BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

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| CLIFFORD ALLEN, | : | |
| Claimant, | : | File Nos. 5064970, 5066146, 5066169, 20700618.01 |
| vs. | : | ARBITRATION DECISION |
| TYSON FRESH MEATS, INC, | : | |
| Employer, Self-Insured, Defendant. | : | Head Notes: 1100; 1402.20; 1402.30; 1402.40; 1702; 1803; 1806; 2501; 2502 |

## STATEMENT OF THE CASE

Claimant Clifford S. Allen filed four petitions in arbitration seeking worker's compensation benefits against Tyson Fresh Meats, Inc., self-insured employer. The consolidated cases came before the undersigned for an arbitration hearing on August 11, 2021. The hearing proceeded via live video hearing using Court Call, with all parties and the court reporter appearing remotely. The hearing proceeded without significant difficulties.

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

The evidentiary record includes Joint Exhibits 1 through 12, Claimant's Exhibits 1 through 10, and Defendant's Exhibits A through K.

Claimant testified on his own behalf. Teri Rottinghaus testified on behalf of the employer. The evidentiary record closed at the conclusion of the evidentiary hearing on August 11, 2021. The parties submitted post-hearing briefs on September 24, 2021, and the cases were considered fully submitted on that date.

## ISSUES

**File No. 5064970; DOI: March 26, 2017**

1. Whether claimant's stipulated work injury was the cause of permanent disability;

2. If so, the extent of industrial disability;

3. The commencement date for permanent disability benefits, if any;

4. Payment of certain medical expenses;

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

6. Whether defendant is entitled to a credit for benefits paid pursuant to a prior award; and,

7. Taxation of costs.

**File No. 5066146; DOI: July 23, 2017**

1. Whether claimant's stipulated work injury was the cause of permanent disability;

2. If so, the extent of disability;

3. The commencement date for permanent disability benefits, if any;

4. Payment of certain medical expenses;

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

6. Taxation of costs.

**File No. 5066169; DOI: July 29, 2017**

1. Whether claimant's stipulated work injury was the cause of permanent disability;

2. If so, the nature and extent of disability;

3. The commencement date for permanent disability benefits, if any;

4. Payment of certain medical expenses;

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

6. Taxation of costs.

**File No. 20700618.01; DOI: April 25, 2020**

1. Whether claimant sustained an injury arising out of and in the course of employment on April 25, 2020;

2. If so, whether the injury was the cause of permanent disability;

3. If so, the nature and extent of disability;

4. The commencement date for permanent disability benefits, if any;

5. Payment of certain medical expenses;

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

7. Taxation of costs.

## FINDINGS OF FACT

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

Claimant's testimony was consistent as compared to the evidentiary record, and his demeanor at the time of hearing gave the undersigned no reason to doubt his veracity. While he was not a perfect historian, few individuals are. Overall claimant is found credible.

Claimant, Clifford Allen, was a 68-year-old person at the time of hearing. (Hearing Transcript, p. 12) He is a high school graduate, earning B and C grades. After high school he attended Northeast Iowa Community College (NIACC), and obtained an Associate's Degree. Claimant also took some classes at Hawkeye Community College, and spent time in the Army, where he trained as a medic. (Tr., p. 13; Defendant's Exhibit A, p. 2; Deposition Transcript p. 7) After his discharge from the Army, claimant attended some classes at University of Northern Iowa, and then he started working at John Deere. (Tr., pp. 13-14)

Claimant worked at John Deere for approximately 20 years, until he was laid off in 1993. (Tr., p. 14; Def. Ex. G, p. 4) His work at John Deere was general manual labor. (Def. Ex. A, p. 2; Dep. Tr., p. 7) Following his layoff, claimant worked for Century 21 as a realtor. (Def. Ex. G, p. 4) He was licensed in Illinois, and sold residential real estate for about two years. (Def. Ex. A, p. 3; Dep. Tr., pp. 9-10) Claimant then worked at Beef Products, Inc. (BPI) as a production worker, loading boxes. (Def. Ex. A, p. 3; Dep. Tr., p. 11) He was there for about two years, until 1999 when he went to work at Hawkeye Community College as a custodian. (Def. Ex. G, p. 4) He worked there until 2003, when he went to work at Tyson. (Def. Ex. A, p. 3; Dep. Tr., p. 12)

Claimant worked a couple of different positions at Tyson for the first few years of employment, and then became a maintenance worker. (Def. Ex. A, p. 3; Dep. Tr., pp. 13-14) Through Tyson, he completed the "one plus two" program at Hawkeye Community College, which taught him the basics of machine maintenance. (Tr., p. 14) Claimant described himself as essentially computer illiterate, stating that he only uses his home computer to watch sports and soap operas. (Tr., pp. 14-15) While at Tyson, he occasionally took safety courses on a computer as well. (Tr., p. 15)

Claimant sustained a right knee injury while working at Tyson in 2008. (Tr., pp. 15-16) He had knee surgery, and testified that he recovered from the knee surgery. (Tr., p. 16) On November 9, 2011, claimant had another work injury to his right knee and low back. (Def. Ex. I, p. 1) Claimant testified that it was recommended he have another knee surgery at that time, but he declined. (Tr., p. 17) He stated that his knee then continued to improve and get stronger, and by 2017, his knee was "in good shape." (Tr., pp. 17-18) He had not seen any medical providers for his right knee between 2012 and 2017. (Tr., p. 17) With respect to his low back, claimant testified that he did not recall injuring his low back in 2011, but "must have had it because it was on there." (Tr., p. 16) In any event, he testified that by 2017, he was not having any problems with his low back. (Tr. p. 18)

With respect to his 2011 injury, claimant was awarded 10 percent industrial disability, which entitled him to 50 weeks of permanent partial disability benefits. (Def. Ex. I, p. 2) Defendant paid that 10 percent award in full. (Def. Ex. J, p. 1)

On March 26, 2017, claimant sustained a new injury while working. (Tr., p. 23) Claimant was performing preventative maintenance on hoists that day, and was told to replace two hoists on the upper kill floor. (Tr., p. 24) Claimant testified that the hoists weigh 83.5 pounds, and on that day, the elevator that runs up to the upper kill floor was out of service. As such, claimant had to carry the new hoists up the stairs, and the old hoists back down the stairs. (Tr., p. 24) Additionally, in order to replace the hoists, claimant had to reach awkwardly under beams and pipes in order to position the hoists correctly. (Tr., p. 28; See also Claimant's Exhibit 9, pp. 56-57) Claimant testified that as a result of his work that day, he injured his left shoulder and low back. (Tr., p. 29)

Claimant reported the injury to his supervisor, but as it was a Sunday, he had to wait until the next day, Monday, to report to the Tyson nurses' office. (Tr., p. 30) He initially had conservative treatment with the Tyson nurses, and eventually saw Robert Gordon, M.D., who provides on-site medical services to Tyson employees. (Joint Exhibit 3, p. 19) Claimant saw Dr. Gordon on May 3, 2017, and reported left shoulder pain, at times down his arm, as well as lumbar pain. After physical examination, Dr. Gordon recommended an MRI arthrogram of the left shoulder, as well as a lumbar spine MRI. (Jt. Ex. 3, p. 20)

Following the MRIs, claimant again saw Dr. Gordon on May 17, 2017. (Jt. Ex. 3, p. 21) Dr. Gordon noted tendinopathy in the shoulder, along with a small, near-full-

thickness tear of the supraspinatus tendon; partial tears of the infraspinatus and subscapularis tendons; and tearing in the labrum. (Jt. Ex. 3, p. 22) With respect to the lumbar spine, Dr. Gordon noted multilevel degenerative changes but no disc herniation. (Jt. Ex. 3, pp. 21-22) Dr. Gordon recommended a referral to orthopedics for the left shoulder, and physical therapy for the low back. (Jt. Ex. 3, p. 22)

Claimant saw Thomas Gorsche, M.D., for his shoulder on June 8, 2017. (Joint Exhibit 1, p. 2) After reviewing the MRI, Dr. Gorsche's impression was "severe partial tearing LEFT shoulder supraspinatus versus full-thickness tear interstitial intra-articular surface tear of infraspinatus." (Jt. Ex. 1, p. 3) Dr. Gorsche presented claimant with the options of surgery or a trial of physical therapy and injection. Claimant indicated he wanted to avoid surgery, so he was given an injection and physical therapy was ordered. (Jt. Ex. 1, p. 3)

Claimant testified at hearing that he did not want surgery because his father had previously suffered a stroke after having surgery, and he had a friend who became paralyzed after a back surgery. (Tr., pp. 32-33) As such, claimant does not want to have "any type of operation" if he does not have to do so. (Tr., p. 32)

Claimant followed up with Dr. Gordon on June 13, 2017. (Jt. Ex. 3, p. 23) At that time, he reported the shoulder injection Dr. Gorsche provided was helpful. He also reported having had one session of physical therapy for his back. Dr. Gordon stressed the importance of physical therapy and reordered additional therapy. (Jt. Ex. 3, p. 23) At his next follow up for his back, he had completed five sessions of physical therapy, and complained of pins and needles in his left buttock area, and stabbing pain around L3-L4 on the right side. (Jt. Ex. 3, p. 25) He was provided with a back support for core stability, and told to continue with physical therapy. (Jt. Ex. 3, pp. 25-26)

Claimant returned to Dr. Gorsche on July 6, 2017, for his shoulder. (Jt. Ex. 1, p. 4) He reported that the injection gave him a lot of relief, but only for 5 or 6 days. On physical examination, claimant had "good" range of motion of his shoulder and no swelling. [1] At that time, claimant still did not wish to proceed with surgery, and physical therapy had discharged him to home therapy. (Jt. Ex. 1, p. 5) As such, Dr. Gorsche released claimant from his care, to return as needed.

On July 11, 2017, a Tyson nurse recorded that claimant continued to complain of left shoulder pain, low back pain, and heaviness in the bilateral legs. (Jt. Ex. 2, p. 15) At that time he rated his pain at 6 out of 10, but there is no indication whether that pain

[1] In his brief, claimant points out that this portion of the medical record was amended by Dr. Gorsche's nurse on July 25, 2017, the same day Dr. Gordon released claimant from care. He suggests this amendment was made at the direction of Dr. Gordon in order to minimize claimant's symptoms. However, there is no evidence in the record to indicate what was amended – for example, it could have been as simple as correcting a typographical error. Further, there is no contrary evidence to indicate claimant's range of motion was not good on July 6, 2017. With no evidence of a conspiracy between Dr. Gorsche's staff and Dr. Gordon, and no evidence to suggest Dr. Gorsche's record is inaccurate, the record will be taken at face value.

rating is for his back, shoulder, or both combined. On July 25, 2017, the nurse again noted claimant complained of shoulder and back pain, at a level 6 of 10, but there is still no specificity as to which body part claimant was rating or if it was a combination of both his back and shoulder pain. (Jt. Ex. 2, p. 16)

Also on July 25, 2017, claimant followed up with Dr. Gordon. (Jt. Ex. 3, p. 27) Dr. Gordon's report states that claimant reported his back had overall improved, and he was ready to get back to work in a full-duty capacity. He further reported that claimant said his left shoulder was doing fine, he did not believe he needed surgery, and he was also ready for full duty with respect to his left shoulder. Claimant testified that he did not tell Dr. Gordon that his pain was better, and instead told Dr. Gordon that he was still having both shoulder and back pain, now going down his hip and legs. (Tr., p. 34) In any event, Dr. Gordon documented full range of motion and full strength of the left shoulder, and good range of motion of the lumbar region. (Jt. Ex. 3, p. 27) He noted mild tenderness in both areas, but said overall claimant was doing well, and was at maximum medical improvement (MMI) for both the shoulder and the back. Claimant was released to full duty "through a progression," and Dr. Gordon did not find any permanent impairment. (Jt. Ex. 3, p. 27)

On July 23, 2017, claimant sustained an injury to his right knee while working. He was again performing preventative maintenance on the hoists, and while descending a ladder one of the steps shifted, causing claimant to fall. (Tr., pp. 36-37) Claimant testified that his right knee immediately became swollen and painful, and it was difficult to walk. (Tr., p. 37) Claimant reported to the Tyson nurse regarding this injury on July 25, 2017, at which time he stated his knee was sore but he felt it would be okay. (Jt. Ex. 5, p. 47) The nurse noted full range of motion and no swelling on that date. Claimant was offered a cold pack but declined as he did not need it.

Not long after, on July 29, 2017, claimant sustained another injury while working. On that date, claimant was called to work in the blood pit area where a pump was clogged, causing the blood pit to overflow. (Tr., p. 37) Because of the overflow, the opening of the blood pit was not visible, and claimant fell into it, resulting in injuries to his bilateral legs. (Tr., p. 38) The Tyson nurse's report states that claimant said he hit his left shin on something under the blood, and his right leg went down into the open grate. (Jt. Ex. 5, p. 47) He reported pain radiating up and down his inner leg "to arch and thigh." The nurse noted an approximately 2-centimeter abrasion on claimant's left shin, with a lump under the abrasion, and slight swelling in the right inner knee area. Claimant testified that after the July 29 incident, his right knee was worse than it had been before. (Tr., p. 41)

Claimant saw the Tyson nurse again on August 8, 2017, who noted no improvement in his right knee. (Jt. Ex. 5, p. 47) He then saw Dr. Gordon on August 22, 2017. (Jt. Ex. 3, p. 30) Dr. Gordon noted both incidents on July 23 and July 29, as well as claimant's prior right knee surgery. At that time, claimant reported that his right knee had been clicking and locking, and that his left shin injury was improving. With respect to the left leg, Dr. Gordon assessed left anterior tibial contusion, doing well. (Jt. Ex. 3, p.

31) With respect to the right knee, he ordered an MRI. He noted that claimant was working full duty, and felt he was able to continue full duty with caution.

Claimant returned to Dr. Gordon on September 5, 2017. (Jt. Ex. 3, p. 32) With respect to the left shin injury, claimant was placed at MMI as the abrasion had healed. (Jt. Ex. 3, pp. 32-33) With respect to the right knee, Dr. Gordon noted the MRI showed degenerative changes, a small joint effusion, a Baker's cyst, defects of the medial patellar facets compatible with grade II chondromalacia, and a displaced MCL caused by a subluxed medial meniscus. (Jt. Ex. 3, p. 32) Dr. Gordon recommended an evaluation with Dr. Gorsche, who previously treated claimant's right knee. (Jt. Ex. 3, p. 33)

Claimant saw Dr. Gorsche on September 12, 2017. (Jt. Ex. 1, p. 6) Dr. Gorsche noted that he previously performed a right knee arthroscopy and partial medial meniscectomy in 2008, and that claimant had a repeat MRI 5 years later that showed a medial meniscal tear. Claimant elected not to have surgery after the second tear, but continued to do well until the initial injury on July 23, 2017, followed by the second injury on July 29, 2017. Dr. Gorsche reviewed the MRI, and noted no meniscal tear. (Jt. Ex. 1, p. 7) He also noted the displaced MCL due to subluxation of the medial meniscus. Dr. Gorsche recommended an injection, which he performed, and told claimant to continue regular duty work. (Jt. Ex. 1, p. 7)

Claimant followed up with Dr. Gorsche on October 10, 2017. (Jt. Ex. 1, p. 8) He reported the injection gave him no relief, and he had been performing home exercises and working full duty. Dr. Gorsche recommended claimant continue quad exercises and regular duty work. (Jt. Ex. 1, p. 9) He opined that claimant's symptoms were due to the early arthritis, and that claimant does not need a knee replacement. He told claimant he would see him again if he continues to have problems, and notes that claimant brought up the topic of a second opinion. (Jt. Ex. 1, p. 9) That same day claimant completed a Tyson "request for medical care" form, in which he indicated his knee still hurt, and requested another doctor look at his knee, as he was not happy with Dr. Gorsche's care. (Cl. Ex. 5, p. 27) Claimant testified at his deposition that his request for a second opinion was denied. (Def. Ex. A, p. 10; Dep. Tr., p. 38) That same day, Dr. Gorsche responded to a letter authored by Tyson's claims examiner, in which he opined that claimant reached MMI for his right knee on October 10, 2017, and had no permanent functional impairment or restrictions related to the injury. (Def. Ex. E, p. 1)

The next medical record in evidence is again from the Tyson nurse, dated April 24, 2018. (Jt. Ex. 2, p. 18) At that time claimant complained of low back pain at a level 7 out of 10. He stated he had seen the therapist one time for ESI and it is stiff but better.

At his attorney's request, claimant had an independent medical evaluation with Arnold Delbridge, M.D., which took place on June 17, 2019. (Cl. Ex. 1, p. 3) Dr. Delbridge had previously examined claimant for his 2011 low back and knee injuries, and provided impairment ratings related to those injuries. (Cl. Ex. 1, p. 7) With respect to the current injuries, Dr. Delbridge reviewed the medical records and performed a

physical examination. With respect to claimant's left shoulder, Dr. Delbridge determined he had a 12 percent upper extremity impairment based on reduced range of motion. (Cl. Ex. 1, p. 6) He related that impairment to the injury on March 26, 2017. (Cl. Ex. 1, p. 7) The 12 percent upper extremity rating converts to 7 percent of the whole person. (Cl. Ex. 1, p. 9)

With respect to his lumbar spine, Dr. Delbridge reviewed his previous examination related to claimant's 2011 back injury. At the time of that evaluation, he provided an impairment rating of 5 percent of the lumbar spine. Dr. Delbridge stated that the March 26, 2017 injury was an aggravation of the same area of claimant's back, and he was noted to have more degenerative changes than before, as well as a fissure in the disc at L3-L4. However, he had no "true" radiculopathy of his lower extremities, and no herniated discs. Dr. Delbridge opined claimant had a "reasonably good recovery" of his back, and did not add any permanency from claimant's previous evaluation based on the March 26, 2017 injury. (Cl. Ex. 1, p. 7)

Dr. Delbridge placed claimant at MMI for his shoulder on June 17, 2019, and for his back on July 25, 2017. He opined that claimant may need additional treatment for his shoulder, and at that time was indicating he would like to have surgery. (Cl. Ex. 1, p. 8)

With respect to claimant's lower extremities, Dr. Delbridge noted that the MRI did not show another tear in claimant's medial meniscus, and that the degenerative arthritis was present after claimant's prior injuries and "his knee regained reasonably good function." (Cl. Ex. 1, p. 8) His diagnosis was sprain of the ligament of the right knee, large effusion of the knee, and contusion, bruise, and abrasion of the left mid-shin. He noted that in his previous examination related to claimant's 2011 injury, he assigned 18 percent impairment of the right lower extremity, because the injury had aggravated a previously asymptomatic knee. Dr. Delbridge opined that claimant's current situation had "largely reverted to his previous state as far as his knee is concerned and remains at around 18 percent impairment of the right lower extremity." He did not find any impairment on the basis of ligamental failure or lost motion. (Cl. Ex. 1, p. 8) Dr. Delbridge was specifically asked not to provide any opinion regarding permanent restrictions, as claimant did not want to jeopardize his employment. (Cl. Ex. 1, p. 1)

Dr. Gorsche issued a response to Dr. Delbridge's IME on August 10, 2019. (Def. Ex. D, p. 1) He noted that he last saw claimant on October 10, 2017, and it appeared his shoulder condition had deteriorated since that time. He also found an error in Dr. Delbridge's rate calculation, stating it should have been 13 percent of the upper extremity, or 8 percent of the whole body. Dr. Gorsche agreed with the remainder of Dr. Delbridge's report, including his opinions regarding permanent impairment. (Def. Ex. D, pp. 1-2)

Claimant's deposition took place on August 6, 2019. (Def. Ex. A) At his deposition, claimant testified that he had changed his mind regarding shoulder surgery, and at that point he felt he needed it. (Def. Ex. A, p. 8; Dep. Tr., p. 30) He also felt he

needed additional treatment for his right knee and his back. (Def. Ex. A, p. 8; Dep. Tr., p. 39) As such, he returned to see Dr. Gorsche on September 19, 2019. (Jt. Ex. 1, p. 10) Dr. Gorsche noted claimant's complaints of right knee, left shoulder and low back pain. Dr. Gorsche does not treat back pain, but examined claimant's shoulder and knee. He noted "fairly good" range of motion of the shoulder, with some popping and pain. (Jt. Ex. 1, p. 11) With respect to the knee, he noted that claimant did not appear to have any medial joint line tenderness, no effusion, and had good motion of the knee.

Dr. Gorsche stated that claimant expressed interest in left shoulder surgery. Due to the time that had passed since claimant last had MRIs, Dr. Gorsche recommended an arthrogram MRI of the left shoulder and an MRI of the right knee. He told claimant to continue working regular duty in the meantime, and follow up after the MRIs. (Jt. Ex. 1, p. 11)

Claimant saw Dr. Gordon for his low back pain on October 1, 2019. (Jt. Ex. 3, p. 34) He complained of lumbar pain with pain down his bilateral lower extremities. He stated that he had been to see "multiple doctors" regarding his spine since he last saw Dr. Gordon in 2017, and no one had been of any benefit. On physical examination, Dr. Gordon noted tenderness of the lumbar spine, and limited flexion and extension at the waist. (Jt. Ex. 3, p. 34) He did not find any motor deficits or radicular nerve deficits on exam, and noted that claimant walked with a normal gait without antalgia. (Jt. Ex. 3, p. 35) Dr. Gordon ordered an MRI of the lumbar spine, and allowed claimant to continue working full duty in the meantime.

Claimant returned to Dr. Gorsche on October 2, 2019. (Jt. Ex. 1, p. 12) Dr. Gorsche noted that the MRI of the knee showed degenerative changes and a small Baker's cyst. There was no meniscal tear. With respect to the shoulder, Dr. Gorsche noted "a little bit" of arthritic spurring of the humeral head, and a full-thickness rotator cuff tear. Dr. Gorsche recommended a cortisone injection in the knee, and open rotator cuff repair of the left shoulder. Claimant wanted to think about it. He was to continue working full duty, and let Dr. Gorsche know if he decided to proceed. (Jt. Ex. 1, p. 12) Claimant ultimately decided not to have surgery. (Tr., p. 44)

On October 8, 2019, claimant saw Mahesh Mohan, M.D., a pain management physician. (Jt. Ex. 8, p. 50) He reported ongoing back pain, which radiated to his left lower extremity. (Jt. Ex. 8, p. 51) Dr. Mohan recommended a lumbar epidural steroid injection at L5-S1. (Jt. Ex. 8, p. 53) The record notes that claimant wanted to proceed with the injection, but claimant testified that he did not end up having the injection. (Tr., p. 46) He was concerned about the potential complications that might arise from an injection into his back. (Tr., pp. 46-47)

Claimant next saw Gary Knudson, M.D., on October 15, 2019. (Jt. Ex. 9, p. 55) Claimant sought Dr. Knudson's care on his own, in order to obtain a second opinion about his right knee pain. He reported throbbing and achy knee pain, along with weakness and the knee occasionally giving out. Dr. Knudson diagnosed right knee pain,

unspecified chronicity, and post-traumatic osteoarthritis of the right knee. (Jt. Ex. 9, p. 57) Dr. Knudson's recommendations for treatment are not included in the record.

Claimant returned to Dr. Gordon on December 10, 2019. (Jt. Ex. 3, p. 36) Dr. Gordon noted that claimant saw Dr. Chad Abernathey on November 18, 2019; however, Dr. Abernathey's record is not in evidence. Dr. Gordon stated that Dr. Abernathey noted that the MRI of the lumbosacral spine demonstrated mild degenerative changes consistent with age, and no significant neurocompromise. Dr. Gordon's record also states that claimant was unable to recall what took place during Dr. Abernathey's evaluation, or whether they went over the MRI results. Apparently the case manager from Tyson was present at the appointment with Dr. Abernathey, and advised Dr. Gordon that indeed Dr. Abernathey did go over the MRI with claimant, along with his recommendations. Dr. Gordon then states that claimant was argumentative during his evaluation and while discussing the MRI findings. As such, he did not examine him. He did note, however, that claimant walked without antalgia and moved freely at the waist. Dr. Gordon discharged claimant from care with respect to his spine, with no permanent restrictions or permanent impairment. (Jt. Ex. 3, p. 36)

At hearing, claimant testified that Dr. Abernathey spent about five minutes with him, and told him "the good news is you don't need an operation. The bad news is you're going to have pain the rest of your life." (Tr., p. 45)

Claimant returned to Dr. Mohan on December 10, 2019. (Jt. Ex. 8, p. 54) Claimant reported significant lumbar radicular pain, so Dr. Mohan ordered an EMG nerve conduction study. He again discussed an epidural steroid injection, which claimant wanted to have. However, as noted above, claimant testified that he did not end up going through with the injection. (Tr., p. 46)

Claimant returned to Dr. Knudson on January 7, 2020. (Jt. Ex. 9, p. 58) He continued to complain of right knee and left shoulder pain, stating the shoulder pain had recently worsened. On physical examination, Dr. Knudson noted limited range of motion of the shoulder, with positive impingement signs and pain at the extremes of range of motion. (Jt. Ex. 9, p. 59) He also noted moderate subacromial crepitation and weakness in external rotation and abduction secondary to pain. Dr. Knudson discussed all of claimant's treatment options, including surgery, and claimant elected to proceed with physical therapy and a cortisone injection.

On February 5, 2020, Dr. Gorsche responded to a letter authored by Tyson's claims examiner. (Def. Ex. F, p. 1) He placed claimant at MMI for both his right knee and left shoulder as of February 3, 2020. He did not assign any permanent impairment to the knee. With respect to the shoulder, he provided 5 percent upper extremity rating.

Claimant has alleged another back injury occurred on April 25, 2020. (Cl. Ex. 4, p. 26) Claimant did not provide any testimony regarding the alleged April 25, 2020 injury. The injury report in evidence is nearly illegible, but according to claimant's brief, he tripped on a curb while waiting for a COVID test, causing him to twist his back. He

saw his primary care physician, Andrew Luke, M.D., on April 27, 2020. (Jt. Ex. 10, p. 60) Claimant reported low back pain localized into his right hip and radiating own his right leg. He said it is aggravated by standing and walking for long periods, and that he did a lot of standing over the weekend while waiting for his COVID test. Dr. Luke's record also notes claimant's past MRI results, and that epidural injections had been recommended but would not be covered by insurance. He also notes that claimant was previously prescribed medication but had never taken it due to fear of the side effects. (Jt. Ex. 10, p. 60) Dr. Luke's assessment was chronic bilateral low back pain with bilateral sciatica. (Jt. Ex. 10, p. 61) He prescribed medication.

Claimant followed up with Dr. Luke on May 6, 2020. (Jt. Ex. 10, p. 62) At that time, claimant reported his pain in his lower back had improved, and that he had been using the medication. He also stated that his back pain was aggravated by a fall that occurred on April 25, 2020. He denied numbness or tingling in his lower extremities. Dr. Luke continued the medication and told claimant to do stretching exercises and apply ice in the evenings. (Jt. Ex. 10, p. 63)

Claimant was terminated from employment effective June 18, 2020. (Def. Ex. K, p. 14) Defendant maintains that claimant was terminated for striking another employee on April 25, 2020, during the company-wide COVID testing. (Tr., pp. 59-60, 82) Claimant denies hitting the other employee, and claims the other employee called him a racial slur. (Tr., pp. 82-85) Teri Rottinghaus, a human resources manager with Tyson, testified at hearing. (Tr., p. 97) Ms. Rottinghaus was not involved in the investigation that led to claimant's termination, but testified that Tyson has a "zero tolerance" policy when it comes to fighting between team members, and it results in automatic termination for gross misconduct. (Tr., p. 98)

At the time claimant was terminated from employment, he was performing his regular job with no formal restrictions. However, claimant testified that prior to his termination, his coworkers and supervisor were providing him with informal accommodations. (Tr., p. 56) For example, claimant was no longer lifting the hoists; rather, a younger employee would lift and hang hoists for him. (Tr., pp. 56-57) Additionally, he had difficulty with certain body mechanics such as squatting, so he had to change the way he worked in order to accommodate himself. (Tr., p. 57) He did not feel as efficient at work, and took more "excused absences" than he had in the past. (Tr., pp. 58, 79, 90) Despite his difficulties, claimant testified that he enjoyed working at Tyson, and had planned to continue working there "until they kicked [him] out." (Tr., pp. 58-60) In fact, he had continued to work even after qualifying for Social Security retirement benefits. (Tr., p. 58)

Claimant saw neurologist Ivo Bekavac, M.D., Ph.D., on June 17, 2021, for EMG and nerve conduction studies. (Jt. Ex. 11, p. 64) Dr. Bekavac reviewed claimant's medical records and noted that claimant reported worsening back pain. After testing, Dr. Bekavac found mild sensory neuropathy, and no EMG evidence of lumbosacral motor radiculopathy or myopathy. (Jt. Ex. 11, p. 65) It appears Dr. Bekavac referred claimant

to physical therapy, which began on July 7, 2021. (Jt. Ex. 12, p. 66) At the time of hearing, claimant testified he was still doing physical therapy for his back. (Tr., p. 47)

Claimant had an IME with Stanley Mathew, M.D., on July 7, 2021. (Cl. Ex. 2, p. 12) Dr. Mathew reviewed the medical records and examined claimant. His recitation of claimant's medical history contains a few errors, mainly typographical in nature. However, he stated that Dr. Gorsche never made any surgical recommendations for claimant's shoulder, which is incorrect. (Cl. Ex. 2, p. 13) He also stated that claimant had an injection to his left knee, which is incorrect, as the only knee injection claimant had was to his right knee. (Cl. Ex. 2, p. 13; Jt. Ex. 1, p. 7)

On physical examination, he noted claimant had tenderness throughout the left rotator cuff, tenderness to the bilateral knees, and tenderness to the lumbar spine, paraspinal muscles, and bilateral SI joints. (Cl. Ex. 2, p. 14) He noted decreased range of motion in the left shoulder due to pain. [2] He measured claimant's range of motion in the lumbar spine, but did not indicate whether the measurements were within normal limits. He performed manual muscle testing and noted slightly decreased strength in the left shoulder compared to the right, and in the right knee compared to the left.

Dr. Mathew opined that claimant sustained an overuse injury of his left shoulder and low back while working on March 26, 2017. (Cl. Ex. 2, p. 15) He placed claimant at MMI for those injuries as of March 26, 2018. He recommended that claimant avoid repetitive overhead activity, pushing, pulling, avoid prolonged standing, walking bending, squatting, and lifting more than 40 pounds. He noted all activities should be performed as tolerated. He assigned an 8 percent whole body impairment rating for the low back, and 15 percent upper extremity rating for the left shoulder. (Cl. Ex. 2, p. 15)

With respect to claimant's bilateral knees, Dr. Mathew opined that claimant sustained injuries in July of 2017, and noted his prior meniscal tear, which was repaired. He stated that claimant was essentially symptom free after 2012, until both injuries in July of 2017, which brought about pain, treatment, therapy, and the need for injections. (Cl. Ex. 2, pp. 15-16) He opined that claimant sustained permanent partial impairment due to his bilateral knee injuries, and placed him at MMI on July 29, 2018. (Cl. Ex. 2, p. 16) He provided a 10 percent whole person impairment rating, and recommended he avoid prolonged standing, walking, bending, and lifting, and avoid heights, ladders, and repetitive use of stairs.

Dr. Mathew further opined that claimant sustained a cumulative injury to his low back due to his 17 years of work at Tyson, due to prolonged standing, walking, bending, pushing, pulling, and lifting. He did not mention the alleged April 25, 2020 injury, in which claimant stated he tripped on a curb. He did not assign any additional restrictions or impairment ratings as a result of the cumulative injury, and maintained the prior March 26, 2018 date of MMI. [3]

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[2] Dr. Mathew's report contains a typographical error as he lists right shoulder twice, when the second reference should be to the left shoulder. (Cl. Ex. 2, p. 14)

[3] Dr. Mathew's report contains another typographical error in the date, as he inadvertently wrote 2017.

On July 18, 2021, Dr. Mathew issued a supplemental report in response to questions from claimant's attorney. (Cl. Ex. 2, p. 18) Dr. Mathew clarified that his 8 percent impairment rating for claimant's low back is meant to be an increase from Dr. Delbridge's rating of 5 percent, not an addition to the prior rating. In other words, claimant's total low back impairment is 8 percent of the whole person. (Cl. Ex. 2, p. 18) With respect to the bilateral knees, Dr. Mathew intended to assigned 10 percent of the whole person for each knee; meaning a total of 20 percent of the whole person for bilateral knee pain, discomfort, and weakness. He classified this as a "progression" of Dr. Delbridge's 2019 rating.

On July 16, 2021, Dr. Gordon issued a response to Dr. Mathew's IME report. (Def. Ex. B, p. 1) Dr. Gordon noted that there was no evidence of "injurious pathology" on any of claimant's MRIs. He reviewed Dr. Abernathey's record from November 18, 2019, and stated that Dr. Abernathey diagnosed claimant as having mild degenerative changes of the lumbar spine, with no significant objective findings in his evaluation. Likewise, Dr. Gordon noted no objective findings during his examinations of claimant during 2019 that would support Dr. Mathew's 8 percent impairment rating. Dr. Gordon further stated that Dr. Mathew did not explain his rationale for arriving at the 8 percent rating. Dr. Gordon concluded that based on prior evaluations, review of the MRIs, and Dr. Abernathey's report, claimant did not fulfill the criteria for Lumbar DRE Category II impairment as Dr. Mathew had opined. (Def. Ex. B, p. 2) Dr. Gordon maintained his prior opinion that claimant has zero percent impairment for his lumbar spine, and no work restrictions are needed.

With respect to the left shoulder, Dr. Gordon last evaluated claimant on July 25, 2017, at which time he had full range of motion and full strength. However, Dr. Gordon stated that claimant had been evaluated further for his left shoulder since that time, and as such, he was not able to give an updated opinion regarding impairment or restrictions. (Def. Ex. B, p. 2)

Dr. Gorsche also issued a response letter on July 16, 2021. (Def. Ex. C, p. 1) He noted that he last evaluated claimant on October 2, 2019, at which time he recommended open rotator cuff repair and a cortisone injection into his right knee. Claimant declined both procedures. Dr. Gorsche reviewed Dr. Mathew's IME report, and stood by his prior opinion that no restrictions were needed for the shoulder. He noted that claimant was able to work his regular duty job when he was last evaluated, indicating he did not require restrictions. With respect to Dr. Mathew's shoulder rating, Dr. Gorsche could not determine how Dr. Mathew came to the 15 percent rating, as he did not specify his measurements with respect to flexion, extension, abduction, adduction, internal rotation, or external rotation. (Def. Ex. C, p. 2) He reiterated that his 5 percent impairment rating was based on his experience in dealing with rotator cuff tears and his previous examination.

With respect to the bilateral knee rating, Dr. Gorsche again could not determine how Dr. Mathew reached 10 percent impairment, as he used Table 17-8 for loss of

strength. However, he did not break down loss of strength into flexion/extension, or explain how he reached the 10 percent impairment. As such, based on the MRI findings and his examinations, Dr. Gorsche reiterated his prior zero percent rating for the right knee. [4] Based on his experience, evaluation, and review of the MRIs, Dr. Gorsche concluded that claimant has zero percent impairment to the right knee, and 5 percent impairment of the left upper extremity. He would allow claimant to work "within the limits of his tolerance," assigning no specific restrictions, based on the fact that claimant was able to do his regular duty work and declined treatment for either condition. (Def. Ex. C, p. 2)

I find the opinions of Dr. Gorsche, Dr. Gordon, and Dr. Delbridge to be more credible than those of Dr. Mathew. First, with respect to Dr. Delbridge, he has examined claimant previously in connection with his prior work-related injuries. (Def. Ex. A, p. 8; Dep. Tr., pp. 31-32; Cl. Ex. 1, pp. 7-8) As such, he was able to take claimant's prior condition and impairment into account when providing his analysis. His report is detailed and he provides clear analysis in explaining the basis of his opinions.

With respect to Dr. Gorsche and Dr. Gordon, both have treated claimant on prior occasions, including Dr. Gorsche performing claimant's prior knee surgery in 2008. (Jt. Ex. 1, pp. 1, 6) Dr. Gorsche saw claimant on multiple occasions for both his left shoulder and his right knee, and his opinions are based on his experience in treating claimant's injuries over a number of years. Likewise, Dr. Gordon saw claimant on multiple occasions for all of his injuries, including his back, and he was also familiar with claimant's prior injuries and conditions.

Claimant urges that Dr. Gordon cannot be trusted due to his financial relationship with Tyson. However, I find no evidence that his treatment of claimant in this particular case was inappropriate or skewed. He ordered MRIs, and sent claimant to specialists as needed. There is nothing to indicate his treatment was unreasonable or his opinions are biased. Finally, his opinions regarding impairment and restrictions are very similar to the other treating physicians in this case, as well as Dr. Delbridge, one of claimant's IME physicians. In short, there is no evidentiary reason to discount his opinions simply because he provides on-site medical care to Tyson employees on a regular basis.

I do not find Dr. Mathew's opinions to be as convincing. He provided no specifics regarding the basis for his ultimate impairment ratings. Both Dr. Gordon and Dr. Gorsche reviewed Dr. Mathew's ratings, and both disagreed with his conclusions. Dr. Mathew only saw claimant on one occasion, for the purpose of providing impairment ratings. Additionally, his report contains several errors, and while many appear typographical in nature, the errors result in confusing and unconvincing opinions. Finally, Dr. Mathew's follow-up letter, dated July 18, 2021, is a response to questions from claimant's attorney. (Cl. Ex. 2, pp. 17-18) However, the questions posed contain inaccurate information. For example, questions 1 and 2 both reference Dr. Delbridge's

[4] Dr. Gorsche did not provide treatment or a rating for claimant's left knee. Rather, it was the left shin for which Dr. Gorsche provided treatment, which was a temporary injury.

prior back and right knee ratings, but state those ratings were provided in 2019. (Cl. Ex. 2, p. 17) Dr. Delbridge did not assign those ratings in 2019; rather, he assigned them in 2013, after claimant's 2011 injuries. (Cl. Ex. 1, pp. 7-8) His determination in 2019 was that neither claimant's back nor knee had progressed after his 2017 injuries such that additional impairment was warranted. It is unknown whether this detail would have affected Dr. Mathew's opinions, but when considered alongside the other inaccuracies and mistakes in his report, it adds to the overall unreliability of his opinions.

Given their treatment relationships and history with claimant, Dr. Gorsche, Dr. Gordon, and Dr. Delbridge are more credible. Each has provided more thorough and clear analysis than Dr. Mathew, and their collective opinions are given greater weight.

## CONCLUSIONS OF LAW

The party who would suffer loss if an issue were not established ordinarily has the burden of proving that issue by a preponderance of the evidence. Iowa R. App. P. 6.904(3)(e). The claimant has the burden of proving by a preponderance of the evidence that the alleged injury actually occurred and that it both arose out of and in the course of the employment. Quaker Oats Co. v. Ciha, 552 N.W.2d 143, 150 (Iowa 1996); Miedema v. Dial Corp., 551 N.W.2d 309, 311 (Iowa 1996). The words "arising out of" refer to the cause or source of the injury. The words "in the course of" refer to the time, place, and circumstances of the injury. 2800 Corp. v. Fernandez, 528 N.W.2d 124, 128 (Iowa 1995). An injury arises out of the employment when a causal relationship exists between the injury and the employment. Miedema, 551 N.W.2d at 311. The injury must be a rational consequence of a hazard connected with the employment and not merely incidental to the employment. Koehler Elec. v. Wills, 608 N.W.2d 1, 3 (Iowa 2000); Miedema, 551 N.W.2d at 311. An injury occurs "in the course of" employment when it happens within a period of employment at a place where the employee reasonably may be when performing employment duties and while the employee is fulfilling those duties or doing an activity incidental to them. Ciha, 552 N.W.2d at 150.

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

The question of causal connection is essentially within the domain of expert testimony. The expert medical evidence must be considered with all other evidence introduced bearing on the causal connection between the injury and the disability. Supportive lay testimony may be used to buttress the expert testimony, and 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).

While a claimant is not entitled to compensation for the results of a preexisting injury or disease, its mere existence at the time of a subsequent injury is not a defense. Rose v. John Deere Ottumwa Works, 247 Iowa 900, 76 N.W.2d 756 (1956). If the claimant had a preexisting condition or disability that is materially aggravated, accelerated, worsened or lighted up so that it results in disability, claimant is entitled to recover. Nicks v. Davenport Produce Co., 254 Iowa 130, 115 N.W.2d 812 (1962); Yeager v. Firestone Tire & Rubber Co., 253 Iowa 369, 112 N.W.2d 299 (1961).

**File No. 5064970; DOI: March 26, 2017**

In this case, claimant alleges the accepted injuries to his left shoulder and low back have left him permanently and totally disabled. Defendant asserts that claimant's permanent disability, if any, is limited to 10 percent industrial disability based on his left shoulder injury. Defendant further asserts that because claimant was previously paid 10 percent industrial disability for his 2011 claim, he is entitled to nothing further pursuant to Iowa Code section 85.34(7).

The legislature enacted amendments to Iowa Code chapter 85 in 2017. See 2017 Iowa Acts ch. 23. The amendments included changing the language of Iowa Code section 85.34. See Id. at § 13. The amendments apply to injuries that occur on or after July 1, 2017, so they do not apply to this particular file. See Id. at § 24. As such, claimant's shoulder injury is considered to be an injury to the body as a whole, pursuant to Iowa Code 85.34(2)(u) (2004).

Since claimant has an impairment to the body as a whole, an industrial disability has been sustained. Industrial disability was defined in Diederich v. Tri-City Ry. Co. of Iowa, 219 Iowa 587, 258 N.W. 899 (1935) as follows: "It is therefore plain that the Legislature intended the term 'disability' to mean 'industrial disability' or loss of earning capacity and not a mere 'functional disability' to be computed in terms of percentages of the total physical and mental ability of a normal man."

In this case, the only physician who assigned additional functional impairment with respect to claimant's back was Dr. Mathew, who provided an 8 percent impairment rating. He later clarified that his rating was not in addition to Dr. Delbridge's previous 5 percent rating, but an increase. As noted above, I did not find Dr. Mathew's opinions to be the most credible. Both Dr. Delbridge and Dr. Gordon opined that claimant did not sustain any additional functional impairment to his low back as a result of the 2017 work injury. I find Dr. Delbridge and Dr. Gordon have provided the most accurate and reliable opinions regarding claimant's functional impairment related to his 2017 back injury.

With respect to claimant's left shoulder, Dr. Gorsche's final rating, after claimant had completed treatment, was 5 percent of the upper extremity, which is equal to 3

percent of the whole person. (Def. Ex. F, p. 1) Dr. Mathew provided a rating of 15 percent of the upper extremity, which is equal to 9 percent of the whole person. (Cl. Ex. 2, p. 15) Again, as detailed above, I did not find Dr. Mathew's rating to be as credible as Dr. Gorsche's rating. As such, I accept Dr. Gorsche's rating as an accurate measure of claimant's permanent functional impairment as a result of the 2017 shoulder injury.

Functional impairment is an element to be considered in determining industrial disability, which is the reduction of earning capacity, but consideration must also be given to the injured employee's age, education, qualifications, experience, motivation, loss of earnings, severity and situs of the injury, work restrictions, inability to engage in employment for which the employee is fitted and the employer's offer of work or failure to so offer. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963); Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961).

Turning to the other factors that determine industrial disability, following his 2017 injuries claimant was allowed to continue working full duty, and did continue to do so, until his termination in April 2020. Claimant testified, however, that following the 2017 injuries, he began taking more time off work than usual, mostly due to his back pain. (Tr., p. 58) The records of claimant's absences support this testimony to a degree, but it is unclear whether each absence is related to claimant's work injuries or other reasons. (Cl. Ex. 6, pp. 28-46) Further, the records do not provide any information of what was "normal" for claimant prior to 2017.

Claimant also testified, however, about the informal accommodations his coworkers and supervisors provided to him. At both his deposition and at hearing, claimant testified that after his 2017 injuries, he was told to ask for help with carrying or lifting hoists. (Tr., pp. 56-57; 78; Def. Ex. A, p. 11, Dep. Tr., pp. 42-43) He testified at hearing that while he still did his preventative maintenance on the hoists, he was no longer changing them out or lifting and carrying them as before. (Tr., p. 57) He also testified about his prior employment history, and the difficulties he would have today if he attempted to perform any of his past positions. Based on his ongoing low back symptoms, claimant testified he would have trouble doing work that required standing for a long period of time, twisting, or bending. (Tr., p. 66) Due to his shoulder injury, he would not be able to do work that requires much heavy lifting, overhead lifting, or work that would require him to use both arms repetitively. (Tr., pp. 63-66)

Returning to work, even at the same or higher wages, does not mean the worker has not lost earning capacity. Arrow-Acme Corp. V. Bellamy, 500 N.W.2d 92, 95 (Iowa App. 1993) The inquiry goes beyond what the evidence shows the claimant can or cannot do, and includes the extent to which the injury reduced the claimant's earning capacity. Id. (citing Guyton v. Irving Jensen Co., 373 N.W.2d 101, 104 (Iowa 1985)). Continuous employment does not bar, as a matter of law, entitlement to industrial disability benefits. Actual earnings is merely one factor in determining industrial disability. Id.

Claimant is a 68-year old person with an associate's degree. His work history involves jobs that require bending, lifting, squatting, reaching, standing, and other physical activities that are now difficult for claimant because of the injuries he sustained to his low back and left shoulder. Dr. Gorsche did not assign permanent restrictions for his shoulder, but advised he should "work within the limits of his tolerance." Claimant did just that until his termination from employment, which shows his motivation to continue working at Tyson, even after qualifying for Social Security retirement benefits. Claimant testified that he had planned to continue working at Tyson until they "kicked him out."

Based on all of these factors, I find that claimant has sustained industrial disability as a result of his March 26, 2017 injury. However, as claimant had prior injuries with the same employer, which resulted in disability that was compensable under the same paragraph of section 85.34(2) as the current injuries, Iowa Code section 85.34(7) applies. Specifically, the version of Iowa Code section 85.34(7) in effect between the effective dates of the 2004 and 2017 amendments applies here.

Iowa Code section 85.34(7), as it was then in effect, states in part:

> a. An employer is fully liable for compensating all of an employee's disability that arises out of and in the course of the employee's employment with the employer. An employer is not liable for compensating an employee's preexisting disability that arose out of and in the course of employment with a different employer or from causes unrelated to employment.
>
> b. If an injured employee has a preexisting disability that was caused by a prior injury arising out of and in the course of employment with the same employer, and the preexisting disability was compensable under the same paragraph of section 85.34, subsection 2, as the employee's present injury, the employer is liable for the combined disability that is caused by the injuries, measured in relation to the employee's condition immediately prior to the first injury. In this instance, the employer's liability for the combined disability shall be considered to be already partially satisfied to the extent of the percentage of disability for which the employee was previously compensated by the employer.

Based on paragraph b, claimant's disability must be determined by considering the combination of his 2011 and 2017 injuries, measured in relation to his condition immediately prior to the first injury. Based on the factors above, and considering those factors combined with claimant's 2011 injuries, I find that claimant has sustained total industrial disability of 30 percent, which is equal to 150 weeks of benefits.

The purpose of section 85.34(7) was to prevent double recoveries and double reductions in workers' compensation benefits for permanent partial disability. See 2004 Iowa Acts 1st Extraordinary Sess. ch. 1001, § 20. As such, in order to prevent a double recovery for the loss of earning capacity related to claimant's 2011 injury that has already been compensated, defendant is entitled to a credit for the 10 percent

previously paid, which is 50 weeks of benefits. As such, claimant is entitled to 100 weeks of permanent partial disability benefits for the March 26, 2017 injury.

Claimant did not miss any work related to the injuries. As such, permanent partial disability benefits commence on the date of injury, March 26, 2017.

The next issue in this file involves payment of medical expenses. Claimant argues that defendant abandoned care when Dr. Gordon discharged him on December 10, 2019. He seeks reimbursement of out-of-pocket medical expenses in the amount of $707.69, as well as an order that defendant pay $4,381.00 in unpaid medical expenses, reimburse Medicare for $583.85, and hold him harmless regarding any amount paid by Wellmark related to treatment for his back and/or shoulder. (See Claimant's Brief, p. 16; Cl. Ex. 10)

Defendant argues that claimant is not entitled to payment of the medical care as requested, because he did not seek authorized care from defendant prior to obtaining the treatment on his own. Claimant admitted at hearing that he did not request additional care for his low back prior to seeking care with Dr. Bekavac. (Tr., p. 74) There is no evidence in the record that claimant requested additional care through the employer prior to seeing Dr. Mohan or Dr. Knudson. [5]

Under Iowa law, the employer is required to provide care to an injured employee and is permitted to choose the care. Pirelli-Armstrong Tire Co. v. Reynolds, 562 N.W.2d 433 (Iowa 1997). Once an employer acknowledges that the injured employee is seeking medical care for an injury compensable under the workers' compensation statute, Iowa Code section 85.27(4) provides that an "employer is obliged to furnish reasonable services and supplies to treat an injured employee, and has the right to choose the care." Brewer-Strong v. HNI Corp., 913 N.W.2d 235, 247 (Iowa 2018). However, there are situations in which employees may receive alternate medical care paid for by the employer. First, employees may choose their own medical care at the employer's expense during an emergency in which the employer "cannot be reached immediately." Id.; see also Bell Bros., 779 N.W.2d at 203–04. Second, an employee may receive alternate medical care at the employer's expense when the employee and employer consent to such an agreement. Id. Third, "the workers' compensation commissioner may order alternative care paid by the employer following a prompt, informal hearing when the employee is dissatisfied with the care furnished by the employer and establishes the care furnished by the employer was unreasonable." Id.

Outside of these situations, the employer retains the right to choose the employee's medical care. However, the employer's statutory right to choose medical care for the employee's compensable injuries does not prohibit the employee from seeking his or her own medical care, at his or her own expense, when the employer denies compensability for the injury or the employee "abandons the protections

[5] Claimant also requests reimbursement for unauthorized treatment with Dr. Luke, but that treatment was related to the alleged April 25, 2020 injury, and will be addressed in that section.

of section 85.27 or otherwise obtains his or her own medical care independent of the statutory scheme." Id. at 248; citing Bell Bros., 779 N.W.2d at 204.

In Bell Bros., the Iowa Supreme Court held that an employer's duty to furnish reasonable medical care includes those claims for care by the employee that are unauthorized if the employee can prove "by a preponderance of the evidence that such care was reasonable and beneficial" under the totality of the circumstances. Id.; citing Bell Bros., 779 N.W.2d at 206. Unauthorized medical care is beneficial if it provides a more favorable medical outcome than would likely have been achieved by the care authorized by the employer. Id. This burden of proof honors the employer's statutory right to choose the injured employee's medical care under Iowa Code section 85.27(4), yet provides the employee with reimbursement for unauthorized medical care when he or she can show by a preponderance of the evidence that the care was reasonable and beneficial. Id.

There is no evidence in this case that defendant abandoned claimant's medical care at the time Dr. Gordon discharged him on December 10, 2019. Specifically, there is no evidence that claimant requested additional medical care after that date, and had his request denied. As such, it is necessary to determine whether the unauthorized care claimant received was "reasonable and beneficial" under the circumstances. In reviewing the medical records, none of the unauthorized physicians who saw claimant related to the March 26, 2017 injuries provided any treatment that provided a more favorable outcome than the care that was authorized by the employer. As such, claimant has not met his burden to prove that he is entitled to reimbursement for the unauthorized medical care he received from Dr. Mohan, Dr. Knudson, or Dr. Bekavac.

As the issues of payment of claimant's IME expenses and taxation of costs are applicable to multiple files in this consolidated proceeding, those issues will be addressed in a separate section.

**File No. 5066146; DOI: July 23, 2017**

This file involves an injury to claimant's right knee that occurred when he was descending a ladder. (Tr., pp. 36-37) Claimant argues that this injury, as well as his July 29, 2017 injury, caused a permanent aggravation of his prior right knee condition. After this injury occurred, claimant reported to the Tyson nurse 2 days later, who noted full range of motion and no swelling. (Jt. Ex. 5, p. 47) Claimant declined a cold pack and felt he would be okay. There are no records of additional treatment related specifically to this injury. While the incident is not denied, claimant has not met his burden to prove that he sustained any permanent injury to his right knee as a result of the July 23, 2017 injury. As such, claimant shall take nothing with respect to this file.

**File No. 5066169; DOI: July 29, 2017**

This file involves an injury to claimant's bilateral lower extremities that occurred when claimant fell into an overflowing blood pit. Claimant argues that this injury caused

a permanent aggravation of claimant's right knee condition, and a permanent injury to his left knee. He again relies on Dr. Mathew's opinions. Defendant asserts that claimant has not sustained permanent impairment to his bilateral knees, based on the opinions of Dr. Delbridge and Dr. Gorsche.

First, with respect to claimant's left knee, claimant has not met his burden to prove that an actual injury occurred. While defendant has stipulated to bilateral lower extremity injuries occurring on July 29, 2017, the injury to claimant's left lower extremity for which defendant provided treatment was to claimant's left shin, not his left knee. Dr. Gordon placed claimant at MMI for the left shin injury on September 5, 2017, as it had healed. (Jt. Ex. 3, p. 33) There are no medical records in evidence in which claimant mentions left knee pain, with the exception of Dr. Mathew's IME report. Claimant did not report left knee pain after the July 29, 2017 incident to Dr. Gordon or Dr. Gorsche, and it is also not mentioned in Dr. Delbridge's IME report. Additionally, he did not tell Dr. Knudson about any issues or pain in his left knee when he saw him for a second opinion in October of 2019. (See Jt. Ex. 9) Dr. Knudson, on examination, found claimant had reasonable range of motion in the left lower extremity, and no significant instability, tenderness, crepitation, or other problems. (Jt. Ex. 9, p. 56)

Claimant testified at both his deposition and at hearing that his left leg is shorter than his right leg, and he believes that is a result of overcompensating for his right knee following the 2017 injury. (Tr., pp. 55-56; Def. Ex. A, p. 9; Dep. Tr., pp. 34-35) However, there is no medical evidence in the record that supports this testimony. Dr. Mathew is the only physician who provided an impairment rating related to claimant's left knee. However, Dr. Mathew's record also states that claimant had an injection in the left knee, which is incorrect. (Cl. Ex. 2, p. 13) I have found that overall Dr. Mathew's opinions are not credible when compared to the other evidence in the record. As such, claimant has not carried his burden to prove he sustained any injury to the left lower extremity that resulted in permanent impairment.

Under the Iowa Workers' Compensation Act, permanent partial disability is compensated either for a loss or loss of use of a scheduled member under Iowa Code section 85.34(2)(a)-(u) or as an unscheduled injury pursuant to the provisions of section 85.34(2)(v). The extent of scheduled member disability benefits to which an injured worker is entitled is determined by using the functional method. Functional disability is "limited to the loss of the physiological capacity of the body or body part." Mortimer v. Fruehauf Corp., 502 N.W.2d 12, 15 (Iowa 1993); Sherman v. Pella Corp., 576 N.W.2d 312 (Iowa 1998).

Iowa Code section 85.34(x) states:

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

Iowa Code section 85.34 (x).

This agency has adopted The Guides to the Evaluation of Permanent Impairment, Fifth Edition, published by the American Medical Association for determining the extent of loss or percentage of impairment for permanent partial disabilities. See 876 IAC 2.4.

With respect to the right lower extremity, both Dr. Delbridge and Dr. Gorsche have opined that claimant's 2017 injury to his right knee did not result in additional permanent functional impairment. Again, Dr. Mathew is the only physician who provided an impairment rating for the right knee. I did not find Dr. Mathew's opinion to be convincing. As such, claimant has not met his burden to prove that he has sustained additional permanent disability with respect to his right knee.

**File No. 20700618.01; DOI: April 25, 2020**

This file involves an alleged aggravation of claimant's back condition when he tripped on a curb while waiting for his COVID-19 testing to be completed. Claimant provided no testimony regarding this alleged injury. He sought medical treatment on his own with his primary care provider, Dr. Luke. When he first saw Dr. Luke, he said his chronic back pain was aggravated by standing and walking for long periods, and that he did a lot of standing over the weekend while waiting for his COVID test. When he next saw Dr. Luke about a week later, he noted his back pain had improved, and also stated that it had been aggravated by a fall that occurred on April 25, 2020.

Given that claimant provided no testimony regarding this alleged date of injury, and provided conflicting statements to Dr. Luke regarding same, I find that claimant has not met his burden to prove an injury occurred on April 25, 2020 when he tripped on a curb. While it is certainly possible that claimant tripped on a curb and aggravated his low back pain, a possibility is not sufficient; a probability is necessary. Sanchez v. Blue Bird Midwest, 554 N.W.2d 283, 285 (Iowa Ct. App. 1996) (citing Holmes v. Bruce Motor Freight, Inc., 215 N.W.2d 296, 297 (Iowa 1974). As claimant has not met his burden of proof, he will take nothing from this file. The issue of reimbursement for Dr. Luke's medical expenses is moot.

**Payment of Claimant's IME and Taxation of Costs**

The Iowa Workers' Compensation Commissioner has noted that the Iowa Supreme Court adopted a strict and literal interpretation of Iowa Code section 85.39 in Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839 (Iowa 2015) (hereinafter "DART"). See Cortez v. Tyson Fresh Meats. Inc., File No. 5044716 (Appeal December 2015). If an injured worker wants to be reimbursed for the expenses

associated with a disability evaluation by a physician selected by the worker, the process established by the legislature must be followed. This process permits the employer, who must pay the benefits, to make the initial arrangements for the evaluation and only allows the employee to obtain an independent evaluation at the employer's expense if dissatisfied with the evaluation arranged by the employer. DART, 867 N.W.2d at 847 (citing Iowa Code § 85.39).

Claimant asserts he is entitled to reimbursement for the full cost of Dr. Delbridge's IME pursuant to Iowa Code section 85.39. Defendant argues that claimant is only entitled to one-third of that cost, as only one of claimant's three injuries had been rated by a physician of defendant's choosing at the time that Dr. Delbridge issued his IME report.

Defendant overlooks that on July 25, 2017, Dr. Gordon stated claimant had no permanent restrictions "or permanent impairment" related to his left shoulder and low back injuries that occurred on March 26, 2017. (Jt. Ex. 3, p. 27) This was an evaluation of permanent disability made by a physician of the employer's choosing. As defendant acknowledges, on October 10, 2017, Dr. Gorsche provided a zero percent impairment rating related to claimant's July 29, 2017 right knee injury. Dr. Delbridge's examination took place on June 17, 2019, and his report is dated July 15, 2019. As claimant's permanent disability had been evaluated by physicians of claimant's choosing prior to Dr. Delbridge's evaluation, claimant is entitled to reimbursement for the full amount of Dr. Delbridge's IME, $1,850.00.

Claimant also seeks reimbursement of Dr. Mathew's IME and supplemental report under section 85.39. However, the Supreme Court has held that a claimant is entitled to reimbursement for only one IME under section 85.39. Larson Mfg. Co., Inc. v. Thorson, 763 N.W.2d 843, 861 (Iowa 2009).

That being said, the Supreme Court in DART noted that in cases where Iowa Code section 85.39 is not triggered to allow for reimbursement of an IME, a claimant can still be reimbursed at hearing for the costs associated with the preparation of the written report as a cost under rule 876 IAC 4.33. DART, 867 N.W.2d at 846-847. Assessment of costs is a discretionary function of this agency. Iowa Code § 86.40. Costs are to be assessed at the discretion of the deputy commissioner or workers' compensation commissioner hearing the case. 876 IAC 4.33. Given that I did not find Dr. Mathew's IME to be convincing or helpful in reaching my decisions, I decline to award the expense of his reports as a cost.

Turning to the remainder of claimant's requested costs, claimant has requested reimbursement for the cost of the deposition transcript in the amount of $128.80. The deposition was used as defendant's exhibit A, and I found it helpful in reaching my decisions. As such I use my discretion and award claimant the cost of the deposition transcript. Claimant has also requested reimbursement for filing fees in each of the four files. Claimant was only successful in one file, number 5064970. As such I award

claimant the cost of the filing fee for that file, in the amount of $100.00. I decline to award the remainder of the filing fees for each additional file.

## ORDER

THEREFORE, IT IS ORDERED:

**File No. 5064970; DOI: March 26, 2017**

Defendant shall pay claimant one hundred (100) weeks of permanent partial disability benefits, commencing March 26, 2017, at the stipulated rate of six hundred nineteen and 49/100 dollars ($619.49).

Defendant shall pay accrued weekly benefits in a lump sum together with interest at the rate of ten percent for all weekly benefits payable and not paid when due which accrued before July 1, 2017, and all interest on past due weekly compensation benefits accruing on or after July 1, 2017, shall be payable at an annual rate equal to the one-year treasury constant maturity published by the federal reserve in the most recent H15 report settled as of the date of injury, plus two percent. See Gamble v. AG Leader Technology File No. 5054686 (App. Apr. 24, 2018)

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

Defendant shall reimburse claimant in the amount of one thousand eight hundred fifty and 00/100 dollars ($1,850.00) for payment of Dr. Delbridge's IME report, pursuant to Iowa Code section 85.39.

Defendant shall reimburse claimant's costs in the amount of two hundred twenty-eight and 80/100 dollars ($228.80), representing the cost of the deposition transcript and claimant's filing fee.

**File No. 5066146; DOI: July 23, 2017**

Claimant shall take nothing with respect to this file.

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

**File No. 5066169; DOI: July 29, 2017**

Claimant shall take nothing with respect to this file.

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

**File No. 20700618.01; DOI: April 25, 2020**

Claimant shall take nothing with respect to this file.

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

Signed and filed this 4th day of February, 2022.

JESSICA L. CLEEREMAN
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Benjamin Roth (via WCES)

Jason Wiltfang (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.