claimant is not entitled to reimbursement under section 85.39 for Dr. Bansal's second IME.

While claimant is not entitled to reimbursement for the remainder of Dr. Bansal's reports under section 85.39, consistent with the Iowa Supreme Court's holding in Young, his reports may be taxed as a cost. Assessment of costs is a discretionary function of this agency. Iowa Code § 86.40. Costs are to be assessed at the discretion

of the deputy commissioner or workers' compensation commissioner hearing the case. 876 IAC 4.33.

In this case, I did not rely on Dr. Bansal's reports. I found his impairment ratings to be unsupported by the weight of the medical evidence. As such, I decline to award the cost of his reports as costs. Likewise, as claimant has not proven entitlement to benefits beyond defendants' credit, I decline to award any of the additional requested costs.

ORDER

THEREFORE, IT IS ORDERED:

Defendants shall pay claimant thirty-six (36) weeks of permanent partial disability benefits, commencing March 30, 2021, at the stipulated rate of seven hundred thirty-six and 18/100 dollars ($736.18).

Defendants shall be entitled to a credit for all permanent partial disability benefits previously paid.

Defendants shall pay accrued weekly benefits in a lump sum together with interest at an annual rate equal to the one-year treasury constant maturity published by the federal reserve in the most recent H15 report settled as of the date of injury, plus two percent.

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

The parties shall bear their own costs.

Signed and filed this 24th day of January, 2022.

JESSICA L. CLEEREMAN
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

James Byrne (via WCES)

Michael J. Miller (via WCES)

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