BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

PAUL MANUEL, Claimant, vs. GANNETT PUBLISHING SERVICES, Employer, and NATIONAL UNION FIRE INS. CO., Insurance Carrier, Defendants.	:	File No. 5067758 SUBSTITUTED AND AMENDED ARBITRATION DECISION Head Note Nos.: 1803.1, 2300

STATEMENT OF THE CASE

The claimant, Paul Manuel, filed a petition for arbitration and seeks workers' compensation benefits from Gannett Publishing Services, employer, and National Union Fire Insurance Company, insurance carrier. The claimant was represented by Tom Drew. The defendants were represented by Aaron Oliver.

The matter came on for hearing on June 25, 2020, before deputy workers' compensation commissioner Joe Walsh in Des Moines, Iowa via CourtCall. The record in the case consists of joint exhibits 1 through 13; claimant's exhibits 1 through 5; and defense exhibits A through H. The claimant testified under oath at hearing, in addition to Shawn Duminy, the employers' representative. Kristi Miller was approved as the court reporter. The matter was fully submitted on August 12, 2020, after helpful briefing by the parties.

ISSUES

The parties submitted the following issues for determination:

1. Whether the claimant sustained an injury which arose out of and in the course of his employment to any body parts other than those stipulated below.

2. Whether the injuries are a cause of any permanent disability. Defendants dispute the injury is a cause of any permanent disability.

3. Whether claimant is entitled to section 85.27 medical expenses set forth in claimant's exhibit 3.

4. Whether claimant is entitled to an independent medical examination under Iowa Code section 85.39.

5. What is the nature and extent of claimant's permanent partial disability, if any?

6. What is the appropriate commencement date for benefits, if any are owed.

7. Defendants assert the affirmative defense of notice under section 85.23, as it relates to claimant's neck, left knee/leg and left shoulder.

8. Costs.

STIPULATIONS

Through the hearing report, the parties stipulated to the following:

1. The parties had an employer-employee relationship.

2. Claimant sustained an injury which arose out of and in the course of employment to his right shoulder on February 12, 2018.

3. Claimant sustained an injury which arose out of and in the course of his employment to his right elbow on March 11, 2018. This elbow injury fully healed and Mr. Manuel is not seeking further benefits for this injury.

4. Temporary disability/healing period and medical benefits are no longer in dispute.

5. The weekly rate of compensation is $494.82.

6. Defendants have paid and are entitled to a credit of 24 weeks of compensation. Defendants would be entitled to a credit for group short term disability benefits paid to the claimant while off work for left knee surgery.

7. Affirmative defenses, other than the notice defense, have been waived.

FINDINGS OF FACT

Claimant Paul Manuel was born in 1955 and was 64 years old as of the date of hearing. He has been married to the same woman for more than 40 years. He graduated from high school in 1974 in Texas and has some college credits. He is bright and employable. He was a long-term Safeway employee, where he worked his way up to assistant manager and then manager before going into newspaper publishing. He began working for the Fort Worth Star Telegram as a press operator. In approximately 2014, he relocated to Des Moines and began working for the Des Moines Register/Gannett Publishing Services as a printing press operator. The job description for this position is in the record. (Defendant's Exhibit A, page 3) He was undoubtedly a good employee up through the time of injury.

Mr. Manuel testified live and under oath via CourtCall. He is found to be a highly credible witness. His testimony was straightforward and accurately corresponded with the available medical records. There was nothing about his demeanor which caused the undersigned any concern about his truthfulness.

On or about February 12, 2018, Mr. Manuel was walking up a flight of stairs while working for the employer. He testified he tripped and fell forward and caught himself with his outstretched arms. This injury is stipulated. He testified that he immediately felt severe pain in his right shoulder. He testified that he had minor pain in his left shoulder as well that was not severe.

Prior to this injury, Mr. Manuel had no history of any condition in either shoulder or his neck. He did have a long history of bilateral knee pain, which he managed with over-the-counter medications. He had been diagnosed with arthritis in his knees since approximately 2015. (Joint Ex. 1; Jt. Ex. 2) He had continued to treat for the bilateral knee condition up through the date of his injury.

Because of the symptoms in his right shoulder, Mr. Manuel testified he reported the injury to his supervisor. He filled out an accident report which indicated a right shoulder injury. (Def. Ex. B) On this form, he did not specify any injury to any other body part. Claimant testified this was because his right shoulder was his primary issue at the time.

Mr. Manuel first sought treatment for his work injury on February 16, 2018. The following is documented in the Methodist Occupational Health records.

> He notes on 02/12/18 at 4:45 p.m., he was going up some stairs when he suddenly tripped or lost his step and he reached forward with both arms to catch himself. He notes that his arms were extended at the time. When he did this, he felt a sharp pain in his right shoulder. He states that he has continued to have pain in his right shoulder afterwards and he notes that it is mostly painful with

> extending his arms and lifting in front of him. He notes that he has been using his other arm to assist his right arm with lifting. He has been having pain with lifting the press during the day. He does have some pain at night when moving and readjusting his shoulder. He normally takes 2 of ibuprofen 800 mg tablets twice a day for arthritis pain in his knees. He also takes 2 of Extra Strength Tylenol with this. He has not increased the dose since his shoulder injury.

(Jt. Ex. 4, p. 17) A shoulder strain was diagnosed and he was prescribed additional ibuprofen, given work restrictions and some stretching exercises. He continued this conservative care for a short period. Eventually physical therapy was recommended which did not help. Mr. Manuel testified that the physical therapy exacerbated symptoms in his left shoulder. (Tr., p. 30)

In March 2018, Mr. Manuel suffered a second injury when he fell at work. The parties have agreed claimant fully recovered from this injury.

By April 2018, Mr. Manuel's symptoms worsened to the point where he had difficulty lifting his right arm. (Jt. Ex. 4, p. 25) The provider recommended an MRI among other treatments. He had symptoms of radiation down his right arm. The MRI demonstrated tears in his right shoulder. (Jt. Ex. 6, p. 36) He was referred to an orthopedic shoulder specialist. On May 31, 2018, Patrick Sullivan, M.D., performed surgery on the right shoulder. (Jt. Ex. 7, pp. 37-38) He was off work recuperating for a period of time thereafter. He used an abduction sling for a period of time as well to essentially immobilize his right arm.

Mr. Manuel testified that he twisted his left knee while exiting the passenger side of his personal vehicle in early July 2018. He alleges this was a sequela injury because he was protecting his right shoulder from further injury. He testified he felt immediate severe pain in his left knee and could hardly walk on it. (Tr., p. 39) On July 6, 2018, he sought treatment for this condition. The alleged sequela injury is documented. The nurse practitioner suspected a meniscus tear and recommended orthopedic referral if his condition did not continue to improve. (Jt. Ex. 3, p. 16) In September, he was evaluated at Des Moines Orthopedic Surgeons and was provided steroid injections. (Jt. Ex. 12, p. 63)

On October 31, 2018, Dr. Sullivan released Mr. Manuel for his right shoulder condition without any restrictions. (Jt. Ex. 12, p. 65) In November 2018, after undergoing physical therapy on the right shoulder, Dr. Sullivan documented Mr. Manuel's development of left shoulder problems. "Since he has been doing aggressive strengthening and return to work he has had pain, discomfort and weakness of the left shoulder." (Jt. Ex. 12, p. 66) He went on to provide the following specific opinion. "I believe this [left shoulder condition] is work related because this happened during the rehabilitation period for his work related right shoulder." (Jt. Ex. 12, p. 66) I interpret this opinion to mean that claimant sustained a new, sequela left shoulder injury that resulted because of the treatment on his right shoulder. Mr. Manuel received an

injection in his left shoulder. In November 2018, Dr. Sullivan released him for his left shoulder with no restrictions. (Jt. Ex. 12, p. 71)

In December 2018, Mr. Manuel underwent left knee replacement surgery, which was also performed by Dr. Sullivan. (Jt. Ex. 9, p. 48) In March 2019, Dr. Sullivan opined claimant had sustained a 6 percent upper extremity impairment on his right side and no permanent impairment on the left. (Jt. Ex. 12, p. 75) After a period of recuperation, Dr. Sullivan released Mr. Manuel to return to work with no restrictions from this condition in May 2019. Dr. Sullivan never provided any type of medical opinion that either of claimant's knee conditions resulted as a sequelae of his work injury. Instead, in June 2019, Dr. Sullivan provided a generic opinion that his knee condition was not work related. (Def. Ex. F)

Mr. Manuel testified that during the course of his physical therapy, his neck also began to hurt. (Tr., pp. 45-47) He testified that he reported this to Dr. Sullivan during the course of his shoulder and knee treatment. His wife provided a sworn statement that she witnessed this report. (Cl. Ex. 2) Dr. Sullivan has no recollection of any neck complaints and did not provide any treatment for this condition. (Def. Ex. F) In November 2019, Mr. Manuel sought treatment for his neck symptoms at Rock Valley Physical Therapy. That provider documented decreased range of motion and mobility in his neck and recommended physical therapy. (Jt. Ex. 8, p. 45)

Jacqueline Stoken, D.O., evaluated claimant for an independent medical evaluation (IME) on January 21, 2020. She took a history, thoroughly reviewed relevant records and examined Mr. Manuel. She essentially agreed with Dr. Sullivan's diagnoses and assigned permanent impairment ratings for all of his conditions. She further opined that all of these conditions were caused or materially aggravated by the February 2018, work injury. (Cl. Ex. 1, p. 12) She assigned a 23 percent right upper extremity impairment for the shoulder condition. (Cl. Ex. 1, pp. 10-11) She assigned a 17 percent left upper extremity impairment for the left shoulder condition. (Cl. Ex. 1, p. 11) She assigned a 5 percent whole body impairment for the neck/cervical injury due to asymmetric range of motion and muscle spasms. (Cl. Ex. 1, p. 11) She assigned a 75 percent impairment for the left total knee replacement. (Cl. Ex. 1, pp. 11-12) When combining all the ratings, she assigned a 53 percent whole body rating. (Cl. Ex. 1, p. 12) She placed Mr. Manuel into the light work classification and recommended he not lift more than 10 pounds frequently, 15 occasionally and 20 rarely. (Cl. Ex. 1, p. 12)

Dr. Sullivan issued a report in response to a letter from defense counsel on April 30, 2020. He opined that claimant's knee condition was not work related. He further stated that he had "been presented with no evidence" that his current neck complaints were work related. (Def. Ex. F, p. 18) He further criticized Dr. Stoken's impairment ratings.

Since returning to work from his surgeries, Mr. Manuel has worked his pre-injury position without restrictions. He testified he is able to do the work without accommodations and he has not sought other employment.

Having reviewed all of the evidence in this case, I find that claimant did sustain a work injury on February 12, 2018, which resulted in permanent disability in claimant's bilateral shoulders. The work injury is a direct cause of the right shoulder condition and the left shoulder developed as a sequela of the right shoulder. I further find that the work injury has likely caused symptoms into his neck, but I am not convinced that condition is permanent. I find claimant has failed to meet that his burden of proof that the work injury caused, substantially aggravated or lit up any condition in either of his knees.

CONCLUSIONS OF LAW

The parties have stipulated that Mr. Manuel suffered a workplace injury on February 12, 2018 to his right shoulder. Defendants contend that claimant did not suffer any work injury at that time to any other body part. I find, however, this is merely an effort to reframe a medical causation issue into an issue of "injury".

The true primary issue submitted for my determination is whether that injury caused any disability in claimant's left knee, left shoulder or neck. This is primarily an issue of medical causation although the law regarding workplace injuries is recited below as well.

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

A personal injury contemplated by the workers' compensation law means an injury, the impairment of health or a disease resulting from an injury which comes about, not through the natural building up and tearing down of the human body, but because of trauma. The injury must be something that acts extraneously to the natural processes

of nature and thereby impairs the health, interrupts or otherwise destroys or damages a part or all of the body. Although many injuries have a traumatic onset, there is no requirement for a special incident or an unusual occurrence. Injuries which result from cumulative trauma are compensable. Increased disability from a prior injury, even if brought about by further work, does not constitute a new injury, however. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); Ellingson v. Fleetguard, Inc., 599 N.W.2d 440 (Iowa 1999); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995); McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985). An occupational disease covered by chapter 85A is specifically excluded from the definition of personal injury. Iowa Code section 85.61(4)(b); Iowa Code section 85A.8; Iowa Code section 85A.14.

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).

When an injury occurs in the course of employment, the employer is liable for all of the consequences that "naturally and proximately flow from the accident." Iowa Workers' Compensation Law and Practice, Lawyer and Higgs, section 4-4. The Supreme Court has stated the following. "If the employee suffers a compensable injury and thereafter suffers further disability which is the proximate result of the original injury, such further disability is compensable." Oldham v. Scofield & Welch, 222 Iowa 764, 767, 266 N.W. 480, 481 (1936). The Oldham Court opined that a claimant must present sufficient evidence that the disability was naturally and proximately related to the original work injury.

Before addressing the expert medical opinions in this case, it must be noted that the basic facts of the case are crucial and, in many cases, are not seriously in dispute. Mr. Manuel had bilateral knee arthritis which caused his need for ongoing treatment long prior to the work injury. He was getting by on over-the-counter medications for this condition and had not received substantial medical treatment for this condition prior to the work injury. In fact, he testified honestly at his deposition that he had been told he would eventually need a total knee replacement at some point. (Def. Ex. H, Manuel Depo, p. 52) Mr. Manuel was actually just in the process of establishing a medical provider for this condition at the time the work injury occurred. Mr. Manuel does not contend that he directly injured his left knee when he fell on February 12, 2018, rather, he contends that, after he had right shoulder surgery, he sustained a sequela injury in July 2018, while he was getting out of his personal vehicle and attempting to protect his right shoulder. I have found Mr. Manuel to be a highly credible witness and I believe him that this incident occurred as he described it.[1]

The problem is, that based upon the record before me, there is no convincing expert medical opinion to establish this sequela injury is a substantial aggravating cause of his left knee injury. Claimant's expert merely provided a general and somewhat confusing causation opinion that the "incident accelerated, aggravated, or lit up his pre-exiting [sic] condition to this left lower extremity, and body as a whole occurring on or about February 2018." (Cl. Ex. 1, p. 12) To be sure, Dr. Stoken was aware of the sequela injury, however, given the fairly significant symptoms Mr. Manuel had prior to the sequela injury, including his own admission that he would likely need a knee replacement in the future, combined with the general, unexplained nature of her causation opinion, I find that claimant has failed to meet his burden of proof that the work injury or its sequela is a substantial cause of the disability in his left knee.

Therefore, while this is a close issue, the claimant shall take nothing in this case as it relates to his left leg. As a consequence, Mr. Manuel's claim for medical expenses and additional healing period are denied.

The left shoulder, however, is a different matter and the facts are significantly

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[1] It is noted, the defendants do not believe Mr. Manuel is credible. In fact, their defense centers on Mr. Manuel's lack of credibility. I find this argument misplaced. To support their position, defendants primarily point to an answer to interrogatory wherein Mr. Manuel held open the possibility that his left shoulder and other body parts could have been damaged at the time of the original fall. (Def. Ex. C, p. 9) A careful review of this answer demonstrates that it is written by claimant's counsel prior to claimant's evaluation by their chosen expert witness. It is written in legalese and obviously designed to hold open a variety of theories of the case. A comparison of claimant's actual sworn testimony, both in deposition and at hearing, regarding how and when his symptoms developed with the medical documentation actually results in remarkable consistency. I would note that this is even true for the left knee and neck claims, for which I found claimant failed to meet his burden of proof. I have little doubt that Mr. Manuel testified truthfully at hearing. It does appear that both attorneys zealously advocated for their clients by pursuing issues to their extreme conclusion.

different from the facts relating to the left knee claim. Mr. Manuel testified that he began to experience left shoulder symptoms during physical therapy. Again, this is a sequela injury. That is to say, he is not claiming he directly injured his left shoulder when he fell on February 12, 2018. Rather, his left shoulder symptoms developed in physical therapy for the right shoulder, and while working for the employer. Again, it is noted that Mr. Manuel was a highly credible witness and I believe his testimony regarding how and when the symptoms developed. His testimony is credible, at least in part, because these symptoms were reported to Dr. Sullivan right away. And Dr. Sullivan specifically documented this and provided an opinion that the condition was in fact caused by his activities as described. Dr. Sullivan diagnosed work-related left shoulder tendinitis. (Def. Ex. F, p. 18) Based upon this record, I suspect Dr. Sullivan found Mr. Manuel to be highly credible, just as I have. Dr. Stoken's opinion on this topic was quite general, but it contributes to my finding that the claimant sustained a sequela condition to his left shoulder.

The defendants argue that even if the left shoulder condition itself was causally connected to the work injury, the condition resulted in no permanency. As I have already found, I believe the claimant. He testified that he still has significant left shoulder symptoms at the time of hearing. Dr. Sullivan assessed a zero rating at a time when he had claimant on medical restrictions disallowing him from using his left shoulder. Mr. Manuel had just completed treatment when Dr. Sullivan made this assessment, which was relatively successful. In all likelihood, his left shoulder was in the best shape it will ever be since he began to experience symptoms. Dr. Stoken had the benefit of assessing his left shoulder condition after he had returned to the normal use of his left arm. Consequently, I find the greater weight of evidence supports a finding that Mr. Manuel has some permanent loss of function in his left shoulder and arm as a result of his work injury.

In regard to the claimant's alleged neck condition, Mr. Manuel has complained of neck symptoms beginning in 2019. He alleges that these symptoms developed as a sequela of his work injury and treatment. Dr. Sullivan disputed whether claimant ever raised any neck complaints in their visits. Mr. Manuel testified that he did and provided a sworn statement from his wife which supports this. The greater weight of evidence supports a finding that Mr. Manuel probably did report some neck symptoms to Dr. Sullivan. The symptoms, more likely than not, are a sequela of the work injury. The facts of the case, however, do not support a finding that claimant has suffered a permanent neck injury. There has been no work up of the condition, no treatment and no proper diagnosis. This makes it impossible, given claimant's burden of proof, to distinguish his neck symptoms and complaints from those in his bilateral shoulders. As a consequence, I find the claimant has failed to meet his burden of proof that any neck "condition" is causally connected to the stipulated work injury.

The next issue is the extent of claimant's permanent partial disability.

I have found that the claimant suffered a disability to each of his "shoulders" under Iowa Code section 85.43(2)(n) (2019). Both disabilities arose out of the same injury. As such, his disability shall be assessed as a scheduled disability, which means I am arbitrarily limited to choosing between the impairment ratings of the expert physicians.

> In all cases of permanent partial disability described in paragraphs "a" through "t", or paragraph "u" 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 permanent impairment pursuant to paragraphs "a" through "t", or paragraph "u" when determining functional impairment and not loss of earning capacity.

Iowa Code section 85.34(2)(x) (2019). In other words, the law, as written, is not concerned with an injured worker's actual functional loss as determined by the evidence, but rather the impairment rating as assigned by the adopted version of the AMA Guides. The only function of the agency is to determine which impairment rating is most accurate.

In this case, I am not satisfied with either of the impairment ratings. Dr. Sullivan provided a 6 percent upper extremity rating on the right and a zero on the left. In my estimation, these ratings do not reflect the actual loss of function described in the claimant's highly credible testimony for either shoulder.

Dr. Stoken assigned a 23 percent rating on the right and a 17 percent rating on the left. Dr. Stoken's ratings seem particularly high, particularly on the left side, where Mr. Manuel did not even require surgery and his symptoms had significantly subsided for a period of time. When viewing all of the evidence as a whole, however, I find that the ratings of Dr. Stoken provide a more accurate and reliable indication of Mr. Manuel's permanent loss of function in his shoulders than those of Dr. Sullivan.

Therefore, I conclude that claimant is entitled to 92 weeks of benefits (23 percent of 400 weeks) for the right shoulder and 68 weeks of compensation (17 percent of 400 weeks) for the left shoulder. Had I the authority to use my agency expertise to evaluate his actual loss of function, I likely would have come down somewhere in between the two ratings. I am, alas, bound to interpret the statute as it is written. Since this is not a bilateral scheduled injury under Iowa Code Section 85.34(2)(t), the statute actually provides no guidance about how or when these benefits are to be paid. The parties

have provided no argument on this topic. I find the benefits should be paid consecutively, for a total of 160 weeks commencing on November 15, 2018, the date his temporary disability ended.

The next issue is notice.

Iowa Code section 85.23 requires an employee to give notice of the occurrence of an injury to the employer within 90 days from the date of the occurrence, unless the employer has actual knowledge of the occurrence of the injury.

The purpose of the 90-day notice or actual knowledge requirement is to give the employer an opportunity to timely investigate the facts surrounding the injury. The actual knowledge alternative to notice is met when the employer, as a reasonably conscientious manager, is alerted to the possibility of a potential compensation claim through information which makes the employer aware that the injury occurred and that it may be work related. Dillinger v. City of Sioux City, 368 N.W.2d 176 (Iowa 1985); Robinson v. Department of Transp., 296 N.W.2d 809 (Iowa 1980).

Failure to give notice is an affirmative defense which the employer must prove by a preponderance of the evidence. DeLong v. Highway Commission, 229 Iowa 700, 295 N.W. 91 (1940).

Defendants have asserted a novel notice defense, arguing that although Mr. Manuel provided timely notice of the injury, he failed to notify the employer of each specific body part he claimed was injured in the notice. I conclude there is no such requirement in Iowa law.

It is important to note at the outset that I have found claimant failed to meet his burden of proof with regard to the neck claim and the left knee. Therefore, the only discussion herein is whether claimant provided notice of his injury as it relates to his right and left shoulder. I conclude that the only notice claimant was required to provide was the notice he sustained an injury on February 12, 2018.

The defendants did present the testimony of Shawn Duminy, claimant's supervisor. Mr. Duminy testified that Mr. Manuel never told him he injured any body part other than his right shoulder. This is confirmed in the incident report as well. Of course, this is because he only had right shoulder symptoms at that time.

The Defendants rely upon a series of agency cases which are simply not applicable to the case before the agency at this time. Even if a claimant were required to provide notice of each body part injured in the notice of injury, this would not apply to the circumstances involved in a sequela injury. Mr. Manuel did not develop symptoms in his left shoulder until he was undergoing physical therapy in approximately November 2018. (Jt. Ex. 8, p. 42) This was more than 6 months after his work injury. The following day, he reported the symptoms to Dr. Sullivan who opined the condition was

work related. These notes were faxed to the claims adjustor for the third party administrator. (Jt. Ex. 12, p. 66) In other words, the defendants were on notice of this condition (and its work relatedness) almost immediately after the symptoms began.

Notice is an affirmative defense. The burden is on the defendants to prove this defense. If I accept the defendants' position regarding notice, virtually no sequela injury could ever be deemed compensable. I find both as a matter of fact and law, the defendants have failed to prove a notice defense under Iowa Code Section 85.23. Unlike a number of other issues in this case, this issue is not close.

The next issue is whether claimant is entitled to an independent medical evaluation and costs.

Section 85.39 permits an employee to be reimbursed for subsequent examination by a physician of the employee's choice where an employer-retained physician has previously evaluated "permanent disability" and the employee believes that the initial evaluation is too low. The section also permits reimbursement for reasonably necessary transportation expenses incurred and for any wage loss occasioned by the employee attending the subsequent examination.

Defendants are responsible only for reasonable fees associated with claimant's independent medical examination. Claimant has the burden of proving the reasonableness of the expenses incurred for the examination. See Schintgen v. Economy Fire & Casualty Co., File No. 855298 (App. April 26, 1991). Claimant need not ultimately prove the injury arose out of and in the course of employment to qualify for reimbursement under section 85.39. See Dodd v. Fleetguard, Inc., 759 N.W.2d 133, 140 (Iowa App. 2008).

Iowa Code section 86.40 states:

> **Costs.** All costs incurred in the hearing before the commissioner shall be taxed in the discretion of the commissioner.

Iowa Administrative Code Rule 876—4.33(86) states:

> **Costs.** Costs 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. Costs of service of notice and subpoenas shall be paid initially to the serving person or agency by the party utilizing the service. Expenses and fees of witnesses or of obtaining doctors' or practitioners' reports initially shall be paid to the witnesses, doctors or practitioners by the party on whose behalf the witness is called or by whom the report is requested. Witness fees shall be paid in accordance with Iowa Code section 622.74. Proof of payment of any cost shall be filed with the workers' compensation commissioner before it is taxed. The party initially paying the expense shall be reimbursed by the party taxed with the cost. If the expense is unpaid, it shall be paid by the party taxed with the cost. Costs are to be assessed at the discretion of the deputy commissioner or workers' compensation commissioner hearing the case unless otherwise required by the rules of civil procedure governing discovery. This rule is intended to implement Iowa Code section 86.40.

Iowa Administrative Code rule 876—4.17 includes as a practitioner, "persons engaged in physical or vocational rehabilitation or evaluation for rehabilitation." A report or evaluation from a vocational rehabilitation expert constitutes a practitioner report under our administrative rules. Bohr v. Donaldson Company, File No. 5028959 (Arb. November 23, 2010); Muller v. Crouse Transportation, File No. 5026809 (Arb. December 8, 2010) The entire reasonable costs of doctors' and practitioners' reports may be taxed as costs pursuant to 876 IAC 4.33. Caven v. John Deere Dubuque Works, File Nos. 5023051, 5023052 (App. July 21, 2009).

At dispute is Dr. Stoken's bill in the amount of $3,800.00. Dr. Stoken charged for the initial evaluation and report the amount of $3,200.00 and added a fee of $600.00 for two additional body parts. I find that defendants are only responsible for the $3,200.00 IME charge. In addition, defendants shall pay the $100.00 filing fee.

ORDER

THEREFORE IT IS ORDERED:

Defendants shall pay the claimant one hundred sixty (160) weeks of permanent partial disability benefits at the rate of four hundred and ninety-four and 82/100 ($494.82) per week from November 15, 2018.

Defendants shall pay accrued weekly benefits in a lump sum.

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

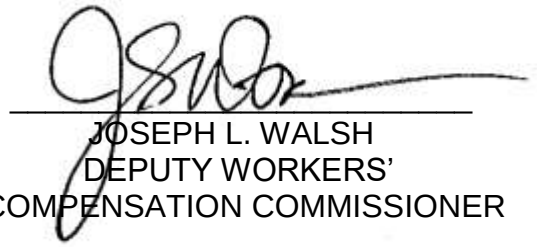
Defendants shall be given credit for the twenty-four (24) weeks previously paid.

Defendants shall reimburse three thousand two hundred and no/100 dollars ($3,200.00) for the IME expense.

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

Costs in the amount of one hundred and no/100 dollars ($100.00) are taxed to defendants.

Signed and filed this __18th___ day of February, 2021.



JOSEPH L. WALSH
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served as follows:

Tom Drew (Via WCES)

Aaron Oliver (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.