BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

BERNARD HORNE,	:	
Claimant,	:	File No. 21005075.01
vs.	:	
UNITED TECHNOLOGIES CORP.,	:	
Employer,	:	ARBITRATION DECISION
and	:	
NEW HAMPSHIRE INSURANCE CO.,	:	
Insurance Carrier,	:	
and	:	Headnotes: 1108, 1402.30, 1402.40, 1402.60, 1803, 1803.1, 2501, 2502, 2701, 2907, 3202
SECOND INJURY FUND OF IOWA, Defendants.	:	

Claimant Bernard Horne filed a petition in arbitration on May 26, 2021, alleging he sustained an injury to his right upper extremity while working for Defendant United Technologies Corporation ("United Technologies") on September 2, 2019. Horne later amended his petition to change the date of injury to September 5, 2019. United Technologies and its insurer, Defendant New Hampshire Insurance Company ("New Hampshire") filed an answer on June 14, 2021. Horne amended his petition to add Defendant Second Injury Fund of Iowa ("Fund") as a party. The Fund filed an answer on February 8, 2022.

An arbitration hearing was held *via* Zoom video conference on August 25, 2022. Attorney Emily Schott Hood represented Horne. Horne appeared and testified. Attorney Lee Hook represented United Technologies and New Hampshire. Assistant Attorney General Sarah Timko represented the Fund. Joint Exhibits ("JE") 1 through 11, and Exhibits 1 through 7, A through G, and AA were admitted into the record. The record was held open through October 21, 2022, for the receipt of post-hearing briefs. The briefs were received and the record was closed.

Before the hearing the parties submitted a Hearing Report for the case, listing stipulations and issues to be decided. Defendants waived all affirmative defenses. The Hearing Report Order was entered at the conclusion of the hearing adopting the parties' stipulations and issues to be decided.

STIPULATIONS

1. An employer-employee relationship existed between United Technologies and Horne at the time of the alleged injury.

2. Horne sustained an injury, which arose out of and in the course of his employment with United Technologies on September 5, 2019.

3. The alleged injury is a cause of temporary disability during a period of recovery.

4. Temporary benefits are no longer in dispute.

5. The alleged injury is a cause of permanent disability.

6. The commencement date for permanent partial disability benefits, if any are awarded, is December 22, 2021.

7. At the time of the alleged injury, Horne's gross earnings were $1,828.60 per week, he was married and entitled to four exemptions, and the parties believe his weekly rate is $1,152.14.

8. Prior to the hearing Horne was paid 19.358 weeks of compensation at the rate of $1,152.14 per week.

9. Horne sustained a prior qualifying loss to his right leg on January 2, 2019.

10. The functional loss from the prior qualifying loss is 2 percent of the right leg.

11. Costs set forth in Exhibit 7 have been paid.

ISSUES

1. What is the nature of the injury?

2. What is the extent of disability?

3. Is Horne entitled to alternate care for his alleged neck injury with Thrive Care: Chronic Pain Solutions?

4. Is Horne entitled to recover lost pay for three hours of lost wages under Iowa Code section 85.27(7) for medical care he received at Thrive Care: Chronic Pain Solutions on June 15, 2022, June 16, 2022, and July 14, 2022?

5. Is Horne entitled to payment of medical expenses set forth in Exhibit 6?

6. Did Horne sustain a compensable loss to his right arm on September 5, 2019?

7. If Horne sustained a compensable loss to his right arm, what is the functional loss from the second qualifying loss to the right arm?

8. If Horne sustained a compensable loss to his right arm, what is the commencement date for benefits through the Fund?

9. Is the Fund entitled to a credit of 9.4 weeks under Iowa Code section 85.64?

10. Is Horne entitled to recover the cost of the independent medical examination?

11. Should costs be assessed against the parties?

FINDINGS OF FACT

Horne lives in Cedar Rapids, Iowa. (Tr.:13) Horne obtained an associate's degree in 1992. (Tr.:13) Horne attended additional schooling, but he has not completed a bachelor's degree. (Tr.:13) Horne is 12 credits short of earning a bachelor's degree in business management. (Tr.:51) Horne holds a four-year apprenticeship journeyman's card from the Department of Labor. (Tr.:13) At the time of the hearing he was 57. (Tr.:48)

Horne commenced full-time employment with Rockwell Collins, the predecessor of United Technologies, in February 1986, as an assembly operator. (Exs. A; 1:9; Tr.:13) Horne has worked for United Technologies and its predecessor for 36 years. (Tr.:13) Horne has worked as a sheet metal fabricator, machinist, technical inspector, maintenance technician, and building maintenance mechanic. (Tr.:14)

On September 5, 2019, Horne reported he injured his right elbow while lifting and moving file cabinets at United Technologies. (JE 7; Ex. E; Tr.:21) While holding a file cabinet Horne stepped in between the slats of a pallet and lost his balance and he fell backwards into a row of file cabinets and caught himself. (Tr.:22)

At the time of the injury Horne was working as a building maintenance mechanic. (Tr.:14) Horne worked on a construction crew and he was primarily involved in industrial heating and air conditioning installations and related work. (Tr.:14) Horne has an extensive medical history prior to the alleged work injury in September 2019.

Horne sought treatment for right shoulder symptoms in September 2007. (JE 1:1) Right shoulder magnetic resonance imaging did not show evidence of a rotator cuff tear. (JE 1:1)

In July 2012, Horne sought treatment for his cervical spine. (JE 1:2) Horne underwent cervical spine magnetic resonance imaging and the reviewing radiologist

listed an impression of multifocal changes of degenerative disc disease, noting "[t]he most abnormal level is probably C2-C5." (JE 1:3)

Horne attended an appointment with David Segal, M.D., a neurosurgeon, on September 4, 2012, complaining of bilateral posterior neck, bilateral upper back, bilateral scapular, and bilateral mid back pain, radiating into his left upper arm, left forearm, left hand, and left hand fingers, mostly in the pinky and ring fingers. (JE 2:64) Dr. Segal examined Horne, noted his magnetic resonance imaging showed multiple levels of disc bulging, most prominent at C5-C6 and C6-C7, with mild/moderate foraminal narrowing at C6-C7. (JE 2:67) Dr. Segal assessed Horne with cervical spondylosis with myelopathy and displacement of cervical intervertebral disc, noted his imaging did not look that bad, making it more difficult to determine exactly where his pain was coming from, discussed treatment options, and recommended injections. (JE 2:65-67)

On September 14, 2012, Horne attended an appointment with Mark, Kline, M.D., a pain specialist, complaining of aching and sharp neck pain radiating into his left scapular region and left upper extremity. (JE 1:7) Dr. Kline noted Horne's cervical spine imaging revealed bilateral disc osteophyte complexes at C3-C4 and C4-C5, a mild left lateral and paracentral disc bulge resulting in mild left foraminal narrowing and mild to moderate central stenosis at C5-C6, and a left paracentral disc bulge or protrusion resulting in mild to moderate central canal stenosis and mild foraminal narrowing at C6-C7. (JE 1:7) Dr. Kline listed an impression of cervical disc protrusions, cervical spondylosis, and cervical radiculitis and he performed a C7 through T1 interlaminar epidural steroid injection. (JE 1:6, 8)

Horne attended 21 chiropractic appointments with Jill Byrnes-Lange, D.C., from May 6, 2015 through February 3, 2016, and received chiropractic treatment for bilateral neck pain, bilateral shoulder pain, and bilateral upper back pain. (JE 3:69-110)

On December 2, 2015, Horne attended an appointment with Scott Piper, M.D., his family medicine provider, complaining of left elbow pain and constant neck pain for years. (JE 4:135-36)

Horne attended six physical therapy appointments for left elbow pain and cervicalgia from December 14, 2015, through April 7, 2016. (JE 5)

Horne returned to Dr. Byrnes-Lange on February 1, 2017 and received six additional chiropractic treatments for bilateral neck pain, bilateral shoulder pain, and bilateral upper back pain from February 2017, through July 19, 2017. (JE 3:112-23)

On July 22, 2017, Horne attended an appointment with Stephen Runde, M.D., a family medicine provider, complaining of upper back pain between his shoulder blades with no known injuries, and numbness and tingling in both arms and fingers, but no neck pain. (JE 11:251) Horne relayed he had had the same symptoms in the past and received chiropractic treatment and injections. (JE 11:251) Dr. Runde assessed Horne

with a thoracic strain and recommended conservative treatment with icing, Aleve, and Flexeril. (JE 11:251)

Horne attended two chiropractic appointments with Dr. Byrnes-Lange in March 2018 and an appointment on April 16, 2019, for bilateral neck pain, bilateral shoulder pain, and upper back pain. (JE 3:124-30)

Horne underwent right knee magnetic resonance imaging on January 31, 2019, for complaints of right knee pain. (JE 6:160) The reviewing radiologist listed an impression of mild focal inner margin blunting of the body and posterior horn of the medial meniscus, suggestive of a degenerative radial tear, noted he suspected a small meniscal fragment adjacent to the medial aspect of the posterior horn, and a small joint effusion with intact cruciate and collateral ligaments. (JE 6:162)

On February 7, 2019, Horne attended an appointment with Daniel Fabiano, M.D., an orthopedic surgeon with Physicians Clinic of Iowa, complaining of right knee pain. (JE 6:163) Dr. Fabiano examined Horne, noted his magnetic resonance imaging showed a radial medial meniscus tear, assessed Horne with acute right knee pain and a complex tear of the right medial meniscus, and documented he was a candidate for arthroscopic meniscectomy. (JE 6:164) Dr. Fabiano performed a right knee arthroscopy on Horne on February 18, 2019. (JE 6:166)

Following the September 5, 2019 work injury, Horne returned for chiropractic treatment. On September 13, 2019, and September 30, 2019 Horne received chiropractic treatment for bilateral neck pain, bilateral shoulder pain, and bilateral upper back pain. (JE 3:131-34) Dr. Byrnes-Lange's treatment notes do not mention a work injury or an acute injury. (JE 3:131-34)

On November 7, 2019, Horne attended an appointment with Shirley Pospisil, M.D., complaining of right elbow pain after lifting a file cabinet at work on September 5, 2019. (JE 1:16) Horne relayed he had been experiencing shoulder and right upper trapezius pain since the incident. (JE 1:16) Dr. Pospisil examined Horne, assessed him with right lateral epicondylitis, a right shoulder strain, and right upper trapezius strain, and ordered physical therapy. (JE 1:16-17)

Horne attended an appointment with Dr. Piper, his family physician, on November 13, 2019, reporting he had been having some issues with his right elbow since September when he was injured while lifting file cabinets during a remodeling project at work. (JE 4:139-41)

Horne returned to Dr. Pospisil on January 2, 2020, regarding his right elbow pain. (JE 1:18) Dr. Pospisil noted Horne was tender to palpation over the right lateral epicondyle and slightly distal into his right forearm extensors, but he was less tender to palpation in his shoulder and right upper trapezius and complained less of pain. (JE 1:18) Dr. Pospisil continued his therapy and use of a tennis elbow brace, recommended he use ice, and imposed no work restrictions. (JE 1:18-19)

On January 30, 2020, Horne attended an appointment with Dr. Pospisil reporting his right elbow was 99 percent better and his right upper trapezius pain was 75 percent better. (JE 1:20) Dr. Pospisil continued his physical therapy and recommended Horne continue to work on a home exercise program. (JE 1:20-21)

Horne attended a follow-up appointment with Dr. Pospisil on February 13, 2020, reporting he believed his physical therapy was helping. (JE 1:22) Dr. Pospisil documented Horne was moving better than in the past, but still had tenderness to palpation in his right lateral epicondyle and right upper trapezius. (JE 1:22)

On February 27, 2020, Horne returned to Dr. Pospisil, reporting his right elbow hurt on and off, but his symptoms were rare, and reporting he still had an area in his right upper trapezius that was painful. (JE 1:24) Dr. Pospisil discontinued Horne's physical therapy and recommended he continue with his home exercise program. (JE 1:24-25) Dr. Pospisil offered Horne dry needling, but he declined treatment. (JE 1:24)

Horne attended an appointment with Dr. Pospisil on June 4, 2020, complaining of a pinpoint headache on the right side of his head that has been increasing with time. (JE 1:26) Dr. Pospisil documented Horne could move his neck to the right, but not well to the left, and he was very tender to palpation in his right upper trapezius and had pain at the base of his skull on the right on exam. (JE 1:26) Dr. Pospisil assessed Horne with right upper trapezius pain and headaches, ordered physical therapy, recommended dry needling, and ordered magnetic resonance imaging. (JE 1:26-28)

Horne underwent cervical spine magnetic resonance imaging on June 9, 2020. (JE 10) The reviewing radiologist listed an impression of multilevel mild-to-moderate changes, mild spinal canal stenosis at C3-C4 through C6-C7, moderate right-sided neural foraminal narrowing at C5-C6 and mild-to-moderate neuroforaminal narrowing bilaterally at C4-C5. (JE 10)

On June 11, 2020, Horne attended a follow-up appointment with Dr. Pospisil, regarding his upper trapezius pain. (JE 1:29) Horne relayed he had one spot on his head the size of the tip of a finger where he had a headache. (JE 1:29) Dr. Pospisil noted Horne had undergone cervical spine magnetic resonance imaging, which showed multiple mild to moderate degenerative changes at many levels, with the most significant narrowing at C5-C6, with moderate right-sided neural foraminal narrowing. (JE 1:29) Dr. Pospisil documented Horne was becoming less mobile with his right arm, he had muscle spasms in his right upper trapezius, he had full range of motion with his right shoulder, but he had pain with right arm abduction and subscapular lift. (JE 1:29) Dr. Pospisil documented it did not appear his pain was stemming from his cervical spine, assessed Horne with right upper trapezius pain and right-sided neck pain with headaches, and continued his physical therapy and dry needling. (JE 1:29-30)

During a return appointment on June 24, 2020, Horne told Dr. Pospisil he had not had a headache since he had dry needling at the base of his skull and that he was feeling much better. (JE 1:33) Horne reported he was sore in his lower cervical/upper thoracic paraspinal muscle area on the right. (JE 1:33) Dr. Pospisil assessed Horne

with right upper trapezius pain, improving, and headaches, improved, and ordered additional dry needling. (JE 1:33-34)

On July 8, 2020, Horne informed Dr. Pospisil his status had plateaued and he had started getting headaches again and experiencing right upper trapezius pain. (JE 1:36) Dr. Pospisil assessed Horne with right upper trapezius pain and headaches, ordered a TENS unit, and continued his dry needling until he could be seen at the pain clinic. (JE 1:36-37)

Defendants' representative sent a facsimile to Dr. Pospisil on July 17, 2020, regarding her recommendations of a TENS unit and referral to pain management. (JE 1:40) Dr. Pospisil responded on July 20, 2020, stating she agreed Horne's neck condition appeared to be degenerative in nature, but his right upper trapezius was very tight and he had palpable muscle spasms she believed could be the cause of his headaches, which she believed could be treated with trigger point injections. (JE 1:40) Dr. Pospisil stated she could not state with complete certainty that the work injury was the cause of his right upper trapezius and right shoulder pain. (JE 1:40)

On December 14, 2020, Horne returned to Dr. Kline. (JE 1:44) Dr. Kline diagnosed Horne with cervical disc disorder at C5-C6 with radiculopathy and administered an epidural steroid injection. (JE 1:44-48)

Horne attended an appointment with Dr. Pospisil on January 4, 2021, reporting he was feeling much better after receiving the injection, but his right shoulder remained tight and he was interested in getting a TENS unit. (JE 1:49) Dr. Pospisil diagnosed Horne with right upper trapezius pain and ordered physical therapy and a TENS unit. (JE 1:49-50)

On February 9, 2021, Horne returned to Dr. Pospisil, reporting the TENS unit was helpful, but he had two areas on his shoulder that were painful when working overhead. (JE 1:51) Dr. Pospisil assessed Horne with right upper trapezius/right-sided neck pain, provided Horne with 5 percent lidocaine patches, and directed him to continue with his home exercise program and use of the TENS unit. (JE 1:51-54)

Horne attended a follow-up appointment with Dr. Pospisil on March 2, 2021, reporting the lidocaine patches and TENS unit were helping, but he was having difficulty sleeping due to his right shoulder and right-sided neck pain. (JE 1:55) Dr. Pospisil assessed Horne with right shoulder, right-sided neck pain and right upper trapezius pain, ordered a right shoulder magnetic resonance imaging arthrogram, and directed Horne to continue with his home exercise program and use of lidocaine patches. (JE 1:55-56)

Horne underwent a right shoulder magnetic resonance imaging arthrogram on March 11, 2021. (JE 1:58) The reviewing radiologist listed an impression of:

> 1. Supraspinatus full-thickness tear at the distal anterior insertion. Partial-thickness tearing with possibly a small full-thickness perforating

tear of the infraspinatus as detailed above. Partial thickness intrasubstance longitudinal tear of subscapularis.

2. SLAP tear.

3. Moderate degenerative changes at the AC joint.

(JE 1:59)

On March 15, 2021, Horne returned to Dr. Pospisil following the imaging. (JE 1:61-63) Dr. Pospisil documented the imaging showed Horne had a full thickness tear at the distal anterior insertion, partial thickness tearing with a possible full thickness tear of the infraspinatus and partial thickness intrasubstance longitudinal tear of the subscapularis and a SLAP tear. (JE 1:61-63) Dr. Pospisil documented Horne reported when he was injured he was moving file cabinets on a pallet with another row of file cabinets on top and as he was picking up the top row of cabinets he instantly felt pain. (JE 1:61-63) Dr. Pospisil assessed Horne with a right shoulder rotator cuff tear and right-sided neck pain with right upper trapezius pain and referred him to an orthopedic surgeon. (JE 1:61-63)

On April 19, 2021, Horne attended an appointment with David Hart, M.D., an orthopedic physician with Physicians Clinic of Iowa, complaining of right shoulder pain following an injury in September 2019 while moving file cabinets at work. (JE 6:169) Dr. Hart assessed Horne with a complex right rotator cuff tear, right shoulder pain, and a superior labrum anterior-to-posterior tear of the right shoulder, recommended an arthroscopic subacromial decompression, rotator cuff repair, SLAP repair, and biceps tenodesis, and released him to return to work without restrictions. (JE 6:170-72)

Horne attended an appointment with Dr. Piper, his family physician, on May 5, 2021, complaining of numbness in his fourth and fifth digits bilaterally for about a year and pinpoint headaches in the posterior left. (JE 4:142-43)

On June 14, 2021, Dr. Hart performed an arthroscopic rotator cuff repair of the subscapularis tendon, debridement of a supraspinatus tear, arthroscopic SLAP repair, and arthroscopic biceps tenodesis of the right shoulder. (JE 6:175) Dr. Hart listed a postoperative diagnosis of a type II SLAP tear and partial rotator cuff tears, subscapularis and supraspinatus of the right shoulder, ordered physical therapy to commence one week after surgery, and restricted Horne from working. (JE 6:175, 179-80)

Horne returned to Dr. Hart on June 30, 2021, reporting his shoulder was much better than it was before surgery. (JE 6:181) Dr. Hart continued his physical therapy. (JE 6:182)

On August 13, 2021, Horne attended a follow-up appointment with Dr. Hart reporting he was a little stiff. (JE 6:183) Dr. Hart continued his physical therapy and

released him to return to light duty with his arm at the side with no lifting over one pound, no use of ladders, and no pushing, pulling, or overhead motions. (JE 6:183, 185)

Horne attended an appointment with Dr. Hart on September 24, 2021, reporting he was doing well and stating he was eager to return to work without restrictions. (JE 6:186) Dr. Hart continued his physical therapy and released Horne to return to work without restrictions on September 27, 2021. (JE 6:186, 188; Tr.:36)

On February 9, 2022, Chad Abernathey, M.D., a neurosurgeon, conducted an independent medical examination ("IME") for Defendants. (Ex. F:17) Dr. Abernathey reviewed Horne's medical records and examined him. (Ex. F) Dr. Abernathey found Horne's magnetic resonance imaging showed diffuse degenerative changes at multiple levels without significant neural compromise, minimal stenosis, and neural elements well decompressed on the images. (Ex. F:17) Dr. Abernathey did not recommend any aggressive neurosurgical treatment and opined he did not believe Horne "suffered any significant cervical spine injuries related to his work event of September 5, 2019," and recommended conservative care. (Ex. F:17) The same date Dr. Abernathey sent Defendants' counsel a letter stating he did not believe Horne sustained an injury to his cervical spine as a result of the September 5, 2019, incident. (Ex. F:16)

During a follow-up appointment with Dr. Hart on December 22, 2021, Horne reported he had found a new job with United Technologies and he was working full-time without restrictions. (JE 6:189) Dr. Hart found Horne had reached maximum medical improvement and released him without restrictions. (JE 6:190-91)

On March 1, 2022, Horne attended an appointment with Joshua Barber, M.D., an orthopedic surgeon with Physicians Clinic of Iowa, complaining of cervical spine and left arm symptoms. (JE 6:192) Horne relayed he had posterior neck tightness, pain with turning his head to the right, and pain, numbness and tingling from his left elbow down into his ulnar 1.5 digits when his elbow is flexed that was worse following a work accident in 2019. (JE 6:192) Dr. Barber examined Horne, assessed him with left cubital tunnel syndrome and musculoskeletal neck pain and mild to moderate degenerative disc pathology at C5-C7 with bridging anterior osteophytes. (JE 6:193) Dr. Barber ordered physical therapy, electromyography, and prescribed meloxicam. (JE 6:193-94)

Pursuant to a request from Defendants' representative, Dr. Hart issued an impairment rating for Horne's right shoulder on March 9, 2022. (JE 6:195) Using the Guides to the Evaluation of Permanent Impairment (AMA Press, 5th Ed. 2001) ("AMA Guides") Dr. Hart opined:

> [u]sing the range of motion model, 3% impairment is calculated. Using table 16-35 as a guide, noting mild weakness on abduction testing, an additional 2% impairment is given for total 5%. Table 16-3 converts a 5% impairment rating into a 3% whole person rating. Final impairment rating right shoulder: 5% right upper e 3% whole person.

(JE 6:195)

Mark Taylor, M.D., an occupational medicine physician, conducted an IME for Horne on February 21, 2022, and issued his report on March 17, 2022. (Ex. 1:9-24) Dr. Taylor reviewed Horne's medical records and examined him. (Ex. 1:9-24)

Dr. Taylor diagnosed Horne with right-sided cervicalgia and trapezius pain, with prior extension of pain into the right upper extremity down to the elbow, right-sided lateral epicondylitis, improved, right-sided rotator cuff tears of the supraspinatus and subscapularis, a SLAP tear with rotator cuff repair, SLAP repair and biceps tenodesis, right knee medial meniscal tear with arthroscopy with partial medial meniscectomy, and possible left side cubital tunnel syndrome. (Ex. 1:19)

Dr. Taylor measured Horne's bilateral shoulder range of motion:

Shoulder Right/Left	Flexion	Extension	Abduction	Adduction	Internal Rotation	External Rotation
Value	160/180 degrees	55/60 degrees	140/175 degrees	30/50 degrees	40/80 degrees	80/100 degrees

(Ex. 1:17-18) He found Horne's cervical spine revealed 40 degrees of flexion and extension, side-bending to 30 degrees to the right and 20 degrees to the left, rotation to 50 degrees to the right and 70 degrees to the left. (Ex. 1:18) Dr. Taylor documented Horne had full extension of his elbows, his bilateral elbow flexion measured to 150 degrees, supination was 80 degrees on the right and 75 degrees on the left, and pronation was 80 degrees bilaterally. (Ex. 1:18)

With respect to his right lower extremity, using Table 17-33 of the AMA Guides, Dr. Taylor assigned Horne two percent right lower extremity impairment for a partial medial meniscectomy. (Ex. 1:19) Dr. Taylor found Horne had done well with his right knee, stated Horne may not tolerate repetitive squatting or kneeling, but can likely perform these activities on an occasional to frequent basis. (Ex. 1:19)

Using the AMA Guides, Dr. Taylor opined:

> [t]urning to Figures 16-40, 16-43, and 16-46, on pages 476-479, and compared to his unaffected left side, Mr. Horne will be assigned 7% right upper extremity impairment related to decrements in range of motion. These values were checked and rechecked with a goniometer, and only the maximum value is recorded and utilized for impairment rating purposes. He demonstrated mild weakness of supination on the right compared to the left. Turning to Table 16-35, on page 510, I recommend an additional 2% related to supination. When combined with the previous 7%, the result is 9% right upper extremity impairment. If needed, this converts to 5% whole person impairment, as per Table 16-3, on page 439.

> As far as the persistent pain associated with the cervical/thoracic, trapezius, levator scapula, etc., areas, I will utilize Table 15-5, on page 392. The localized area of guarding and spasm was noted by Dr. Pospisil on at least a couple of occasions. It was still noted as part of his exam for his IME on February 21, 2022. In this circumstance, it is my opinion that he falls in DRE Category II, and I recommend 5% whole person impairment.
>
> When 5% is combined with 5%, the result is 10% whole person impairment (as per the Combined Values Chart on page 604).

(Ex. 1:20)

Dr. Taylor opined, given the available history and medical records he believes Horne's right elbow condition is directly and causally related to the September 5, 2019, work injury and his persistent neck and trapezius issues also occurred as a result of his work activities, noting Horne was moving a large number of 50 to 60 pound file cabinets when his foot became caught or slipped down into a pallet and he lost his balance and noted acute pain in multiple areas. (Ex. 1:20) Dr. Taylor stated while Horne has a history of multilevel cervical spine degenerative disc disease, he was doing well overall and his last neck injections were in 2012, he required intermittent chiropractic appointments mainly for a localized area in his mid to upper back, the pain he was treated for was in a different location and was different in character, and his neck problems in 2012 mainly impacted the left scapular region and left upper extremity. (Ex. 1:20-21)

Dr. Taylor found Horne reached maximum medical improvement on December 22, 2021. (Ex. 1:21). Dr. Taylor recommended no additional treatment and recommended Horne continue with any home exercises or stretches he learned in therapy. (Ex. 1:21) Dr. Taylor noted Horne's current job as a mechanical inspector is mostly sedentary, but he recommended no more than occasional overhead activities, avoid holding his head and neck in a non-neutral position for extended times, and to keep his right arm as close to his body as possible while lifting. (Ex. 1:22)

On April 6, 2022, Horne attended an appointment with Thomas Rogers, D.O., a neurologist with Physicians Clinic of Iowa for electromyography. (JE 6:196) Dr. Rogers found Horne's electromyography was normal, he could not find any electrophysiologic evidence of left upper extremity cervical radiculopathy or plexopathy, but noted some mild slowing of the ulnar nerve across the elbow, and listed an impression of left mild ulnar neuropathy at the elbow. (JE 6:196-97)

On April 11, 2022, Horne attended an appointment with Peter Chimenti, M.D., an orthopedic surgeon with Physicians Clinic of Iowa, regarding his left cubital tunnel syndrome. (JE 6:199) Dr. Chimenti noted there was a dispute whether the condition was work-related. (JE 6:199) Dr. Chimenti examined Horne, assessed him with a left upper limb ulnar nerve lesion, and found he could not say whether the injury was work-related because Horne did not have symptoms following the September 2019 work

injury and Horne could not recall directly impacting his left elbow at the time of the work injury. (JE 6:200) Dr. Chimenti recommended nighttime left elbow splinting to keep it straight overnight, and continued his physical therapy. (JE 6:200)

Horne testified since the September 2019 work injury he has difficulty gripping and turning objects, including screwdrivers and wrenches. (Tr.:41) Horne relayed there are things he now does with his left hand that he used to do with his right hand, including turning doorknobs and handling keys because if he uses his right hand he will drop things. (Tr.41)

Horne testified since the January 2019 injury to his right knee, his knee aches and is stiff when it is cold and wet outside. (Tr.:42) Horne reported he wears braces for his right knee, when appropriate. (Tr.:43) He also takes over-the-counter pain medication and ices his knee. (Tr.:43)

Horne reported he works out. (Tr.:49) Since the work injury he cannot do chin-ups, pull-ups, or dips. (Tr.:50) Horne can still perform planks and do core work. (Tr.:50)

At the time of the hearing Horne was working as a mechanical inspector for United Technologies. (Tr.:43) Horne testified his position does not require heavy lifting and relayed "[m]ost days my coffee cup is the heaviest thing." (Tr.:45) Horne reported he plans to work 10 or fewer years for United Technologies. (Tr.:47) Horne stated he moved into the position when it opened because it is less physical and he believes his options with the company are limited due to his physical limitations. (Tr.:47-48)

At the time of the work injury, Horne was earning $37.73 per hour. (Ex. A:1) As of May 7, 2020, Horne was earning $40.82 per hour. (Ex. A:1)

CONCLUSIONS OF LAW

I. Nature of the Injury: Right Shoulder, Right Elbow, Cervical Spine, Thoracic Spine and Trapezius

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

> it is within the period of employment at a place where the employee reasonably may be in performing his duties, and while he is fulfilling those duties or engaged in doing something incidental thereto. An injury in the course of employment embraces all injuries received while employed in

> furthering the employer's business and injuries received on the employer's premises, provided that the employee's presence must ordinarily be required at the place of the injury, or, if not so required, employee's departure from the usual place of employment must not amount to an abandonment of employment or be an act wholly foreign to his usual work. An employee does not cease to be in the course of his employment merely because he is not actually engaged in doing some specifically prescribed task, if, in the course of his employment, he does some act which he deems necessary for the benefit or interest of his employer.

Farmers Elevator Co. v. Manning, 286 N.W.2d 174, 177 (Iowa 1979).

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 v. Smith-Doyle Contractors, 569 N.W.2d 154, 156 (Iowa 1997). When considering the weight of an expert opinion, the fact-finder may consider whether the examination occurred shortly after the claimant was injured, the compensation arrangement, the nature and extent of the examination, the expert's education, experience, training, and practice, and "all other factors which bear upon the weight and value" of the opinion. Rockwell Graphic Sys., Inc. v. Prince, 366 N.W.2d 187, 192 (Iowa 1985).

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

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

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

Horne alleges he sustained an injury to his right shoulder as a result of the September 5, 2019, work injury, and that the work injury caused or materially aggravated his neck and right elbow conditions. In their post-hearing brief, United Technologies and New Hampshire agree Horne sustained an injury to his right shoulder arising out of and in the course of his employment. United Technologies and New

Hampshire contend the work injury did not cause or materially aggravate Horne's cervical spine and right elbow conditions.

A. Permanent Right Elbow Injury

Horne alleges the September 2019 work injury caused or materially aggravated his right elbow condition. United Technologies and New Hampshire reject his assertion.

Dr. Taylor diagnosed Horne with right-sided lateral epicondylitis, improved, and opined his right elbow condition was directly and causally related to the work injury. (Ex. 1:19) Dr. Taylor assigned Horne two percent permanent impairment for loss of supination of the elbow under Table 16-35 of the AMA Guides. (Ex. 1:20) Dr. Taylor's opinion is unrebutted. Horne has established he sustained a permanent impairment to his right upper extremity caused by the September 5, 2019, work injury.

B. Permanent Cervical Spine and Trapezius Injury

Horne received treatment for cervical spine and upper back symptoms for years before the work injury. In September 2012, Horne attended an appointment with Dr. Segal, a neurosurgeon, complaining of bilateral posterior neck, bilateral upper back, bilateral scapular, and bilateral mid back pain, radiating into his left upper arm, left forearm, left hand, and left hand fingers, mostly in the pinky and ring fingers. (JE 2:64) Dr. Segal examined Horne, noted his magnetic resonance imaging showed multiple levels of disc bulging, most prominent at C5-C6 and C6-C7, with mild/moderate foraminal narrowing at C6-C7. (JE 2:65) Dr. Segal assessed Horne with cervical spondylosis with myelopathy and displacement of cervical intervertebral disc, noted his imaging did not look that bad, making it more difficult to determine exactly where his pain was coming from, discussed treatment options, and recommended injections. (JE 2:65-67)

On September 14, 2012, Horne attended an appointment with Dr. Kline, a pain specialist, complaining of aching and sharp neck pain radiating into his left scapular region and left upper extremity. (JE 1:7) Dr. Kline noted Horne's cervical spine imaging revealed bilateral disc osteophyte complexes at C3-C4 and C4-C5, a mild left lateral and paracentral disc bulge resulting in mild left foraminal narrowing and mild to moderate central stenosis at C5-C6, and a left paracentral disc bulge or protrusion resulting in mild to moderate central canal stenosis and mild foraminal narrowing. (JE 1:7) Dr. Kline listed an impression of cervical disc protrusions, cervical spondylosis, and cervical radiculitis and he performed a C7 through T1 interlaminar epidural steroid injection. (JE 1:6, 8)

During an appointment with Dr. Piper, his family physician, in December 2015, Horne complained of constant neck pain for years. (JE 4:135-36) From December 14, 2015, through April 7, 2016, Horne also received physical therapy for left elbow pain and cervicalgia. (JE 5)

Horne received 21 chiropractic treatments for bilateral neck, bilateral shoulder, and bilateral upper back pain from May 6, 2015, through February 3, 2016, six chiropractic treatments for bilateral neck, bilateral shoulder, and bilateral upper back pain from February 1, 2017, through July 19, 2017, two treatments for bilateral neck, bilateral shoulder, and bilateral upper back pain in March 2018, and an additional treatment on April 16, 2019, for bilateral neck, bilateral shoulder, and bilateral upper back pain. (JE 3:69-130)

On July 23, 2017, Horne attended an appointment with Stephen Runde, M.D., a family medicine provider, complaining of upper back pain between his shoulder blades with no known injuries, and numbness and tingling in both arms and fingers, but no neck pain. (JE 11:251) Horne relayed he had had the same symptoms in the past and he had received chiropractic treatment and injections. (JE 11:251) Dr. Runde assessed Horne with a thoracic strain and recommended conservative treatment with icing, Aleve, and Flexeril. (JE 11:251)

On September 13, 2019, eight days after the work injury, Horne sought additional chiropractic treatment with Dr. Byrnes-Lange and again on September 30, 2019 for bilateral neck pain, bilateral shoulder pain, and bilateral upper back pain. (JE 3:131-34) Dr. Byrnes-Lange's treatment notes do not mention a work injury or other acute injury. (JE 3:131-34) Dr. Byrnes-Lange's treatment notes do not mention any change in the location of the pain she had treated before or after the September 2019 work injury.

Dr. Pospisil's treatment notes from November 7, 2019, mention right elbow, shoulder, and right upper trapezius pain and she assessed Horne with right lateral epicondylitis, a right shoulder strain, and a right upper trapezius strain. (JE 1:16-17) Her notes do not mention cervical spine complaints.

During an appointment with Dr. Piper on November 13, 2019, Horne reported having some issues with his right elbow following a work injury. (JE 4:139-41) His history notes current problems with chronic neck pain. (JE 4:140) There is no mention of any acute injury to Horne's cervical spine or upper trapezius.

Horne continued to report having right elbow and upper trapezius pain to Dr. Pospisil during return appointments on January 2, 2020, January 30, 2020, February 13, 2020, and February 27, 2020. (JE 1:18-25) He did not mention any cervical spine problems. It was not until his appointment on June 4, 2020, that he complained of a headache on the right side of his head and difficulty moving his neck to the left. (JE 1:26-28) During an appointment on June 11, 2020, Dr. Pospisil documented she did not believe Horne's pain was stemming from his cervical spine. (JE 1:29-30) Following this appointment Horne continued to complain of right upper trapezius pain and soreness in his lower cervical/upper thoracic paraspinal muscle area on the right. (JE 1:33-56) When questioned about his right upper trapezius pain, Dr. Pospisil stated she could not state with complete certainty the work injury was the cause of his right upper trapezius pain. (JE 1:40)

Two physicians provided causation opinions on the alleged cervical spine injury, Dr. Abernathey, a neurosurgeon who performed an IME for United Technologies and New Hampshire, and Dr. Taylor, an occupational medicine physician who performed an IME for Horne. Dr. Abernathey opined the work injury did not cause an injury to Horne's cervical spine. (Ex. F:16)

Dr. Taylor diagnosed Horne with right-sided cervicalgia and trapezius pain with prior extension of pain into the right upper extremity down to the elbow. (Ex. 1:19) He did not diagnose Horne with a thoracic condition or muscle injury. (Ex. 1:19) Dr. Taylor found:

> [a]s far as the persistent pain associated with the cervical/thoracic, trapezius, levator scapula, etc., areas, I will utilize Table 15-5, on page 392. The localized area of guarding and spasm was noted by Dr. Pospisil on at least a couple of occasions. It was still noted as part of his exam for his IME on February 21, 2022. In this circumstance, it is my opinion that he falls in DRE Category II, and I recommend 5% whole person impairment.

(Ex. 1:20) Table 15-5 involves the cervical spine only. Dr. Taylor's opinion discusses pain in both the cervical and thoracic areas. He did not assign permanent impairment to the thoracic spine.

Dr. Taylor did not opine the work injury materially aggravated, accelerated, worsened, or lit-up an underlying condition. (Ex. 1:20) He opined the work injury caused Horne's persistent neck and trapezius issues. (Ex. 1:20) Dr. Taylor acknowledged Horne's history of multilevel cervical spine degenerative disease, but stated that his last injections were in 2012 and he required intermittent chiropractic appointments, "mainly for a localized area in the mid to upper back." (Ex. 1:20) This is not consistent with Horne's chiropractic treatment record. (JE 3)

During a chiropractic visit on May 6, 2015, Dr. Byrnes-Lange, documented:

> his neck and shoulders are really painful today. The pain has been off and on for several years. The pain became worse Monday. He is having difficulty turning his neck, looking up/down, and reaching for things. He is using ice for temporary relief.
>
> His upper back is tight.
>
> Neck Pain. Bernard's condition started on 5/4/2015. The symptoms appear on both sides. Reporting moderate symptoms today. The symptoms are also described as sharp. . . . The symptoms are happening constantly (76-100% of the day). Ice and sleep/rest make the symptoms better. Looking down, looking up and turning make symptoms worse. . . .

> Upper Back Pain. Bernard's condition started on 5/4/2015. The symptoms appear bilaterally. Bernard reports moderate symptoms today. The symptoms are described as tightness. . . .The symptoms are happening constantly (76-100% of the day). Ice and sleep/rest make the symptoms better. Looking down, looking up, reaching back with arm and reaching out/up/down are making the symptoms worse.

(JE 3:69)

During an appointment on February 1, 2017, Horne again complained of bilateral neck pain and bilateral upper back pain with "difficulty turning his neck, looking up/down, and reaching for things," and reporting "[l]ooking down, looking up, and turning are making [neck] symptoms worse," and "[l]ooking down, looking up, reaching back with arm and reaching out/up/down are making the [upper back] symptoms worse." (JE 3:112)

Likewise, during an appointment on March 14, 2018, Horne reported his upper back was tight, he had neck pain on both sides, and he had upper back pain on both sides, reporting "[l]ooking down, looking up, and turning are making the [neck] symptoms worse," and "[l]ooking down, looking up, reaching back with arm and reaching out/up/down make the [upper back] symptoms worse." (JE 3:124)

Following the work injury Horne returned to Dr. Byrnes-Lange on September 13, 2019, complaining of neck soreness, upper back tension, neck pain, and upper back pain. (JE 3:131) Horne again relayed "[l]ooking down, looking up, and turning are making the [neck] symptoms worse," and "[l]ooking down, looking up, reaching back with arm and reaching out/up/down make the [upper back] symptoms worse." (JE 3:131) Her notes do not document an acute injury or that the pain and symptoms were in different areas of the spine and/or musculature. The chiropractic records do not support Dr. Taylor's assertion.

The record does not support the work injury caused Horne's cervical/thoracic spine and trapezius symptoms. Horne had ongoing problems with his cervical spine, thoracic spine, and related musculature prior to the work injury. Dr. Taylor did not opine the work injury temporarily or permanently materially aggravated, accelerated, worsened, or lit-up an underlying condition. No physician has opined the work injury permanently materially aggravated, accelerated, worsened, or lit-up an underlying condition in Horne's cervical spine, thoracic spine, or related musculature. For these reasons I do not find Horne has met his burden of proof he sustained permanent impairments to this cervical spine, thoracic spine, or trapezius caused by the work injury.

II. Alternate Care and Medical Bills

Horne seeks to recover the cost of medical bills set forth in Exhibit 6, alternate care with Thrive Care for his alleged injury, and lost wages under Iowa Code section 85.24(7) for medical care he received at Thrive Care for his alleged cervical condition

on June 15, 2022, June 16, 2022, and July 14, 2022. United Technologies and New Hampshire aver Horne is not entitled to recover the cost of the treatment.

An employer is required to furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance, hospital services and supplies, and transportation expenses for all conditions compensable under the workers' compensation law. Iowa Code § 85.27(1). The employer has the right to choose the provider of care, except when the employer has denied liability for the injury. Id. "The treatment must be offered promptly and be reasonably suited to treat the injury without undue inconvenience to the employee." Id. § 85.27(4). If the employee is dissatisfied with the care, the employee should communicate the basis for the dissatisfaction to the employer. Id. If the employer and employee cannot agree on alternate care, the commissioner "may, upon application and reasonable proofs of the necessity therefor, allow and order other care." Id. The statute requires the employer to furnish reasonable medical care. Id. § 85.27(4); Long v. Roberts Dairy Co., 528 N.W.2d 122, 124 (Iowa 1995) (noting "[t]he employer's obligation under the statute turns on the question of reasonable necessity, not desirability"). The Iowa Supreme Court has held the employer has the right to choose the provider of care, except when the employer has denied liability for the injury, or has abandoned care. Iowa Code § 85.27(4); Bell Bros. Heating & Air Conditioning v. Gwinn, 779 N.W.2d 193, 204 (Iowa 2010).

The statute also requires the employer to pay the employee "an amount equivalent to the wages lost at the employee's regular rate of pay for the time the employee is required to leave work" for one full day or less to receive services under Iowa Code section 85.27. Iowa Code § 85.27(7).

As analyzed above, I found Horne failed to meet his burden of proof he sustained permanent impairments to this cervical spine, thoracic spine, or trapezius caused by the work injury. As a result, he is not entitled to recover the cost of medical bills, compensation for lost wages, or alternate care related to these conditions. Horne also submitted bills from his family medical provider, Dr. Piper. (Ex. 6:114) The bills involve behavioral assessments, blood draws, COVID vaccines, and other preventative care. Horne has not established these bills are related to the work injury. He is not entitled to recover the medical bills set forth in Exhibit 6.

III. Extent of Disability

Dr. Hart, the treating orthopedic surgeon, and Dr. Taylor, an occupational medicine physician who performed an IME for Horne both assigned Horne percent impairment. An injury to the shoulder is evaluated functionally based on 400 weeks. Iowa Code § 85.34(2)(n) (2019).

For functional loss determinations,

> . . . when determining functional disability and not loss of earning capacity, the extent of loss or percentage of permanent impairment shall be determined solely by utilizing the guides to the evaluation of permanent

> impairment, published by the American medical association, as adopted by the workers' compensation commissioner by rule pursuant to chapter 17A. Lay testimony or agency expertise shall not be utilized in determining loss or percentage of impairment pursuant to paragraphs "a" through "u", or paragraph "v" when determining functional disability and not loss of earning capacity.

Iowa Code § 85.34(2)(x).

Two experts provided opinions on extent of disability for his right shoulder, Dr. Hart, a treating orthopedic surgeon, and Dr. Taylor, an occupational medicine physician who conducted an IME for Horne. Dr. Hart assigned Horne three percent permanent impairment for deficits in range of motion, and two percent permanent impairment for weakness on abduction, for a total five percent permanent impairment. Dr. Taylor assigned Horne seven percent permanent impairment for deficits in range of motion.

Dr. Hart has superior training to Dr. Taylor. Dr. Hart also performed surgery on Horne and treated him for an extended period of time. Unfortunately, Dr. Hart did not provide any range of motion findings when assigning the percentage of impairment, as directed by the AMA Guides. Dr. Taylor provided range of motion findings when assigning the percentage of impairment and documented he used a goniometer, as directed by the AMA Guides. For these reasons, I find his opinion to be most persuasive on extent of disability. Seven percent of 400 weeks is 28 weeks. I find under the statute Horne is entitled to 28 weeks of permanent partial disability benefits for his right shoulder injury.

As analyzed above, Horne established he sustained two percent permanent impairment to his right upper extremity as a result of his right elbow injury. Under the schedule, compensation for loss of an arm is limited to 250 weeks. Iowa Code § 85.34(2)(m). Two percent of 250 weeks is five weeks.

Horne is entitled to a total of 33 weeks of permanent partial disability benefits for the September 5, 2019, work injury, commencing on the stipulated commencement date of December 22, 2021.

I do not find Dr. Taylor's opinion on restrictions persuasive. As discussed above, I did not find Horne met his burden of proof the work injury caused or materially aggravated his cervical spine condition, thoracic spine condition, or trapezius. Dr. Hart released Horne to full duty without restrictions. Horne successfully returned to work without restrictions. He has not worked with restrictions since Dr. Hart released him to full duty. I do not find Horne requires permanent restrictions as a result of the work injury.

IV. Second Injury Fund Benefits

Horne alleges he is entitled to Fund benefits based on the January 2, 2019 injury to his right knee and for an alleged injury to his right arm from the September 5, 2019 injury. The Fund rejects his assertion.

Iowa Code section 85.64 states:

> [i]f an employee who has previously lost, or lost the use of, one hand, one arm, one foot, one leg, or one eye, becomes permanently disabled by a compensable injury which has resulted in the loss of or loss of use of another such member or organ, the employer shall be liable only for the degree of disability which would have resulted from the latter injury if there had been no preexisting disability. In addition to such compensation, and after the expiration of the full period provided by law for the payments thereof by the employer, the employee shall be paid out of the "Second Injury Fund" created by this subchapter the remainder of such compensation as would be payable for the degree of permanent disability involved after first deducting from such remainder the compensable value of the previously lost member or organ.

Thus, an employee is entitled to Fund benefits if the employee establishes: (1) the employee sustained a permanent disability to a hand, arm, foot, leg, or eye, a first qualifying injury; (2) the employee subsequently sustained a permanent disability to another hand, arm, foot, leg, or eye, through a work-related injury, a second qualifying injury; and (3) the employee has sustained permanent disability resulting from the first and second qualifying injuries exceeding the compensable value of the "previously lost member." Gregory v. Second Injury Fund of Iowa, 777 N.W.2d 395, 398-99 (Iowa 2010).

The parties stipulated Horne sustained a first qualifying loss to his right leg of two percent as a result of the January 2, 2019 injury. The parties dispute whether Horne sustained a second qualifying injury. Horne alleges he sustained a second qualifying loss to his right elbow. The Fund rejects his assertion.

As discussed above, I found Horne met his burden of proof he sustained two percent permanent impairment to his right elbow as a result of the September 5, 2019, injury. I also found Horne met his burden of proof he sustained seven percent permanent impairment to his right shoulder as a result of the September 5, 2019, injury.

The Fund avers the injury resulting in permanent shoulder and arm impairment is not a Fund-eligible loss, involving two scheduled members. Fund benefits are not available for an injury to a shoulder. Iowa Code § 85.64; Anderson v. Bridgestone Americas, Inc., File No. 5067475, 2022 WL 301799 (Iowa Workers' Comp. Comm'n Jan. 25, 2022). An injury to an arm is covered by the statute. Iowa Code 85.64.

In the case of Second Injury Fund v. George, 737 N.W.2d 141 (Iowa 2007), Iowa Supreme Court rejected the Fund's assertion that an injury to two scheduled members could not be a second qualifying loss, interpreting the phrase "loss of or loss of use of another such member" to mean a subsequent loss to another enumerated member notwithstanding the loss included a disability to more than one enumerated member as a consequence of the same incident. The Fund's argument lacks merit. See also Gregory v. Second Injury Fund of Iowa, 777 N.W.2d 395 (Iowa 2010) (rejecting Fund's argument claimant was not entitled to Fund benefits for an injury causing permanent impairments to scheduled and unscheduled members, finding "the focus of our analysis must therefore be on whether Gregory sustained a partial permanent loss of at least two enumerated members in successive injuries," and noting the Iowa Legislature did not intend to disadvantage claimants with histories of more complex combinations of enumerated and unenumerated injuries); Strable v. Second Injury Fund of Iowa, File No. 1666216.03, 2022 WL 17490657 (Iowa Workers' Comp. Comm'n Nov. 29, 2022). Horne sustained a partial permanent loss to his right leg and a second partial permanent loss to his right arm, two enumerated members. I find Horne has established he sustained a first qualifying loss and a second qualifying loss.

The parties stipulated the first qualifying loss is two percent of the right leg. The schedule provides a maximum of 220 weeks for the loss of a leg. Iowa Code § 85.34(2)(p). Two percent of 220 weeks is 4.4 weeks. I also found Horne sustained a second qualifying loss of two percent to the right arm for his elbow injury, entitling Horne to five weeks of permanent partial disability benefits. The total of the first and second qualifying losses is 9.4 weeks. Given Horne has sustained a first and a second qualifying loss, it is necessary to determine his extent of industrial disability.

"Industrial disability is determined by an evaluation of the employee's earning capacity." Cedar Rapids Cmty. Sch. Dist. v. Pease, 807 N.W.2d 839, 852 (Iowa 2011). In considering the employee's earning capacity, the deputy commissioner evaluates several factors, including "consideration of not only the claimant's functional disability, but also [his] age, education, qualifications, experience, and ability to engage in similar employment." Swiss Colony, Inc. v. Deutmeyer, 789 N.W.2d 129, 137-138 (Iowa 2010). The inquiry focuses on the injured employee's "ability to be gainfully employed." Id. at 138.

The determination of the extent of disability is a mixed issue of law and fact. Neal v. Annett Holdings, Inc., 814 N.W.2d 512, 525 (Iowa 2012). Compensation for permanent partial disability shall begin at the termination of the healing period. Iowa Code § 85.34(2). Compensation shall be paid in relation to 500 weeks as the disability bears to the body as a whole. Id. § 85.34(2)(v). When considering the extent of disability, the deputy commissioner considers all evidence, both medical and nonmedical. Evenson v. Winnebago Indus., Inc., 881 N.W.2d 360, 370 (Iowa 2016).

At the time of the hearing he was 57. (Tr.:48) Horne lives in the urban city of Cedar Rapids. (Tr.:13) Horne has earned an associate's degree. (Tr.:13) Horne attended additional schooling, but he has not completed a bachelor's degree. (Tr.:13) Horne is 12 credits short of earning a bachelor's degree in business management.

(Tr.:51) Horne holds a four-year apprenticeship journeyman's card from the Department of Labor. (Tr.:13) While Horne is an older worker, I found him to be articulate. I believe he is capable of retraining. He also testified he plans to work an additional 10 years.

Horne has worked for United Technologies and its predecessor for 36 years. He returned to work without restrictions following his shoulder surgery. I found Horne does not require any permanent restrictions as a result of the work injury. Horne relayed he struggles with using his right hand and now grips and turns items with his left hand. Horne's hourly rate is higher now than it was at the time of the September 2019 work injury. (Tr.:53-55) Considering all of the factors of industrial disability, including his continued employment with United Technologies, I find he has sustained a 10 percent industrial disability, entitling him to 50 weeks of permanent partial disability benefits.

The Fund is responsible only for the amount of the industrial disability from which the employee suffers, reduced by the compensable value of the first and second injuries. Second Injury Fund of Iowa v. Nelson, 544 N.W.2d 258, 269 (Iowa 1995). In the event the credits due to the Fund exceed the industrial disability resulting from the qualifying injuries, the fund has no liability. Crudo v. Second Injury Fund of Iowa, Case No. 98-828 (Iowa App. July 23, 1999). The combined disability of the first and second qualifying losses is 9.4 weeks. 50 weeks minus 9.4 weeks is 40.6 weeks. Horne is entitled to 40.6 weeks of permanent partial disability benefits from the Fund commencing after the expiration of United Technologies and New Hampshire's liability.

V. Independent Medical Examination

Horne seeks to recover the $4,887.50 cost of Dr. Taylor's IME. United Technologies and New Hampshire aver they should not be responsible for the portion of the IME relating to Horne's claim against the Fund. The Fund avers it is not responsible for payment of the IME or other costs.

Iowa Code section 85.39(2) (2019), provides:

> 2. If an evaluation of permanent disability has been made by a physician retained by the employer and the employee believes this evaluation to be too low, the employee shall, upon application to the commissioner and upon delivery of a copy of the application to the employer and its insurance carrier, be reimbursed by the employer the reasonable fee for a subsequent examination by a physician of the employee's own choice, and reasonably necessary transportation expenses incurred for the examination. . . . An employer is only liable to reimburse an employee for the cost of an examination conducted pursuant to this subsection if the injury for which the employee is being examined is determined to be compensable under this chapter or chapter 85A or 85B. An employer is not liable for the cost of such an examination if the injury for which the employee is being examined is determined not to be a compensable injury. A determination of the reasonableness of a fee for

> an examination made pursuant to this subsection, shall be based on the typical fee charged by a medical provider to perform an impairment rating in the local area where the examination is conducted.

Dr. Taylor conducted his IME after Dr. Hart issued a permanent impairment rating. Horne complied with the requirements of the statute.

The Second Injury Fund Act does not provide for the recovery of costs. See Hannan v. Second Injury Fund of Iowa, File No. 5052402, 2018 WL 3648112 (Iowa Workers' Comp. Comm'n July 25, 2018). Iowa Code section 85.66 (2), specifically states, "[m]oneys collected in the second injury fund shall be disbursed only for the purposes stated in this subchapter, and shall not at any time be appropriated or diverted to any other use or purpose." I find Horne is not entitled to recover costs against the Fund, including the cost of the IME.

Dr. Taylor's report is 16 pages. The majority of the report addresses Horne's claims against United Technologies and New Hampshire. I find one-third of the cost of the report should be attributed to Horne's claim against the Fund. I find United Technologies and New Hampshire should reimburse Horne $3,258.33 for the cost of the IME.

VI. Costs

Horne seeks reimbursement for the $100.30 filing fee, service fees for United Technologies and New Hampshire totaling $13.92, a service fee for the Fund of $7.33, $164.25 for Horne's deposition transcript, and $4,887.50 for Dr. Taylor's report. (Ex. 7) The Fund avers it is not responsible for costs in this case.

Iowa Code section 86.40, provides, "[a]ll costs incurred in the hearing before the commissioner shall be taxed in the discretion of the commissioner." Rule 876 IAC 4.33(86), provides:

> [c]osts taxed by the workers' compensation commissioner or a deputy commissioner shall be (1) attendance of a certified shorthand reporter or presence of mechanical means at hearings and evidential depositions, (2) transcription costs when appropriate, (3) costs of service of the original notice and subpoenas, (4) witness fees and expenses as provided by Iowa Code sections 622.69 and 622.72, (5) the costs of doctors' and practitioners' deposition testimony, provided that said costs do not exceed the amounts provided by Iowa Code sections 622.69 and 622.72, (6) the reasonable costs of obtaining no more than two doctors' or practitioners' reports, (7) filing fees when appropriate, (8) costs of persons reviewing health service disputes.

As analyzed above, I found Horne is not entitled to recover costs against the Fund. I also found Horne was entitled to recover a portion of Dr. Taylor's IME from United Technologies and New Hampshire. The administrative rule allows for the

recovery of the cost of the petition, service on United Technologies and New Hampshire, and for the cost of the deposition transcript. I find United Technologies and New Hampshire should reimburse Horne $100.30 for the filing fee, $13.92 for the cost of service fees on United Technologies and New Hampshire, and $164.25 for the cost of Horne's deposition transcript.

ORDER

IT IS THEREFORE ORDERED, THAT:

United Technologies and New Hampshire shall pay Horne 33 weeks of permanent partial disability benefits, commencing on the stipulated commencement date of December 22, 2021, at the stipulated weekly rate of one thousand one hundred fifty-two and 14/100 dollars ($1,152.14).

United Technologies and New Hampshire 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.

The Fund shall pay Horne 40.6 weeks of permanent partial disability benefits at the stipulated weekly rate of one thousand one hundred fifty-two and 14/100 dollars ($1,152.14), commencing after the expiration of United Technologies and New Hampshire's liability.

The Fund shall pay interest on all accrued weekly benefits pursuant to Iowa Code section 85.30. Interest accrues on unpaid Second Injury Fund benefits from the date of this decision. Second Injury Fund of Iowa v. Braden, 459 N.W.2d 467 (Iowa 1990).

United Technologies and New Hampshire shall reimburse Horne one hundred and 30/100 dollars ($100.30) for the filing fee, thirteen and 92/100 dollars ($13.92) for the cost of service, and one hundred sixty-four and 25/100 dollars ($164.25) for the cost of the deposition transcript under 876 IAC 4.33(6).

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

Signed and filed this ____3rd____ day of February, 2023.

HEATHER L. PALMER
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served as follows:

Nate Willems (via WCES)

Emily Schott Hood (via WCES)

Lee P. Hook (via WCES)

Tyler Smith (via WCES)

Sarah Timko (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.