BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

DAVIN RICHARD NORSTRUD,	FILED	
Claimant,	MAY 30 2019	File No. 5061935
vs.	WORKERS COMPENSATION	ARBITRATION
SNAP-ON LOGISTICS CO. a/k/a SNAP-ON TOOLS CORP.,		DECISION
Employer, Self-Insured, Defendant.		Head Note Nos.: 1402.30, 1403.30, 1802 1803, 2209

On April 5, 2018, the claimant, Davin Norstrud, filed a petition in arbitration against the defendant, Snap-On Tools, Inc. ("Snap-On"), alleging he sustained a cumulative injury to his shoulders and neck while working for Snap-On on or about March 3, 2017. Snap-On filed an answer on April 25, 2018, denying Norstrud sustained a work injury. Norstrud later filed a motion to amend petition, alleging he sustained a cumulative injury to his left shoulder only on March 3, 2017.

An arbitration hearing was held on February 27, 2019, at the Division of Workers' Compensation, in Des Moines, Iowa. Attorney Mark Soldat represented Norstrud. Norstrud appeared and testified. Attorney Joseph Quinn represented Snap-On. Damon O'Neall appeared and testified on behalf of Snap-On. Joint Exhibit 1 ("JE 1"), and Exhibits 1 through 3, and A through M were admitted into the record. After the hearing concluded Joseph Quinn filed an application to withdraw as counsel for Snap-On and Joni Ploeger filed an appearance on behalf of Snap-On. The record was held open through April 10, 2019, for the receipt of post-hearing briefs. The briefs were received and the record was closed.

Before the hearing the parties prepared a hearing report, listing stipulations and issues to be decided. Snap-On raised the affirmative defense of untimely claim under Iowa Code section 85.26, and waived all other affirmative defenses.

STIPULATIONS

1. An employer-employee relationship existed between Norstrud and Snap-On at the time of the alleged injury.

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

3. If Snap-On is liable for the alleged injury, Norstrud is entitled to temporary total disability or healing period benefits from January 5, 2018 through March 6, 2018.

4. Although entitlement to temporary benefits cannot be stipulated, Norstrud was off work from January 5, 2018 through March 6, 2018.

5. At the time of the alleged injury Norstrud's gross earnings were $961.12 per week, he was single and entitled to one exemption, and the parties believe the weekly rate is $571.34.

6. Snap-On is entitled to a credit of $18,641.87 for medical expenses paid by Aetna.

7. Costs have been paid.

ISSUES

1. Did Norstrud sustain an injury which arose out of and in the course of his employment with Snap-On?

2. Is Norstrud's claim timely under Iowa Code section 85.26?

3. What is the manifestation date or discovery date?

4. Is the alleged injury a cause of permanent disability?

5. Is the disability a scheduled member disability to the shoulder or an industrial disability?

6. What is the extent of disability?

7. What is the commencement date for permanency?

8. Is Norstrud entitled to temporary total disability or healing period benefits from January 5, 2018 through March 6, 2018?

9. As of February 27, 2019, does Snap-On owe Norstrud healing period benefits in the amount of $2,722.11 per the attached credit interest computation, Exhibit 3?

10. As of February 27, 2019, does Snap-On owe Norstrud permanent partial disability benefits in the amount of $27,998.28, with interest at the rate of 2.98 percent?

11. Is Norstrud entitled to payment of medical expenses?

12. Is Norstrud entitled to recover the cost of the independent medical examination?

13. Should costs be assessed against either party?

FINDINGS OF FACT

Norstrud is married and lives with his wife in Britt, Iowa. (Exhibits 2, page 31; K, pp. 6-7) Norstrud and his wife married in October 2017, after the alleged work injury. (Ex. K, pp. 7-8) Norstrud is right-hand dominant. (Transcript, p. 15) At the time of the hearing Norstrud was fifty-eight. (Tr., p. 19)

Norstrud attended school through the tenth grade. (Ex. 2, p. 32) After leaving high school Norstrud worked in home construction, framing homes and pouring concrete, in meat packing, and for a plumbing company. (Exs. 2, p. 33; K, pp. 10-11)

On September 10, 1979, Snap-On hired Norstrud to work in its Algona plant. (Ex. 2, pp. 1, 33; Tr., pp. 20-22) Snap-On manufactures tool storage boxes at the Algona plant. (Tr., p. 21) Norstrud has not worked for any other employer since 1979. (Ex. K, p. 11)

In December 1984, while working for Snap-On Norstrud earned a G.E.D. (Ex. 2, p. 32) The next year Norstrud enrolled in two basic computer classes. (Ex. 2, p. 32) Norstrud has not received any additional education.

During his employment with Snap-On Norstrud primarily worked in the paint department. (Tr., p. 22) Norstrud worked as a painter helper from 1979 through 1986. (Ex. 2, p. 2; Tr., p. 22) At that time parts were painted through a liquid immersion process on a paint line. (Tr., p. 23) Norstrud would hang and take off drawers for the tool boxes from the line. (Tr., p. 23) Norstrud relayed he worked overhead while hanging and removing the parts from hooks on the line. (Tr., pp. 23-24)

While Norstrud has predominantly worked as a painter helper, due to workload production issues he has worked in other positions. From 1986 through 1991, Norstrud transferred back and forth from painter helper to strip tank operator, metal box assembler, and press brakes. (Ex. 2, pp. 3-16) Norstrud testified the strip tank operator and metal box assembler positions did not require him to perform any overhead work with his upper extremities. (Tr., p. 24)

In late 1991 Snap-On placed Norstrud on layoff for a period of time, and he returned to work in press brakes in 1992. (Ex. 2, pp. 17-19) Norstrud was again subject to layoff and Snap-On recalled Norstrud from press brakes in 1993. (Ex. 2, pp. 19) In 1993, Norstrud transferred from press brakes to fork truck operator. (Ex. 2, p. 20) In 1994, Norstrud transferred from fork truck operator to spot welder, and in 1995 he transferred to drawer cell operator, and back to fork truck operator. (Ex. 2, pp. 21-22) In 1996, Norstrud transferred to spot welder, and back to fork truck operator. (Ex. 2, pp. 23, 26) From 1999 through 2008 Norstrud worked as a fork truck operator,

painter helper, form and weld operator, punch press operator, utility operator, and assembler. (Ex. 2, pp. 24-26) In 2009 Norstrud returned to painter helper, and he continued to work as a painter helper at the time of the hearing. (Ex. 2, p. 24)

During his employment with Snap-On Norstrud complained of work-related left shoulder pain or problems on several occasions. On March 28, 1988, Norstrud reported a work injury to Snap-On that he developed left shoulder pain while hanging drawers on paint hooks on March 9, 1988. (Ex. 2, pp. 10, 35) Norstrud received treatment from Burt Boltjen, M.D., and Mark Davis, P.A. (Ex. 2, pp. 10, 35) Norstrud's personnel records note he was diagnosed by Davis with mild left shoulder overuse syndrome. (Ex. 2, p. 10) In his answers to interrogatories, Norstrud relayed he experienced "a cumulative trauma injury to the left shoulder from the repetitious hanging of drawers on paint hooks." (Ex. 2, p. 35) At hearing Norstrud agreed with his counsel that he was "[c]ompletely better" after he received treatment from Davis. (Tr., p. 26)

Norstrud testified when he worked on the line hanging and removing parts his shoulders would hurt while he was working, but he would not have shoulder pain when he was off on the weekend. (Tr., p. 27) Norstrud reported that he also experienced left shoulder pain while working in press brakes, where he formed the parts by using a brake press that bent the steel. (Tr., p. 27) Norstrud testified some of the parts he worked on were higher overhead than the parts on the paint line. (Tr., p. 28)

On March 9, 1991, Snap-On documented Norstrud complained to Snap-On he experienced left shoulder pain while taking drawers off the line. (Ex. 2, p. 9) Norstrud testified at that time he was working on press brakes. (Tr., p. 29) On May 28, 1991, Snap-On documented Norstrud reported left shoulder pain when he was latching a basket on a cart. (Ex. 2, p. 20) Norstrud complained of continued left shoulder pain on June 2, 1991. (Ex. 2, p. 20)

Norstrud testified after he left press brakes he primarily worked as a fork truck operator through January 1999. (Tr., p. 29) Norstrud relayed he was not performing any overhead work and he did not have any problems with his left shoulder during that period of time. (Tr., pp. 29-30)

At some point Snap-On switched from immersion paint to powder coat paint. (Tr., p. 31) Norstrud reported he worked downstairs and upstairs as a painter helper. (Tr., pp. 31-32) At first he rotated with two other employees where he was assigned downstairs for a week at a time, until he was assigned primarily to the downstairs position. (Tr., p. 32) Snap-On collected the waste paint powder in a collector downstairs. (Tr., p. 32) Norstrud also took care of the wash system, waste treat, changed the filters, loaded and unloaded trucks, and put away chemicals. (Tr., p. 33) When he worked downstairs Norstrud did not hang or remove parts from the paint line. (Tr., p. 33) When working upstairs Norstrud would hang and remove parts from the paint line.

In his answers to interrogatories Norstrud reported he sustained a strain injury to his left shoulder while helping painters move a collector on June 16, 2003. (Ex. 2, p. 36) On June 23, 2003, Norstrud completed an employee report of injury form, stating he was injured while "helping painters move collector." (Ex. 2, p. 27)

On June 23, 2003, Norstrud attended an appointment with Stephen Richards, D.O., reporting he sustained an injury on June 16, 2003. (JE 1, pp. 1-2) Dr. Richards diagnosed Norstrud with a painful shoulder/shoulder strain, and released him to return to work with one hand duty only. (JE 1, p. 3) Norstrud underwent a left shoulder x-ray, and the reviewing physician listed an impression of a probable rotator cuff injury. (JE 1, p. 1) Norstrud also attended physical therapy, and during therapy reported on June 16, 2003 he was assisting with pushing a cart at Snap-On and he felt a sharp pulling and burning sensation in his left shoulder. (JE 1, p. 2) The physical therapist documented Norstrud indicated his pain was significantly less than it was following the work injury, but noted he had a "significant loss of strength with rather continual pain through the shoulder." (JE 1, p. 2) Dr. Richards released Norstrud to return to work on July 3, 2003. (JE 1, p. 3)

In his answers to interrogatories Norstrud reported that on December 16, 2005, he sustained a pop in his sternum, following by pain in the left side of his chest, left upper extremity, and middle of his back while pulling trim onto 751 cases. (Ex. 2, p. 37) Norstrud did not receive any treatment for his condition. (Ex. 2, p. 37)

On April 3, 2012, Norstrud reported a work injury to Snap-On alleging he injured his "back, muscle upper back between back bone and shoulder blade," while "pulling 690 lb. sludge cart out from under sludge north press over uneven grading." (Ex. H, p. 43) Norstrud indicated he would seek medical attention if his condition did not improve. (Ex. H, p. 43) Norstrud testified he was working on the lower paint downstairs at that time and he was not having any problems with his left shoulder. (Tr., pp. 33-35)

Norstrud received treatment on October 1, 2014, October 22, 2014, and November 12, 2014 from a Snap-On physical therapist for bilateral shoulder pain, which was worse on the left than the right. (Tr., pp. 37-38; JE 1, p. 4) The therapist documented Norstrud reported his pain was not constant and it would come and go. (JE 1, p. 4) During an appointment on November 12, 2014, the therapist documented Norstrud reported his "shoulder pops & grinds. States he can't raise [his left] arm beyond 90 [degrees]" without increasing pain. (JE 1, p. 4) Norstrud testified he was working as a painter helper at that time, and that his condition improved after November 2014. (Tr., pp. 37-39)

On December 19, 2014, Norstrud reported a work injury to Snap-On to his left shoulder from "many years of repetitious overhead work" at Snap-On. (Ex. H, p. 44) Kathy Reddel the safety manager for Snap-On communicated with Dawn Heetland with Mercy Health, and Heetland noted that conservative treatment for Norstrud's left shoulder was appropriate. (Ex. 2, p. 28) In his answers to interrogatories Norstrud relayed he sustained "a cumulative trauma injury to [his] left shoulder from repetitious

overhead work" which manifested on October 1, 2014. (Ex. 2, p. 37) Norstrud testified he made the report because "[i]t just seemed like I kept injuring my shoulder." (Tr., p. 36)

Norstrud testified he worked as a painter helper downstairs after 2014 through 2016. (Tr., p. 39) Mrs. Norstrud testified she started dating her husband in July 2015. (Tr., p. 10) Mrs. Norstrud reported when they first started dating, Mr. Norstrud did not complain of any left shoulder pain. (Tr., pp. 10-11)

Mrs. Norstrud testified in 2016, Norstrud complained to her about back pain and she encouraged him to see her doctor. (Tr., p. 11) On March 19, 2016, Norstrud attended an appointment with Dennis Colby, D.O., a family medicine physician. (JE 1, p. 17) Norstrud complained of neck pain and tenderness in the cervical thoracic region. (JE 1, pp. 17-18)

Mrs. Norstrud attended the appointment with Dr. Colby and noted Norstrud had an actual bump on both shoulders in between his neck and the top of his shoulder, which was more pronounced on the left. (Tr., p. 12) Mrs. Norstrud testified Norstrud discussed the bump with Dr. Colby and he ordered an x-ray of Norstrud's left shoulder. (Tr., p. 12) Dr. Colby's records indicate he ordered x-rays of Norstrud's cervical spine and left shoulder. (JE 1, p. 20) The reports list impressions of cervical spine degenerative change without evidence of an acute injury, left carotid bulb calcification for the cervical spine image, and left shoulder joint degenerative change without evidence of an acute injury for the left shoulder image. (JE 1, p. 20) Dr. Colby assessed Norstrud with cervical spine degeneration and cervical spine somatic dysfunction and performed an osteopathic manipulation. (JE 1, p. 19) In his answers to interrogatories Norstrud reported he sustained "a cumulative trauma injury to [his] neck and left shoulder for a period of time up to 3/18/16." (Ex. 2, p. 37)

Mrs. Norstrud testified that when they were dating, Norstrud showed her how to do squats with a long bar on one occasion. (Tr., p. 16) At that time Norstrud worked out and lifted weights a couple times per week. (Tr., p. 17)

In June 2016, Norstrud and his future wife went on a trip to California. (Tr., p. 14) Mrs. Norstrud testified after they returned from vacation, Norstrud's complaints of left shoulder pain increased and she encouraged him to return to Dr. Colby. (Tr., p. 14) On cross-examination Mrs. Norstrud agreed Norstrud also complained about his right shoulder occasionally. (Tr., p. 15) Mrs. Norstrud reported after they returned from California Norstrud stopped lifting weights, and he has not lifted weights since that time. (Tr., pp. 17-18) Norstrud testified he stopped lifting weights after the California trip because of his shoulder pain. (Tr., pp. 59-60)

Norstrud testified after his trip to California Snap-On assigned him to rotate between downstairs and upstairs. (Tr., p. 40) Norstrud relayed after he started working upstairs again where he was hanging and removing parts off the line he started having problems. (Tr., pp. 40-41) Norstrud reported that after he returned from his trip his left

shoulder was hurting all the time, but improved during periods when he worked downstairs at Snap-On. (Tr., p. 49)

On November 7, 2016, Norstrud reported to Kathy Reddel, the safety manager for Snap-On, that he had "'bumps' on top of his shoulders and swelling on his right clavicle due to repetitive over shoulder work over the last 25 years." (JE 1, p. 5) Norstrud relayed he was seen by a doctor for pain twenty-five years ago, he had no specific injury or incident that caused his condition, and relayed his condition had become worse over time. (JE 1, p. 5)

On May 16, 2017, Charles Mooney, M.D., conducted an independent medical examination of Norstrud for Snap-On regarding his bilateral shoulder pain. (JE 1, p. 26) Dr. Mooney reviewed Norstrud's medical records and examined him. (JE 1, p. 26) Dr. Mooney ordered a left shoulder x-ray. (JE 1, p. 28) The reviewing radiologist listed an impression of mild degenerative changes in the acromioclavicular joint. (JE 1, p. 29) Dr. Mooney assessed Norstrud with symptoms of bilateral shoulder impingement with mildly positive testing, and documented, "[i]t is my opinion that this is predominantly a personal medical condition based on shoulder anatomy rather than any specific relationship to his work activities as described." (JE 1, p. 27) Dr. Mooney requested a job analysis to provide a more formal opinion on causation, and recommended home exercises, but no other intervention, and released Norstrud to full duty without restrictions. (JE 1, pp. 27, 29)

John Kruzich, M.S., performed an on-site job analysis for Norstrud of the painter helper, lower paint position at Snap-On on August 23, 2017. (JE 1, p. 31; Ex. B, p. 20) Kruzich opined based on his job site evaluation "the causation of a pathological disorder about the bilateral shoulder regions due to the performance of the Painter Helper, Lower Paint position is biomechanically/medically implausible." (JE 1, p. 32; Ex. B, p. 22)

On September 27, 2017, Dr. Mooney documented he had reviewed a job analysis performed by Kruzich, and opined:

> [u]pon review of the job analysis, it is evident that the work performed during the course of Mr. Norstrud's duties for Snap-On Corporation in Algona, Iowa as a painter helper, lower paint position, is not either a causal factor, or a specific aggravator. This is supported by the AMA Guides to the Evaluation of Disease and Injury Causation related to shoulder tendinopathy and impingement.
>
> It remains my opinion that Mr. Norstrud's complaints of shoulder pain are an intrinsic and personal medical condition and unrelated to his work activities at Snap-On Corporation.

(JE 1, p. 30)

On October 5, 2017, the third party administrator for Snap-On sent Norstrud a letter informing him Snap-On was denying his claim because Dr. Mooney had opined his shoulder pain "is an intrinsic and personal medical condition and unrelated" to his work activities at Snap-On. (JE 1, p. 14) Norstrud testified that after he received the denial, Snap-On did not rotate his assignments and he was assigned only to work upstairs. (Tr., p. 47)

On November 14, 2017, Norstrud attended an appointment with Jason Hough, D.O., complaining of left shoulder pain with clicking and stiffness, exacerbated by motion of the shoulder. (JE 1, p. 34) Norstrud reported his left shoulder had been bothering him for more than ten years. (JE 1, p. 34) Dr. Hough examined Norstrud and reviewed his x-rays. (JE 1, p. 34) Dr. Hough assessed Norstrud with left shoulder impingement and scheduled left shoulder magnetic resonance imaging. (JE 1, p. 34)

Norstrud underwent left shoulder magnetic resonance imaging on November 17, 2017. (JE 1, p. 45) The reviewing radiologist listed an impression of:

1. Tendinosis and longitudinal split tears are present involving the long head of the biceps tendon. This results in fragmented appearance. This is seen at the level of the anterior humeral sulcus and along it's [*sic*] intra-articular course.

2. [S]ubchondral cystic change as well as spur formation at the level of the lesser tuberosity.

3. Intact supraspinatus and infraspinatus tendons.

4. Moderate hypertrophic change at the AC joint.

5. Intact glenoid labrum.

(JE 1, p. 45)

Norstrud returned to Dr. Hough on December 1, 2017. (JE 1, p. 35) Dr. Hough noted Norstrud's left shoulder magnetic resonance imaging demonstrates "what appears to be this clavicle arthropathy with downgoing spur along the distal clavicle and the medial aspect of the acromion. Also demonstrates some cystic changes within the anterior portion of the humeral head near the bicipital groove. Does have some fraying of the biceps." (JE 1, p. 35) Dr. Hough assessed Norstrud with left shoulder impingement and recommended a left shoulder arthroscopy with subacromial decompression distal clavicle excision and biceps tenodesis. (JE 1, p. 35)

On January 5, 2018, Norstrud underwent a left shoulder arthroscopy, subacromial decompression, distal clavicle excision, biceps tendon debridement, and rotator cuff debridement with Dr. Hough. (JE 1, p. 52) Dr. Hough listed a postoperative diagnosis of left shoulder impingement syndrome with distal clavicle overgrowth and biceps tendinitis, with partial thickness rotator cuff tear. (JE 1, p. 52)

On January 17, 2018, Norstrud attended a follow-up appointment with Jennifer Krieg, P.A.-C, with Dr. Hough's office. (JE 1, p. 36) Norstrud complained the superior aspect of his left shoulder was tender over the area where the distal clavicle excision was done. (JE 1, p. 36) Krieg ordered physical therapy, continued use of a sling, as needed, and restricted Norstrud from working for three weeks until his appointment with Dr. Hough. (JE 1, p. 36)

Norstrud attended physical therapy on January 29, 2018 and February 1, 2018. (JE 1, pp. 46-50) Norstrud did not attend an appointment scheduled for February 6, 2018, and he was later discharged from physical therapy after attending two visits. (JE 1, p. 50)

Norstrud returned to Dr. Hough on February 7, 2018. (JE 1, p. 38) Dr. Hough documented Norstrud reported he was doing quite well, but complained of some achiness. (JE 1, p. 38) Dr. Hough recommended Norstrud return to part-time work for two weeks on March 7, 2018. (JE 1, p. 38) Norstrud testified his recuperation from surgery "was good," but his shoulder has never returned to 100 percent. (Tr., pp. 48-49) Norstrud testified that when he returned to work Snap-On placed him downstairs in the lower paint area. (Tr., p. 63)

On April 7 and April 10, 2018, Norstrud attended appointments with Scott Wood, D.C., complaining of neck pain. (JE 1, pp. 56-57)

During an appointment with Dr. Colby on June 25, 2018, Norstrud complained of right hip and neck pain. (JE 1, pp. 23-25) Dr. Colby ordered an x-ray of Norstrud's right hip and the report lists an impression of an unremarkable right hip. (JE 1, p. 24) Dr. Colby also ordered a cervical spine x-ray and the report lists an impression of mild to moderate cervical spine degeneration changes. (JE 1, p. 24)

On July 13, 2018, Norstrud's attorney sent a letter to Dr. Hough enclosing records and requesting Dr. Hough's opinions. (JE 1, pp. 38-41) Dr. Hough responded on August 21, 2018, as follows:

> [i]n regards to your question, to a reasonable degree of medical certainty, is it or is it not probable that over a period of time the left shoulder condition you treated arose out of Mr. Norstrud's work activity and employment of Snap-On over a period of time, I would say with a high degree of medical probability that the patient's cumulative effect of his job and repetitive type work did cause his work-related injury to his left shoulder. In response to Item B, my rationale for this due to the impingement type setup within his shoulder, the repetitive type motion and weightbearing through the arm would cause repetitive microstructure damage to the rotator cuff, causing the partial-thickness tear. In regards to Item C, with a high degree of medical probability, Mr. Norstrud did sustain permanent impairment. In regards to Question D, the patient did reach maximum medical improvement on July 05, 2018. I would give the

> patient a permanent impairment rating of 3% upper extremity rating for his impingement-type syndrome, another 3% upper extremity rating for his rotator cuff, for a total of a 6% upper extremity rating, which would translate into a 4% whole-person rating as per the Fifth Edition. In regards to Item F, the charges from Spencer Hospital Therapy and myself were reasonable and necessary.

(JE 1, p. 42)

On August 16, 2018, Norstrud responded to interrogatories propounded by Snap-On. (Ex. I) Interrogatory Number 18 asked, and he responded:

> Interrogatory No. 18: State in Claimant's own words, in a narrative fashion, exactly how this injury occurred.
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> **ANSWER TO INTERROGATORY NO. 18:**
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> In 1988 I was hanging drawers on the paint line when I first noted pain in my shoulder. The pain has resurfaced off and on over the years with the repetitious overhead work, *i.e.*, hanging drawers and cases overhead, as well as forming bottoms and panels on the brake line and forming parts overhead in the brake press department for approximately 4 years. The pain recently started bothering me more than ever when I was placed back on the paint line.

(Ex. I, p. 49)

Norstrud testified Snap-On had a night shift worker who worked downstairs in the lower paint area. (Tr., p. 63) At some point the position was discontinued and Norstrud agreed with his attorney that the work downstairs became more vigorous. (Tr., p. 64) In December 2018, Norstrud filed another report of injury alleging he hurt his shoulder when hanging parts. (Tr., p. 64) Norstrud reported he was concerned about reinjuring his shoulder and he decided to retire. (Tr., pp. 64-65) Norstrud relayed he was retiring four years earlier than he planned to. (Tr., p. 65)

John Kuhnlein, D.O., an occupational medicine physician, conducted an independent medical examination of Norstrud for Snap-On, on January 3, 2019, and issued his report on January 28, 2019. (Ex. A) Dr. Kuhnlein reviewed Norstrud's medical records and examined him. (Ex. A) Dr. Kuhnlein noted Kruzich performed a job analysis, but he only looked at the lower paint position, rather than the upper paint position Norstrud believed caused his injury, and thus, he believed Dr. Mooney's opinion was suspect. (Ex. A, p. 11) Dr. Kuhnlein further opined:

> [i]f other information becomes available, I would be happy to review it, but at this time, I have no reason to disbelieve what Mr. Norstrud tells me about his job. If the painter helper job is as described by Mr. Norstrud, it appears that he was exposed to shoulder stressors on a long-term basis

> while performing the job, so the left shoulder condition would be related to his work for Snap-On Tools. Based on what he says, his left shoulder condition including the impingement syndrome produced by the arthritic conditions and partial rotator cuff wear would be related to his work for Snap-On Tools on a cumulative basis.
>
> It does appear that Mr. Norstrud was aware of the cumulative work-relatedness of his left shoulder condition to his work for Snap-On Tools as far back as 1988, based on the April 4, 1988, First Report of Injury describing problems in the left shoulder possibly as a result of repeated overhead work, and a December 19, 2014, report of injury describing left shoulder pain from "many years of repetitious overhead work." There was no specific injury to his left shoulder on or about March 3, 2017.

(Ex. A, p. 11) Dr. Kuhnlein diagnosed Norstrud with left shoulder impingement syndrome with a January 5, 2018 arthroscopic subacromial decompression, distal clavicle excision, biceps tendon debridement, and rotator cuff debridement, and opined he reached maximum medical improvement on or about July 5, 2018, six months after surgery. (Ex. A, p. 12)

Using the Guides to the Evaluation of Permanent Impairment (AMA Press, 5th Ed. 2001) ("AMA Guides"), Dr. Kuhnlein opined:

> [i]n this case, Mr. Norstrud has injuries to both shoulders. As a result, the impairment rating would be based solely on the left shoulder measurements, as the other shoulder cannot be used as a control. Turning to Figures 16-40, 16-43 and 16-46, there is a total of 8% left upper extremity impairment for deficits in range of motion. Turning to Table 16-35, page 510, there is 1% left upper extremity impairment for the motor deficits. With respect to the distal clavicle excision, and turning to Table 16-27, Page 506, an initial 10% left upper extremity impairment would be assigned. However, this value must be multiplied by the modifier from Table 16-18, Page 499, if one reads the instructions on Page 498. When these values are multiplied together (10%x25%) and rounded according to the instructions on page 20, this is a 3% left upper extremity impairment for the distal clavicle excision.
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> Turning to the Combined Values Chart on page 604, when these values are combined (8% x3% x1%) this is a 12% left upper extremity impairment. Turning to Table 16-3, page 439, this would convert to a 7% whole person impairment.

(Ex. A, p. 12) Dr. Kuhnlein recommended Norstrud work on range of motion and strengthening exercises for his left shoulder, and use of over-the counter anti-inflammatory medication when necessary, but recommended no additional formal medical care. (Ex. A, p. 12) Dr. Kuhnlein recommended material handling restrictions,

including lifting fifty pounds occasionally from floor to waist, lifting sixty pounds occasionally from waist to shoulder, and lifting thirty pounds occasionally over the shoulder, and recommended nonmaterial handling restrictions of working at or above shoulder height occasionally. (Ex. A, p. 13) Dr. Kuhnlein also offered opinions concerning Norstrud's right shoulder and cervical spine. Norstrud did not allege he has sustained temporary or permanent impairments to his right shoulder and cervical spine at hearing.

On January 9, 2019, Mark Kirkland, D.O., conducted an independent medical examination for Norstrud, and issued his report on January 16, 2019. (Ex. 1) Dr. Kirkland reviewed Norstrud's medical records and examined him. (Ex. 1) Dr. Kirkland noted that approximately fifty years ago Norstrud fractured his left clavicle when he fell down some steps. (Ex. 1, p. 7) Norstrud reported early on in his career with Snap-On he experienced pain in his left shoulder, but the pain would improve. (Ex. 1, p. 7) With respect to causation, Dr. Kirkland opined:

> [i]t is my opinion, within a reasonable degree of medical certainty, that Mr. Norstrud had distinct separate periods of cumulative trauma which arose out of Snap-On work activity during 1988, 2014, 2016, and 2017. Prior to 2014, Mr. Norstrud had episodes of pain in his left shoulder. However, his pain would improve and he was essentially asymptomatic. One of the reasons why he started getting continuous pain in his left shoulder is that he was forced to go up to do the paint line activities again. This job position probably is the pain generator in regard to his left and sometimes right shoulder. Again, Davin started having consistent and continuous pain from his work duties starting in 2016. This continued pain brought Davin to the operating room on January 5, 2018.

(Ex. 1, p. 12)

When questioned whether it is or not probable that the June 16, 2003 injury and the injury reported on April 3, 2012 arouse out of specific incidents of trauma and not from a period of cumulative trauma, Dr. Kirkland further opined:

> [i]t is my opinion that the June 16, 2003 injury and the injury reported on April 3, 2012 arose out of specific incidents of trauma, and not a period of cumulative trauma. The injury that occurred on or about June 16, 2003 was caused by Davin helping painters move a collector. This would be a specific incident of trauma. The injury reported on April 3, 2012 was caused by Davin pulling a sludge cart out from under a sludge press over uneven grating. This would also be a specific incident of trauma and not from a period of cumulative trauma.

(Ex. 1, p. 12) Dr. Kirkland further opined any shoulder condition preexisting 2016 through 2017 "was aggravated, accelerated, lighted up, and was worsened by Dr. [*sic*] Norstrud's work at Snap-On" noting Norstrud experienced pain in his shoulder every

time he worked in the upper paint room, and that prior to 2016 and 2017 the pain would wax and wane and did not become continuous until 2016 to 2017. (Ex. 1, p. 13) Dr. Kirkland did not identify what medical records or information supported his finding of a cumulative trauma in 2017.

Dr. Kirkland disagreed with Dr. Mooney's opinion that Norstrud's shoulder problems are not the result of his work activities and are a predominantly personal medical condition, noting the work Norstrud performed in the lower paint position was relatively easier than the work in the upper paint position where he had to hang drawers and boxes and work above shoulder level. (Ex. 1, p. 14)

Using the AMA Guides, Dr. Kirkland opined:

> Davin has a 3% impairment to his left upper extremity secondary to lack of shoulder flexion, a 1% impairment secondary to lack of extension, a 2% impairment secondary to loss of abduction, and a 4% impairment secondary to a loss of internal rotation. This gives Davin a 10% impairment to his left upper extremity secondary to decreased range of motion. These values are obtained from Figures 16-40, 16-43, and 16-46 of the [AMA Guides]. Davin also has a 10% impairment to this left upper extremity secondary to excision of his distal clavicle. This value is obtained from Table 16-27, Page 506 of the Guides. The combination of 10 and 10 gives a combined value of 19. Davin has a 19% impairment to his left upper extremity. A 19% impairment to the left upper extremity converts to 11% of the whole person. None of these rated permanent impairments are apportioned to any shoulder injuries or conditions pre-existing 2016.

(Ex. 1, p. 13) Dr. Kirkland recommended Norstrud limit significant work at shoulder level or above. (Ex. 1, p. 14)

At the time of the hearing Norstrud was working for Snap-On full-time as a painter helper. (Tr., p. 50) Norstrud acknowledged Dr. Hough had released him to return to work without restrictions. (Tr., p. 50; Ex. J, p. 14) Norstrud reported he was performing the same duties on March 3, 2017. (Tr., p. 50)

During cross-examination Norstrud testified he trained another person to work downstairs in the lower paint area in 2016. (Tr., p. 51) When questioned about the March 3, 2017 injury, Norstrud was asked and responded:

> Q. Okay. So March 3, 2017 – was there another time that they moved you back to the line and put somebody else downstairs?
> A. I don't recall.
> Q. Well, let me ask you this. I think you told Dr. Kuhnlein that you don't know why that date of injury was chosen. Do you recall that?

A. No.
Q. Okay. Do you recall anything specifically happening on March 3, 2017 that caused an injury to your shoulder?
A. Not right offhand, no.
Q. Okay. And my understanding, based on your deposition testimony, was that you were working the lower paint line back at that time. Are you – is that not correct now, based on your recollection?
A. No. I think I was – I don't recall now. I'm getting confused now.
Q. Well, let's – let's add to the confusion or maybe try to clear some of it up. . . . You had been the only person down in the lower paint line; is that correct?
A. Yes.
Q. Okay. And then they had you train somebody; correct?
A. Correct.
Q. And then they ended up taking you back up to the upper line and letting that guy do the lower line for a period of time; correct?
A. Correct.
. . . .
Q. Is he still there, do you know?
A. Yeah.
Q. And so my understanding is, today you've testified that that happened sometime in 2016 – that they put you back up to the upper paint line?
A. Correct.
Q. Now, in your deposition, you told me that somebody took the lower line from you back in 2014 or 2015. Do you recall testifying to that?
A. No.
Q. I'm on page 55 of the deposition transcript. Do you recall me asking specifically, okay, do you recall how long you were on – on – then back up on the line in that 2014, 2015 time? And you told me no.
Did something jog your memory to remind you how long you were up on that –
A. That was just an estimate with five, six months.
Q. Okay. So that – that might not be accurate?
A. Correct.
Q. Could have been shorter than that?
A. Might have been. Could have been longer.
Q. Okay. Is that – is it possible that that happened in 2014 or 2015 as opposed to 2016?
A. I don't recollect.
Q. Okay. Back on March 3, 2017, you weren't under any restrictions at that time at work; is that correct?

A. Correct.
Q. And then even after March 3, 2017, you continued to work without restrictions right up until you went off for your left shoulder surgery; is that right?
A. Correct.

(Tr., pp. 51-54)

Norstrud completed reports of injury on April 3, 2012 and December 19, 2014. (Tr., p. 54) Norstrud acknowledged on cross-examination that he knew the process or the procedure for reporting a work injury at Snap-On, when he completed the April 3, 2012 and December 19, 2014 reports of injury, yet he did not complete a report of injury for March 3, 2017. (Tr., pp. 54-55)

Norstrud worked in the lower paint area for five or six years. (Tr., p. 55) Norstrud testified he believed the upper paint line where he hung and removed parts caused his left shoulder problems. (Tr., p. 55) During the time he worked in the lower paint position Norstrud continued to work on the upper paint line to relieve his coworkers when they took breaks. (Tr., pp. 55-56) During his deposition Norstrud reported hanging drawers was the only job duty that bothered his left shoulder. (Tr., pp. 56-57) Norstrud admitted he had not worked on the upper paint line full-time apart from the time when his coworker was trained on the lower paint area downstairs, but also reported he relieved coworkers during breaks every day for approximately one hour total. (Tr., pp. 57-58)

Norstrud has not applied for any work since his alleged injury at Snap-On. (Tr., p. 62) Norstrud testified he planned to retire the Friday after the hearing. (Tr., p. 63)

CONCLUSIONS OF LAW

I. Iowa Code Section 85.26

Norstrud avers he sustained a cumulative injury to his left shoulder on March 3, 2017, while working for Snap-On. Snap-On contends Norstrud did not sustain an injury arising out of his employment with Snap-On, and if he did, his claim is barred by Iowa Code section 85.26.

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

> [I]t is within the period of employment at a place where the employee reasonably may be in performing his duties, and while he is fulfilling those duties or engaged in doing something incidental thereto. An injury in the course of employment embraces all injuries received while employed in furthering the employer's business and injuries received on the employer's premises, provided that the employee's presence must ordinarily be required at the place of the injury, or, if not so required, employee's departure from the usual place of employment must not amount to an abandonment of employment or be an act wholly foreign to his usual work. An employee does not cease to be in the course of his employment merely because he is not actually engaged in doing some specifically prescribed task, if, in the course of his employment, he does some act which he deems necessary for the benefit or interest of the employer.

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

The claimant bears the burden of proving the claimant's work-related injury is a proximate cause of the claimant's disability and need for medical care. Ayers v. D & N Fence Co., Inc., 731 N.W.2d 11, 17 (Iowa 2007); George A. Hormel & Co. v. Jordan, 569 N.W.2d 148, 153 (Iowa 1997). "In order for a cause to be proximate, it must be a 'substantial factor.'" Ayers, 731 N.W.2d at 17. A probability of causation must exist, a mere possibility of causation is insufficient. Frye v. Smith-Doyle Contractors, 569 N.W.2d 154, 156 (Iowa Ct. App. 1997). The cause does not need to be the only cause, "[i]t only needs to be one cause." Armstrong Tire & Rubber Co. v. Kubli, 312 N.W.2d 60, 64 (Iowa 1981).

The question of medical causation is "essentially within the domain of expert testimony." Cedar Rapids Cmty. Sch. Dist. v. Pease, 807 N.W.2d 839, 844-45 (Iowa 2011). The deputy commissioner, as the trier of fact, must "weigh the evidence and measure the credibility of witnesses." Id. The trier of fact may accept or reject expert testimony, even if uncontroverted, in whole or in part. Frye, 569 N.W.2d at 156. When considering the weight of an expert opinion, the fact-finder may consider whether the examination occurred shortly after the claimant was injured, the compensation arrangement, the nature and extent of the examination, the expert's education, experience, training, and practice, and "all other factors which bear upon the weight and value" of the opinion. Rockwell Graphic Sys., Inc. v. Prince, 366 N.W.2d 187, 192 (Iowa 1985).

Norstrud avers he sustained a cumulative injury to his left shoulder while working for Snap-On. A cumulative injury is an occupational disease that develops over time, resulting from cumulative trauma in the workplace. Baker v. Bridgestone/Firestone, 872 N.W.2d 672, 681 (Iowa 2015); Larson Mfg. Co., Inc. v. Thorson, 763 N.W.2d 842, 851 (Iowa 2009); McKeever Custom Cabinets v. Smith, 379 N.W.2d 368, 372-74 (Iowa 1985). "A cumulative injury is deemed to have occurred when it manifests – and 'manifestation' is that point in time when 'both the fact of the injury and the causal

relationship of the injury to the claimant's employment would have become plainly apparent to a reasonable person.'" Baker, 872 N.W.2d at 681.

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

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

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

Snap-On avers Norstrud failed to file a timely petition in arbitration within two years and his claim is barred under Iowa Code section 85.26(1). Norstrud alleges his claim is timely because he was not aware his injury was compensable until March 2017.

Under Iowa Code section 85.26(1),

> [a]n original proceeding for benefits under this chapter or chapter 85A, 85B, or 86, shall not be maintained in any contested case unless the proceeding is commenced within two years from the date of the occurrence of the injury for which benefits are claimed or, if weekly compensation benefits are paid under section 86.13, within three years from the date of the last payment of weekly compensation benefits.

Failure to timely commence an action under the limitations statute is an affirmative defense, which Snap-On must prove by a preponderance of the evidence. Pella Corp. v. Mennenga, 2008 WL 2200095 *5 (Iowa Ct. App. May 29, 2008) (employer bears the burden of proving the affirmative defense of untimely claim under Iowa Code section 85.23).

At the time of the hearing Snap-On had not paid any weekly workers' compensation benefits to Norstrud. Norstrud filed his original petition in arbitration on April 5, 2018, alleging on March 3, 2017, he sustained a cumulative injury to his shoulders, which he later amended to assert a left shoulder injury only. Norstrud reported work injuries prior to March 3, 2017. He never completed a report of injury for March 3, 2017 to Snap-On before filing the petition. There is no evidence Norstrud

sustained a traumatic injury to his left shoulder on March 3, 2017. The arguments raised by the parties require analysis using the discovery rule.

The discovery rule is applicable to workers' compensation claims. Baker, 872 N.W.2d at 680-81. Under the discovery rule, the limitations period "does not begin to run until the claimant knows or in the exercise of reasonable diligence should know 'the nature, seriousness[,] and probable compensable character' of his or her injury." Id. at 684-85. Thus, the claimant must have actual or imputed knowledge of all three elements before the statute begins to run. Swartzendruber v. Schimmel, 613 N.W.2d 646, 650-51 (Iowa 2000). The Iowa Supreme Court has held:

> [u]nder the imputed knowledge prong of the discovery rule, the statute of limitations begins when a claimant gains information sufficient to alert a reasonable person of the need to investigate. Thus, a claimant's knowledge is judged under the test of reasonableness. The need to investigate arises when a reasonable person has knowledge of the *possible* compensability of the condition. This knowledge must include all three characteristics of the condition. As of that date, the duty to investigate begins and the claimant has imputed knowledge of all the facts that would have been disclosed by a reasonable diligent investigation. Thus, a claimant has two years from that time to gather the facts and file a petition.

Id. (internal citations omitted).

The discovery rule does not require "exact knowledge of the seriousness of an injury," nor does it require an expert opinion "to establish knowledge of the characteristics of the injury," rather, the claimant has a duty to investigate when the claimant is aware of the problem. Id. at 650-51. "[I]f it is reasonably possible an injury is serious enough to be compensable as a disability, the seriousness component of the test is satisfied." Id. at 651.

On March 28, 1988, Norstrud reported to Snap-On he experienced left shoulder pain while hanging drawers on paint hooks while working for Snap-On on March 9, 1988. (Ex. 2, pp. 10, 35) Norstrud received treatment, and he returned to his normal duties.

On March 9, 1991, Norstrud again reported to Snap-On he experienced left shoulder pain while taking drawers off the paint line. (Ex. 2, p. 9) A few months later, on May 28, 1991, Norstrud complained to Snap-On of left shoulder pain while latching a basket on a cart while working in press brakes. (Ex. 2, p. 20) Norstrud continued to complain of left shoulder pain on June 2, 1991. (Ex. 2, p. 20) Norstrud returned to work without restrictions and did not receive treatment for his left shoulder for many years.

On June 23, 2003, Norstrud completed a report of injury form for Snap-On, alleging he strained his left shoulder while helping the painters move a collector on June

16, 2003. (Ex. 2, p. 27) Norstrud received treatment, including an x-ray, physical therapy, and temporary restrictions of one hand work only. (JE 1, pp. 1-3) The physician who reviewed the x-ray listed an impression of a probable rotator cuff injury. (JE 1, p. 1) Norstrud was released to return to work on July 3, 2003, without restrictions. (JE 1, p. 3)

Norstrud received treatment on October 1, 2014, October 22, 2014, and November 12, 2014, from a Snap-On therapist for bilateral shoulder pain, which he reported was worse on the left than the right. (Tr., pp. 37-38; JE 1, p. 4) The therapist documented Norstrud reported his pain was not constant and would come and go. (JE 1, p. 4) During an appointment on November 12, 2014, the therapist documented Norstrud reported his "shoulder pops & grinds. States he can't raise [his left] arm beyond 90 [degrees]" without increasing pain. (JE 1, p. 4)

Norstrud testified at hearing he was working as a painter helper at that time and his condition improved after November 2014. (Tr., pp. 37-39) However, on December 19, 2014, a month later, Norstrud submitted a written report of injury to Snap-On, reporting he had injured his left shoulder from "many years of repetitious overhead work" at Snap-On. (Ex. H, p. 44) Norstrud testified at hearing he made the report because "[i]t just seemed like I kept injuring my shoulder." (Tr., p. 36) Snap-On determined Norstrud did not need to see a physician for the reported injury. (Ex. 2, p. 28)

Mrs. Norstrud testified she started dating her husband in July 2015. (Tr., p. 10) She testified that when they started dating, he did not complain about left shoulder pain. (Tr., pp. 10-11)

In March 2016, Norstrud told Mrs. Norstrud, he was experiencing back pain and she encouraged him to see her physician, Dr. Colby. (Tr., p. 11) During the appointment on March 19, 2016, Norstrud reported bumps on his shoulders, noting the bump on his left shoulder was more pronounced and Dr. Colby ordered a x-rays of Norstrud's cervical spine and left shoulder. (Tr., p. 12; JE 1, p. 20) The x-ray reports list impressions of cervical spine degenerative change without evidence of an acute injury, left carotid bulb calcification for the cervical spine image, and left shoulder joint degenerative change without evidence of an acute injury for the left shoulder image. (JE 1, p. 20)

Norstrud and his wife aver his left shoulder pain increased after a trip to California in June 2016. (Tr., pp. 14, p. 40) On November 7, 2016, Norstrud reported to Snap-On that he had bumps on his shoulder "due to repetitive over shoulder work over the last 25 years," his condition had become worse over the years, and he wanted to see someone. (JE 1, p. 5)

Norstrud alleges an injury date of March 3, 2017. There is no evidence in the record supporting anything happened on this date.

The evidence supports by December 19, 2014, Norstrud was aware he had injured his left shoulder and that that injury resulted from the "many years of repetitious overhead work" at Snap-On when reported his work injury to Snap-On. (Ex. H, p. 44) By this date, as evidenced by his report of a cumulative injury that developed over many years, Norstrud knew, or in the reasonable diligence should have known the nature, seriousness, and probable compensable character of his injury. I find his injury manifested on this date. Dr. Kuhnlein acknowledged this fact in his opinion as follows:

> [i]t does appear that Mr. Norstrud was aware of the cumulative work-relatedness of his left shoulder condition to his work for Snap-On Tools as far back as 1988, based on the April 4, 1988, First Report of Injury describing problems in the left shoulder possibly as a result of repeated overhead work, and a December 19, 2014, report of injury describing left shoulder pain from "many years of repetitious overhead work." There was no specific injury to his left shoulder on or about March 3, 2017.

(Ex. A, p. 11) Given Norstrud knew or should have known of the nature, seriousness, and probable compensable character of his left shoulder condition, at the very latest on December 19, 2014, and because Snap-On paid no benefits to Norstrud for his left shoulder condition, I find the two year statute of limitations period expired on December 19, 2016. Norstrud did not file his petition until April 5, 2018. His claim is untimely and his petition should be dismissed.

II. Costs

Norstrud seeks to recover the $100.00 filing fee, $7.83 service fee, $500.00 paid to Dr. Hough for his report, and $4,080 paid to Dr. Kirkland for the independent medical examination. (Exs. 1, p. 6; 3, p. 6) Iowa Code section 86.40, provides, "[a]ll costs incurred in the hearing before the commissioner shall be taxed in the discretion of the commissioner." Snap-On avers Norstrud is not entitled to recover the cost of the independent medical examination under Iowa Code section 85.39 (2017) under the 2017 amendments to the statute, and alternatively asserts under the old statute Norstrud is not entitled to reimbursement for Dr. Kirkland's independent medical examination because Dr. Kirkland issued his report before Dr. Kuhnlein issued his report. Snap-On also alleges Norstrud is not entitled to an award of costs.

A. Independent Medical Examination

As discussed above, I found Norstrud's left shoulder injury manifested in 2014. Therefore, the amendments to Iowa Code section 85.39 from 2017 do not apply to Norstrud's claim. 2017 Iowa Acts ch. 23 § 24 (the changes to Iowa Code sections 85.26 and 85.39 apply to injuries occurring on or after the effective date of the Act, or July 1, 2017).

Iowa Code section 85.39 (2014), provides, in part:

> [a]fter an injury, the employee, if requested by the employer, shall submit for examination at some reasonable time and place and as often as reasonably requested, to a physician or physicians authorized to practice under the laws of this state or another state, without cost to the employee; but if the employee requests, the employee, at the employee's own cost, is entitled to have a physician or physicians of the employee's own selection present to participate in the examination. If an employee is required to leave work for which the employee is being paid wages to attend the requested examination, the employee shall be compensated at the employee's regular rate for the time the employee is required to leave work, and the employee shall be furnished transportation to and from the place of examination, or the employer may elect to pay the employee the reasonable cost of the transportation. . . . If an evaluation of permanent disability has been made by a physician retained by the employer and the employee believes this evaluation to be too low, the employee shall, upon application to the commissioner and upon delivery of a copy of the application to the employer and its insurance carrier, be reimbursed by the employer the reasonable fee for a subsequent examination by a physician of the employee's own choice, and reasonably necessary transportation expenses incurred for the examination. . . .

On January 3, 2019, seven weeks before the arbitration hearing, Dr. Kuhnlein conducted an independent medical examination of Norstrud for Snap-On, and issued his report on January 28, 2019, thirty-one days before hearing, and one day before the deadline for serving expert reports. (Ex. A) After Dr. Kuhnlein examined Norstrud, on January 9, 2019, six weeks before hearing, Dr. Kirkland conducted an independent medical examination for Norstrud, and issued his report on January 16, 2019, more than thirty days before hearing. Snap-On waited just weeks before the hearing to request an impairment rating. While Dr. Kirkland issued his report before Dr. Kuhnlein issued his report, Dr. Kirkland did not perform the independent medical examination for Norstrud until after Dr. Kuhnlein conducted his examination. Norstrud is entitled to recover the $4,080.00 cost of Dr. Kirkland's independent medical examination.

B. Costs

Rule 876 Iowa Administrative Code 4.33(6), provides:

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

reports, (7) filing fees when appropriate, (8) costs of persons reviewing health service disputes.

I found Norstrud failed to timely file his claim. Using my discretion, I find the parties should be assessed their own costs.

ORDER

IT IS HEREBY ORDERED:

Claimant shall take nothing in this case.

Defendant shall reimburse the claimant four thousand eighty and 00/100 dollars ($4,080.00) for the cost of the independent medical examination.

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

Signed and filed this 30th day of May, 2019.

HEATHER L. PALMER
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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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 in writing and received by the commissioner's office 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 a legal holiday. The notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 1000 E. Grand Avenue, Des Moines, Iowa 50319-0209.