



to use ice and to use over-the-counter medication for pain. (Exhibit B, page 5; Transcript p. 8; Ex. 7; Deposition p. 22)

On or about December 21, 2017 claimant underwent an MR Arthrogram to the right shoulder. It showed a nearly circumferential labral tear, severe AC joint degenerative changes, and a mild supraspinatus tendinopathy. (Ex. 3, p. 9)

On April 23, 2018 claimant was in a motor vehicle accident. Claimant had complaints of pain in the neck, right shoulder, leg and lower back. Claimant was assessed as having a motor vehicle accident with cervicgia. (Ex. 3, p. 9) There is no evidence in the record this motor vehicle accident resulted in any permanent impairment.

On May 25, 2018 claimant saw Suleman Hussain, M.D. Claimant had been off work. Claimant was painting his home. Claimant had pain in the right shoulder. Claimant was given a right shoulder injection. (Ex. 3, p. 10)

Claimant saw Dr. Hussain on July 18, 2018. Claimant had improving labral tear pain in the right shoulder. Claimant was told to finish with physical therapy and transition to a home exercise program. Claimant was returned to work at full duty. (Ex. 3, p. 10)

In a March 10, 2019 letter, Dr. Hussain indicated claimant was last seen on July 18, 2018. Dr. Hussain found claimant had a two percent permanent impairment to the right upper extremity based on figures 16-43 and 16-46 of the AMA Guides to the Evaluation of Permanent Impairment. (Ex. 1) (Dr. Hussain refers to "Table 16-43 and 16-46." As there is no "Table 16-43 and 16-46" in The Guides, it is assumed the word "Table" is an error and the reference was meant to be "Figure" 16-43 and 16-46).

Claimant testified that at his last appointment with Dr. Hussain, the doctor spent little time evaluating him. (Tr. p. 11)

In an August 20, 2019 report, Sunil Bansal, M.D., gave his opinions of claimant's condition following an independent medical evaluation (IME). Claimant had continued pain in the right shoulder depending on activity. Claimant had pain with range of motion and lifting. (Ex. 3, p. 11)

Dr. Bansal assessed claimant as having a labral tear of the right shoulder. He found claimant at maximum medical improvement (MMI) as of July 18, 2018. Dr. Bansal restricted claimant to no lifting greater than 15 pounds in the right arm to shoulder level and to avoid work above the shoulder. Based on the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, specifically Figures 16-40 through 16-46, he found claimant had a 7 percent permanent impairment to the right upper extremity. (Ex. 3, pp. 11-14) Claimant testified Dr. Bansal spent approximately 45 minutes examining him. (Tr. p. 12)

Claimant testified his shoulder becomes irritated with activity two to three times a week. He says he ices his shoulder when this occurs. Claimant says he does not take medications for his right shoulder. He says he has some difficulty dressing, doing chores at home, and throwing a ball due to his shoulder condition. Claimant says he believes he has lost 15-20 percent of his strength in his right shoulder since his injury. (Ex. 7; Depo. pp. 32-35; Tr. p. 38)

Claimant testified Dr. Hussain told him he would eventually require shoulder surgery for his arm repair labral tear. (Ex. 7; Depo. pp. 24, 28, 37)

Claimant said since his injury, he has chosen to work in a more supervisory job at Arconic. He says the job is less physically demanding than the one he held at the time of injury. He says he earns less on the new job due to less overtime. (Ex. 7; Depo. pp. 10-13)

### CONCLUSIONS OF LAW

The first issue to be determined is the extent of claimant's entitlement to permanent partial disability benefits.

The party who would suffer loss if an issue were not established has the burden of proving that issue by a preponderance of the evidence. Iowa R. App. P. 6.14(6).

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)-(t) or for loss of earning capacity under section 85.34(2)(u). 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). The fact finder must consider both medical and lay evidence relating to the extent of the functional loss in determining permanent disability resulting from an injury to a scheduled member. Terwilliger v. Snap-On Tools Corp., 529 N.W.2d 267, 272-273 (Iowa 1995); Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417, 420 (Iowa 1994).

When determining the functional loss of a scheduled member injury:

[T]he extent of loss of 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.

Iowa Code section 85.34(2)(x) (2017).

New legislation under Iowa Code section 85.34(2)(x) prohibits the use of lay testimony "...in determining loss or percentage of permanent impairment." Consistent with the new statute, the undersigned has not used lay testimony to "determine" loss or the percentage of permanent impairment. However, the new statute does not appear to prohibit using lay testimony in aiding to ascertain which of the two ratings in this case is more convincing or credible.

Defendants contend claimant's permanent disability to the upper extremity should be based on Dr. Hussain's rating of two percent. Claimant contends his permanent disability to his upper extremity should be evaluated pursuant to the rating given by Dr. Bansal.

The record indicates claimant's diagnosis for his injury is an unrepaired labral tear. (Ex. 1; Ex. 3, pp. 9, 12, 13)

Dr. Hussain found claimant had a two percent permanent impairment to the right upper extremity. This is based upon Figure 16-43 and 16-46 of the Guides. There are several problems with Dr. Hussain's ratings. Figure 16-43 refers to impairment due to lack of adduction and abduction to the shoulder. (Guides, p. 477) Figure 16-46 refers to permanent impairment due to lack of internal and external rotation of the shoulder. Dr. Hussain's March 10, 2019 letter gives no measurements regarding claimant's loss of adduction, abduction, or loss of internal and external rotation. Because of this, it is unknown how he arrived at the two percent rating for claimant's upper extremity. It is unknown if Dr. Hussain even took measurements. It is unclear if the two percent rating applies to adduction, abduction, or lack of internal or external rotation. In brief, I have no idea how Dr. Hussain arrived at his opinions that claimant has a two percent permanent impairment.

Dr. Bansal's opinion regarding permanent impairment is far more detailed than that of Dr. Hussain. Dr. Bansal has three different measurements for range of motion for claimant's flexion, abduction, adduction, external rotation, internal rotation, and extension. Using his values for claimant's range of motion in the various planes, I am able to follow, using figures 16-40 through 16-46, how he arrived at his findings for claimant's permanent impairment.

Dr. Bansal's findings of permanent impairment are more detailed. I am able to follow how he arrived at his values for claimant's permanent impairment. Based upon this, it is found Dr. Bansal's ratings for permanent impairment are more convincing than that of Dr. Hussain's.

Defendants contend, in their post-hearing brief, Dr. Hussain's rating is more convincing than that of Dr. Bansal's. The foundation of this argument is based upon defendants' allegation that claimant is not a credible witness. I find this argument unpersuasive for several reasons.

Some of defendants' arguments regarding credibility are based on the fact that claimant did not appear at the first scheduled hearing, and was subpoenaed to appear at the December of 2019 hearing. As noted, this is a scheduled member case. There is some question, given the new statute under Iowa Code section 85.34(2)(x), whether claimant's testimony is even relevant. The fact that claimant did not appear at the first hearing, and was subpoenaed to appear at the second hearing, has more to do with the interpretation of the new statute, and the animosity between counsel, than it does with any alleged credibility issues with claimant.

Second, some of claimant's arguments regarding claimant's credibility has to do with claimant's lack of willingness to cooperate with defendants' counsel or defendant insurer. The record suggests claimant's unwillingness to cooperate with defendants, in this case, has more to do with claimant's mistrust of defendants than any credibility issues. Penalty is not at issue in this case. It is irrelevant, given the issues in this case, how defendants processed or investigated claimant's claim. However, the record suggests claimant's lack of cooperation with defendants is not a matter of credibility but simply of claimant's mistrust in the way defendants handled his case. See Exhibit 7; Depo. pp. 37-38; Defendants' Ex. B, p. 2 (claimant refused to sign his HIPPA statement)

Third, defendants cite legal precedent that claimant's credibility is always at issue, no matter what the law is. However, the case law cited by defendants regarding credibility are all precedent before the 2017 change to the law at issue. The new Iowa Code section 85.34(2)(x) (2017) clearly states, "lay testimony or agency expertise shall not be utilized in determining percentage of permanent impairment." Given this language, why does it matter if claimant did not recall if he refused to provide a medical waiver release?

Finally, even if lay testimony can be used to aid to help determine which rating is more convincing, it would appear from the statute the only relevant lay testimony regarding a scheduled member case would be regarding claimant's limitations using the scheduled member. For the reasons detailed above, it is found defendants' claim that claimant is not credible is found not persuasive.

Claimant credibly testified his shoulder becomes irritated two to three times a week and claimant has to ice the shoulder when that occurs. He credibly testified he has some limitations in dressing, doing chores, and throwing a ball given limitations in his shoulder. Claimant credibly testified he believes he lost 15-20 percent of his strength in his right shoulder. Claimant's diagnosis is an unrepaired labral tear. He credibly testified he had been told by providers his shoulder will eventually require surgery. The opinions of Dr. Bansal regarding permanent impairment are found more convincing than those of Dr. Hussain. Given this record, it is found claimant is due 17.5 weeks of permanent partial disability benefits based upon Dr. Bansal's 7 percent rating (7% x 250 weeks).

Assuming, for argument's sake, the new statute under Iowa Code section 85.34(2)(x) completely prohibits using any evidence, other than the ratings, in

determining a percentage of permanent impairment, it is still found the rating of Dr. Bansal is more convincing than that of Dr. Hussain. As noted above, Dr. Hussain gives no data or rationale why he found claimant had a two percent rating under the Guides. Dr. Hussain's rating does not indicate if the impairment applies to a loss of range of motion in adduction, abduction, or internal or external rotation. Dr. Bansal's rating is far more detailed. Dr. Bansal has three ratings for range of motion regarding flexion, adduction, abduction, external and internal rotation and extension. I am able to follow and understand how he arrives at his values for claimant's impairment. I am not able to do that with Dr. Hussain's opinion. Given this record, it is found the rating of Dr. Bansal is more convincing than that of Dr. Hussain's rating regarding the extent of claimant's permanent impairment.

The final issue to be determined is costs. Costs are assessed at the discretion of this agency under rule 876 IAC 4.33. As claimant prevailed in this matter, costs are assessed against defendants.

#### ORDER

Therefore, it is ordered:

That defendants shall pay claimant seventeen point five (17.5) weeks of permanent partial disability benefits at the rate of seven hundred twenty-three and 32/100 dollars (\$723.32) per week commencing on July 19, 2018.


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

That defendants shall be given a credit for benefits previously paid.

That defendants shall pay costs.

That defendants shall file subsequent reports of injury as required by this agency under rule 876 IAC 3.1(2).

Signed and filed this 30th day of January, 2020.

  
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JAMES F. CHRISTENSON  
DEPUTY WORKERS'  
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Valerie Landis (via WCES)

Andrew Bribriesco (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.