BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

REYNALDO PENA, Claimant, vs. LECLAIRE MANUFACTURING CO., Employer, and GREAT AMERICAN ALLIANCE INSURANCE CO., Insurance Carrier, Defendants.	File No. 21015492.01 ARBITRATION DECISION Head Notes: 1100; 1108; 1108.50

STATEMENT OF THE CASE

The claimant, Reynaldo Pena, filed a petition for arbitration seeking workers' compensation benefits from employer LeClaire Manufacturing Co. ("LeClaire"), and their insurer, Great American Alliance Insurance Company. Andrew Bribriesco appeared on behalf of the claimant. Lori Scardina Utsinger appeared on behalf of the defendants.

The matter came on for hearing on July 20, 2022, before Deputy Workers' Compensation Commissioner Andrew M. Phillips. Pursuant to an order of the Iowa Workers' Compensation Commissioner related to the COVID-19 pandemic, the hearing occurred electronically. The hearing proceeded without significant difficulty.

The record in this case consists of Joint Exhibits 1-5, Claimant's Exhibit 1-13, and Defendants' Exhibits A-I. The exhibits were received into the record without objection.

The claimant testified on his own behalf with the assistance of interpreter Angel Martinez. Ralf Valle testified on behalf of the defendants. Angie Maddux was appointed the official reporter and custodian of the notes of the proceeding. The evidentiary record closed at the end of the hearing, and the matter was fully submitted on September 2, 2022, after briefing by the parties.

STIPULATIONS

Through the hearing report, as reviewed at the commencement of the hearing, the parties stipulated and/or established the following:

1. There was an employer-employee relationship at the time of the alleged injury.

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

3. That, if the alleged injury is found to be a cause of permanent disability, it is a scheduled member disability to the right shoulder.

4. That the claimant had gross weekly earnings of nine hundred seventy-three and 45/100 dollars ($973.45) per week, was married, and was entitled to six exemptions at the time of the alleged injury. This provided a weekly compensation rate of six hundred sixty-seven and 87/100 dollars ($667.87).

5. That, with regard to the disputed medical expenses:

    a. The fees or prices charged by providers are fair and reasonable.
    b. The treatment was reasonable and necessary.
    c. That, although disputed, the medical providers would testify as to the reasonableness of their fees and/or treatment set forth in the listed expenses, and the defendants did not offer contrary evidence.
    d. That, although the causal connection of the expenses to a work injury cannot be stipulated, the listed expenses were at least causally connected to the medical condition(s) upon which the claim of injury is based.

6. That the costs listed in Claimant's Exhibit 12 were paid.

The defendants waived their affirmative defenses. Entitlement to credits against any award is no longer in dispute.

The parties are now bound by their stipulations.

ISSUES

The parties submitted the following issues for determination:

1. Whether the claimant sustained an injury, which arose out of and in the course of employment, on August 31, 2020.

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

3. Whether the alleged injury is a cause of permanent disability.

4. Whether the claimant is entitled to temporary partial disability benefits between September 6, 2020, and January 23, 2021.

5. The extent of permanent disability, if any is awarded.

6. If the injury is found to be a cause of permanent disability, whether the commencement date for permanent partial disability benefits should be January 13, 2021, or April 20, 2021.

7. Whether the claimant is entitled to reimbursement for past medical expenses, and whether:

   a. The listed expenses are causally connected to the work injury; and/or,
   b. The requested expenses were authorized by the defendants.

8. Whether the claimant is entitled to reimbursement for an independent medical examination ("IME") pursuant to Iowa Code section 85.39.

9. Whether the claimant is entitled to alternate medical care pursuant to Iowa Code section 85.27.

10. Whether an assessment of costs is appropriate.

FINDINGS OF FACT

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

Reynaldo Pena, the claimant was 27 years old at the time of the hearing. (Testimony). He resides in Davenport, Iowa, with his wife and four children. (Testimony). His highest level of education completed is middle school. (Defendants' Exhibit I).

Prior to working for the defendant-employer, the claimant worked at Rich Metals. (DE I). He worked cutting metal with a torch. (DE I). He left that job because LeClaire offered him a higher rate of pay. (DE I). He began working for LeClaire in October of 2017. (Testimony). At that time, he had a preemployment physical, which he passed. (Testimony).

On August 31, 2020, Mr. Pena worked as a machine operator at LeClaire. (Testimony). He performed that job for close to two and one-half years before his alleged injury. (Testimony). He had been working for about two hours. (Testimony). As part of his job as a machine operator, Mr. Pena worked with metal and molds. (Testimony). Metal was poured into a mold, and then pushed onto a metal table. Mr. Pena then put a piece on top to remove it. (Testimony). He would then cut the piece off and put it in a basket. (Testimony). He lifted parts when they were still hot. (Testimony). This time, he lifted a part, and did not have a good grip on it due to the heat. (Testimony). He testified that he thought the part weighed 80 pounds. (Testimony). When he lifted the hot piece at about chest level, he felt pain in his shoulder. (Testimony). He testified that nothing unusual happened with the part when he was working with it. (Testimony). Prior to this date, he testified that he had no

issues with his shoulders. (Testimony). He never had restrictions for his shoulders, and never had any symptoms in his shoulders. (Testimony).

Mr. Pena testified that he lifted parts over and over again, and that it was simply this one time that he began to notice pain in his bilateral shoulders. (Testimony). His left shoulder felt "a strain on the top area," while his right shoulder felt "as if it had come off." (Testimony). He reported his alleged injury to his supervisor, Ralf Valle. (Testimony). Mr. Valle and/or a safety person filled out a safety report. (Testimony).

Mr. Valle indicated that on August 31, 2020, the claimant told him that he injured his right shoulder. (Testimony). He took Mr. Pena to visit with Paul Miller, the safety coordinator. (Testimony). He opined that Mr. Pena appeared to be double jointed. (Testimony). It is unclear as to Mr. Valle's medical qualifications to opine on this, but this is what he testified. (Testimony).

Mr. Pena was sent to Genesis. (Testimony). Genesis provided him with certain work restrictions, which the company respected. (Testimony). This reduced his work hours down to 32 hours per week. (Testimony).

On September 9, 2020, Mr. Pena reported to Genesis Occupational Medicine. (Joint Exhibit 2:5-7). Mr. Pena complained to Jane Anderson PA-C of pain in his right and left shoulders. (JE 2:5). He indicated that his right shoulder pain began on August 31, 2020, and he described it as intermittent. (JE 2:5). The pain was made worse by use, and manifested as a deep, stabbing, dull ache. (JE 2:5). He rated his pain 7 out of 10 in his right shoulder. (JE 2:5). His left shoulder pain began on September 3, 2020, and was made worse by use. (JE 2:5). He described his pain the same as that in his right shoulder. (JE 2:5). Mr. Pena told the provider via interpreter that he was carrying an 80-pound part, and that afterwards, he experienced pain in both shoulders. (JE 2:5). He also indicated that he felt a pop in his right shoulder with an onset of pain immediately. (JE 2:5). He then had pain in his left shoulder three days later. (JE 2:5). He told the provider further that the part did not slip or jerk. (JE 2:5). At the time of his appointment, he was working light duty while supervising new workers. (JE 2:5). His right shoulder popped during examination, and he had 50 percent to 60 percent of full range of motion. (JE 2:6). The provider diagnosed Mr. Pena with pain in his right and left shoulder, and an unspecified sprain of each shoulder. (JE 2:6). X-rays were completed due to pain in his shoulders. (JE 1:1-2). X-rays of the left shoulder were normal with no soft tissue abnormalities. (JE 1:1). X-rays of the right shoulder were also normal with no soft tissue abnormalities. (JE 1:1-2). Ms. Anderson provided temporary restrictions, which included: 10 pounds of lifting, pulling, and pushing in his combined bilateral hands. (JE 2:6). He also was to perform no above shoulder work or "far reaching" with his bilateral arms. (JE 2:6). Ms. Anderson recommended that the claimant also ice the affected areas, take over-the-counter ibuprofen, supplemented with Tylenol as needed, and pursue physical therapy. (JE 2:6-7).

Mr. Pena returned to Genesis Occupational Medicine again on September 23, 2020, for his bilateral shoulder pain. (JE 2:8-10). Mr. Pena noted that he had a "popping out" sensation with rotation of his right shoulder. (JE 2:8). He continued to rate his pain 7 out of 10. (JE 2:8). Overall, he felt his bilateral shoulders felt the same.

(JE 2:8). His physical therapy had yet to be approved, and he was working light duty. (JE 2:8). However, "due to the rapid rate," Mr. Pena found the light duty work to be painful. (JE 2:8). Ms. Anderson's diagnoses of Mr. Pena remained the same. (JE 2:9). She continued to recommend that he remain on restricted duty. (JE 2:9). Her restrictions for Mr. Pena included 20 pounds maximum of lifting, pulling, or pushing with his bilateral hands for no more than 12 times per hour. (JE 2:10). He also was restricted from performing above shoulder work or reaching far with his bilateral arms. (JE 2:10). Ms. Anderson continued to recommend a referral to physical therapy. (JE 2:10).

On October 6, 2020, Ms. Anderson examined Mr. Pena again at Genesis Occupational Medicine for his complaints of bilateral shoulder pain. (JE 2:11-13). Mr. Pena noted that his issues remained unchanged, and that his right arm pain remained 7 out of 10, while his left arm had pain of 6 out of 10. (JE 2:11). His pain was located in the anterior joint on both sides. (JE 2:11). He described radiating numbness down his right arm into his forearm when he lifted with his fist closed. (JE 2:11). He told Ms. Anderson that his right shoulder seemed to pop with movements that go from directly ahead of him to his side. (JE 2:11). He did not have these issues on the left side. (JE 2:11). He still did not have physical therapy scheduled, and was working light duty in an 8 hour shift, rather than a 10 to 12 hour shift. (JE 2:11). His diagnoses remained unchanged. (JE 2:12). Ms. Anderson kept Mr. Pena's restrictions the same and kept him on restricted duty. (JE 2:13). She recommended that the claimant pursue physical therapy, and continue to take Ibuprofen and Tylenol if needed. (JE 2:13).

Mr. Pena returned to Genesis Occupational Medicine on October 20, 2020, for his ongoing bilateral shoulder issues. (JE 2:14-17). Mr. Pena continued to have the same pain issues, which were worse on his right than the left. (JE 2:14). He reported that he attended six physical therapy sessions with no significant improvement; however, he reported feeling stronger. (JE 2:14). He took ibuprofen and continued icing his shoulders. (JE 2:14). Mr. Pena told the provider that he was having more pain at work, which he attributed to repetitive lifting of more than 20 pounds "despite restrictions." (JE 2:14). The provider reviewed the therapy notes and spoke to the therapist. (JE 2:15). The therapist was concerned that Mr. Pena had forward posture, which affected his shoulder movement and ability to improve. (JE 2:15). The therapist felt that Mr. Pena had signs of impingement. (JE 2:15). The therapist felt that there was "not much more" he could offer to the claimant. (JE 2:15). Upon physical examination, Mr. Pena still displayed 50 percent to 60 percent of full range of motion, and it was noted that his right shoulder popped when it was elevated over his head. (JE 2:15). Mr. Pena's diagnoses remained unchanged, but impingement syndrome of the right shoulder was added. (JE 2:15). The provider increased Mr. Pena's restrictions to a maximum of 10 pounds lifting, pushing, and pulling in his bilateral hands for no more than 12 times per hour. (JE 2:16). He also was to perform no work above his shoulders and avoid reaching "far" with his bilateral arms. (JE 2:16). The provider recommended that the claimant continue in light duty work and referred the claimant to Dr. Frederick due to a lack of progress. (JE 2:16).

On October 28, 2020, Mr. Pena continued his care with Genesis Occupational Health. (JE 2:17-20). A new provider met with Mr. Pena during this visit. (JE 2:17). He continued to complain of bilateral shoulder pain, and noted that it was worse on the right than the left. (JE 2:17). Mr. Pena told the provider that he did not remember lifting a specific item before his right shoulder pain began. (JE 2:17). He indicated that the right shoulder pain was localized to the anterior and superior shoulder, while the left shoulder pain was in the superior shoulder. (JE 2:17). He found no improvement in his shoulders despite participation in physical therapy, icing his shoulder, and taking meloxicam. (JE 2:17). He worked an 8-hour shift with a 10-pound lifting restriction, and noted trouble with repetitive movement of his right shoulder. (JE 2:17). Upon examination, the provider did not find pain on motion or palpation in the right shoulder. (JE 2:19). Mr. Pena also displayed normal strength, and normal range of motion. (JE 2:19). His diagnosis was pain in the right and left shoulder. (JE 2:19). The provider kept Mr. Pena on restricted duty and increased his restrictions to no lifting over 5 pounds with the right hand, and no more than 10 pounds with the left hand. (JE 2:20). Mr. Pena also was to avoid above shoulder work, and was to be allowed to work at his own pace. (JE 2:20). The provider ordered an MRI arthrogram of the right shoulder to evaluate his issues. (JE 2:20). The provider recommended that the claimant continue to ice his right shoulder and take meloxicam. (JE 2:20). The provider opined, "[t]he patient's report of mechanism of injury does not allow for a clear picture of causation. He reports a discrete event causing left shoulder pain and then right shoulder pain over then [*sic*] next few days without a specific mechanism of action." (JE 2:20). She recommended that a job evaluation be done. (JE 2:20).

On November 27, 2020, Mr. Pena had an MR arthrogram of his right shoulder. (JE 1:3-4). The interpreting physician found that Mr. Pena had an anterior inferior labral tear without underlying cartilage defect. (JE 1:4). The MR arthrogram showed an intact rotator cuff, and mild acromioclavicular osteoarthritis. (JE 1:3).

Camilla Frederick, M.D., examined the claimant on December 16, 2020, at Genesis Occupational Health, for his bilateral shoulder pain. (JE 2:21-25). Mr. Pena continued to complain of the right shoulder being worse than the left. (JE 2:21). He described his shoulders as 20 percent of his baseline for his right shoulder and 90 percent for his left. (JE 2:21). Dr. Frederick found the claimant to have normal range of motion and normal strength in his right shoulder. (JE 2:23). She diagnosed the claimant with pain in his left shoulder and a superior glenoid labrum lesion of the right shoulder. (JE 2:23). Dr. Frederick provided updated work restriction to include no above shoulder work, and no lifting over 20 pounds. (JE 2:23, 25). Dr. Frederick recommended that a job evaluation be done to determine causation, and after that "will [*sic*] decide about shoulder." (JE 2:23). She recommended that he return to her office in two weeks for a potential injection. (JE 2:23).

On December 30, 2020, Mr. Pena returned to Dr. Frederick's office. (JE 2:26-30). He continued to complain of issues with his right shoulder while indicating that his left shoulder returned to 100 percent. (JE 2:26). Upon physical examination, Dr. Frederick again found no pain on motion, and normal range of motion and strength in the right shoulder. (JE 2:28). Mr. Pena felt pain with palpation of the right biceps. (JE

2:28). Dr. Frederick's diagnoses remained unchanged. (JE 2:28). Mr. Pena's temporary restrictions remained unchanged. (JE 2:28, 30). Dr. Frederick continued to recommend a job evaluation, and requested that the claimant again return in two weeks. (JE 2:28).

On January 7, 2021, Genesis at Work completed a functional job analysis for Mr. Pena's position with LeClaire. (Defendants' Exhibit E:22-23). Genesis found three essential job functions for Mr. Pena's position: standing for job completion; moving parts through the production cycle to complete part manufacturing; and, using hand tools, band saws and grinders to complete part manufacturing as needed. (DE E:22). Mr. Pena had to stand and walk continuously as part of his job. (DE E:22). He lifted occasionally, which was defined as 6 percent to 33 percent of the time. (DE E:22). Parts weighed between 5 pounds and 55 pounds. (DE E:22). On the date that Mr. Pena was working, the report indicates that the claimant worked with three different parts, the heaviest of which weighed 55 pounds. (DE E:22). Moving of parts used waist to waist transfers and only is lowered into a parts basket upon completion. (DE E:22). This also only lasted about 8 minutes, which results in "down time from lifting activities." (DE E:22). The report noted that Mr. Pena also occasionally moved parts around a work surface, and reached with his arms close to his body. (DE E:22). This was done mostly when parts were removed from the mold. (DE E:22). During this time, the analysis noted that his job functions were done below shoulder height. (DE E:22). The examiner also noted, "[f]rom the observations done on this date, there are no areas of concern," with regard to the claimant's position having caused his shoulder injury. (DE E:23). Due to the lifting being done at waist level, the examiner opined that there was "no excessive strain at the shoulder." (DE E:23). Based upon this review, the lack of OSHA risk factors for ergonomics, and the AMA Guide to Disease and Injury Causation, Curtis Witt, PT, opined that the claimant's bilateral shoulder pain was not work related. (DE E:23).

Mr. Pena discussed the functional job analysis provided by the defendants. (Testimony). He testified that he lifts parts that are heavier than the 50 to 60 pounds mentioned in the report. (Testimony). He also disagreed with the report, which says that his work is done at waist height, while in reality, he believes that his work is done at chest height. (Testimony). He testified further that there are uncomfortable positions in which he has to place his body. (Testimony). Finally, he testified that he had to spend 50 percent of his day lifting parts, and not 30 percent like the report indicated. (Testimony).

Dr. Frederick examined Mr. Pena again on January 13, 2021, for his continued shoulder complaints. (JE 2:31-35). His pain had not improved in his right shoulder. (JE 2:31). He remained at 20 percent of his baseline. (JE 2:31). Dr. Frederick explained the results of the previous MRI and the job evaluation and noted that Mr. Pena had a labrum tear and that the job evaluation "showed no RF." (JE 2:31). Mr. Pena again demonstrated a normal range of motion in his right shoulder, with no pain on motion. (JE 2:33). He also had normal strength. (JE 2:33). He demonstrated pain on palpation over his "biceps, pec [*sic*], and trap." (JE 2:33). Dr. Frederick opined that the examination did not indicate a labrum issue during this visit, and noted that the

examination was "more [indicative] of impingement." (JE 2:31, 33). She recommended physical therapy, and a possible injection. (JE 2:31). She did not make any changes to the claimant's temporary restrictions. (JE 2:35).

On January 20, 2021, Dr. Frederick responded to a check-box type letter from Paradigm regarding the claimant's condition. (DE F:24-25). Dr. Frederick opined that the claimant's right labral tear found on the November 27, 2020, MRI was not causally related to the claimant's work activities. (DE F:24). She reiterated this in response to several other questions. (DE F:24). Finally, Dr. Frederick hand wrote, "he has a non work related labral tear that is symptomatic. He needs care for this. I placed temporary restrictions allowing him time to get into Ortho [*sic*] or PMD [*sic*]. I rec [*sic*] he see Ortho [*sic*] as could go to WI clinic – expediting care." (DE F:24).

Mr. Pena had physical therapy on February 1, 2021. (JE 3:36-37). He indicated feeling about the same after his initial evaluation. (JE 3:36). He told the therapist at Genesis that he shoveled snow all weekend, and "had to take frequent rest breaks due to shoulder pain." (JE 3:36). Manual therapy helped improve some of his symptoms. (JE 3:36).

LeClaire issued a letter on February 1, 2021, denying liability for the shoulder injury. (CE 5:15). They indicated in the letter that this was not a work-related injury. (CE 5:15).

On February 10, 2021, Mr. Pena had another therapy visit. (JE 3:38-39). He felt good after the previous session. (JE 3:38). He reported that he could perform all of his activities of daily living comfortably, including washing his hair, vacuuming, and reaching overhead. (JE 3:38). He only felt pain when he was required to do forceful activities "over time." (JE 3:38). He also indicated that his shoulder fatigued with prolonged activity. (JE 3:38).

Kristyn Darmafall, M.D. of Orthopaedic Specialists examined the claimant on February 10, 2021. (JE 5:54-55). Mr. Pena complained of constant sharp pain in his right shoulder, which radiated to the right anterior aspect of his shoulder. (JE 5:54). He told Dr. Darmafall that he was carrying a part when his injury occurred. (JE 5:54). He also indicated that his symptoms were aggravated by overhead lifting. (JE 5:54). Upon examination, Dr. Darmafall found no tenderness to palpation at the AC joint, but did find some at the biceps tendon. (JE 5:55). His rotator cuff strength was found to be normal. (JE 5:55). Dr. Darmafall reviewed the imaging done to date, as well. (JE 5:55). She diagnosed Mr. Pena with right shoulder instability, anterior subluxation of the right humerus, and pain in the right shoulder. (JE 5:55). The doctor recommended an injection, and ordered an additional MRI and arthrogram. (JE 5:55).

Mr. Pena had an additional right shoulder MRI arthrogram on February 19, 2021, as prescribed by Dr. Darmafall. (JE 4:50-53). Nicholas Ludwig, M.D. reviewed the MRI report. (JE 4:50). The results were compared with those of the previous x-rays and MRI. (JE 4:50). The MRI showed no high-grade rotator cuff tear, but mild bursal surface fraying of the supraspinatus. (JE 4:51). It also showed an intact, "non-subluxed intra-articular long head biceps tendon" with minimal tendinosis. (JE 4:51). Third, Dr. Ludwig found anterior mid to anterior-inferior labral tearing and posterior-superior to

posterior labral fraying and tearing. (JE 4:51). There also was small fluid accumulation and mild acromioclavicular joint arthrosis. (JE 4:51).

Mr. Pena had additional physical therapy on February 22, 2021. (JE 3:40-41). He had been feeling good, and performed his home exercise plan. (JE 3:40). He had no issues with activities of daily living. (JE 3:40). He hoped to return to work, but "right now his shoulder fatigues with repetitive activity." (JE 3:40).

Dr. Darmafall examined the claimant again on February 23, 2021, at which time she reviewed his MRI results with him. (JE 5:56-58). Dr. Darmafall opined that the clinical and imaging findings indicated a diagnosis of multidirectional instability. (JE 5:57). She recommended conservative management, which she opined had "close to an 80% chance of success." (JE 5:57). She noted that this could take 6 to 12 months to fully heal. (JE 5:57). Dr. Darmafall also released the claimant to work full duty and noted that the injury was not work related. (JE 5:58; DE G:26).

Mr. Pena returned for more physical therapy on February 24, 2021. (JE 3:42-43). He indicated that he saw his chiropractor and reviewed results of an MRI. (JE 3:42). Mr. Pena indicated that someone told him that his injury "is not really bad," and that he was told he may benefit from physical therapy. (JE 3:42). He performed all strengthening exercises with no aggravation, though he reported fatigue by the end of the session. (JE 3:42).

On March 12, 2021, Mr. Pena had more physical therapy. (JE 3:44-45). Mr. Pena reported feeling good after his therapy sessions. (JE 3:44). He planned to cut a tree down in the coming week. (JE 3:44). He performed all exercises without increased pain, but reported fatigue by the end of the session. (JE 3:44). The therapist opined that the claimant demonstrated good endurance during the exercise, but continued to fatigue with repetitive functional activities at home. (JE 3:44).

Mr. Pena returned for physical therapy on March 22, 2021. (JE 3:46-47). He reported having no pain during this visit. (JE 3:46). He attributed this to not having to do much work with his shoulder. (JE 3:46). Mr. Pena demonstrated an ability to perform "high level overhead shoulder activity even after fatiguing the musculature." (JE 3:46).

On March 31, 2021, the claimant returned for another therapy session. (JE 3:48-49). He reported that he returned to work and had no increase in his pain. (JE 3:48). He was scheduled for 40 hours that week, and had not returned to his traditional 50-hour week, yet. (JE 3:48). He continued to perform his home exercise plan every day, and asked about work restrictions. (JE 3:48). The therapist opined that the claimant achieved his functional goals and discharged Mr. Pena to a home program. (JE 3:48).

On April 20, 2021, Mr. Pena returned to Dr. Darmafall's office. (JE 5:59-60). He noted that he completed physical therapy for his right shoulder with "moderate relief." (JE 5:59). He rated his pain 4 out of 10 and demonstrated a full range of motion. (JE 5:59). Mr. Pena requested "to possibly see Dr. Kari's office for pain relief." (JE 5:59). Dr. Darmafall planned to order "an image guided corticosteroid injection," and

recommended that the claimant continue his home exercise program. (JE 5:60). Dr. Darmafall discharged the claimant to return on an as needed basis. (JE 5:60).

Upon the arrangement of Mr. Pena's counsel, Mr. Pena visited Richard Kreiter, M.D., for an IME on March 15, 2022. (Claimant's Exhibit 3:9-12). Dr. Kreiter issued a report subsequent to his examination of the claimant. (CE 3:9-12). Dr. Kreiter practices in orthopedics and is board certified in orthopedic surgery. (CE 4:14).

Dr. Kreiter reviewed the claimant's medical history. (CE 3:11-12). Dr. Kreiter opined that the claimant had chronic pain and instability of his right shoulder with labral fraying and no significant rotator cuff tear. (CE 3:12). He found the claimant to have tenderness in and around the right AC joint and minimal tenderness in the biceps groove. (CE 3:12). Dr. Kreiter found the claimant to have active right shoulder flexion to 150 degrees, abduction to 110 degrees, external rotation to 60 degrees, and internal rotation to the lumbosacral spine. (CE 3:12). Dr. Kreiter also noted that the claimant had "good" strength in all of his muscle groups with abduction, internal and external rotation. (CE 3:12). Mr. Pena complained that he could not sleep on his right side due to his shoulder pain. (CE 3:12). He also had no dislocations. (CE 3:12).

Dr. Kreiter opined that the claimant had cumulative trauma to his right shoulder as a result of his work with LeClaire. (CE 3:9). Dr. Kreiter indicated that this was because Mr. Pena performed repetitive activity, "sometimes in awkward positions, with the right upper extremity for three years." (CE 3:9). Mr. Pena described lifting aluminum casting weighing between 50 and 80 pounds positioned just above chest level on his right. (CE 3:9). Dr. Kreiter noted, "[i]t is my opinion on or about August 31, 2020 the instability increased and he became more painful." (CE 3:9). Dr. Kreiter continued by opining that lifting 50 to 80 pound aluminum castings from slightly above the chest level to the floor on a repetitive basis aggravated the labral structures of Mr. Pena's right shoulder. (CE 3:9). Dr. Kreiter continued, "[t]he humeral head butting against the labral structure accelerated the wear of the labral tissue, leading to the instability now present in the right shoulder." (CE 3:9). At the time of the examination, Mr. Pena's right shoulder remained unstable. (CE 3:9). Due to this, Dr. Kreiter recommended that the claimant have a second opinion at the University of Iowa orthopedic department to see if a "capsular reconstruction" might stabilize his shoulder.

Dr. Kreiter used table 16-26 of the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, to provide a permanent impairment rating for Mr. Pena. (CE 3:10). Dr. Kreiter used this because of Mr. Pena's history of acute and cumulative trauma and issues that were reproducible on shoulder stability testing. (CE 3:10). Dr. Kreiter opined that this equated to a 12 percent upper extremity impairment, or a 7 percent whole person impairment. (CE 3:10). Dr. Kreiter provided one restriction, which was that the claimant should refrain from using any overhead throwing-type motion with his right arm. (CE 3:10).

Mr. Pena testified that he spent about an hour with Dr. Kreiter for his IME. (Testimony). Dr. Kreiter told Mr. Pena that he should go see a specialist in Iowa City for his right shoulder. (Testimony). Mr. Pena would like to see a specialist for his right shoulder so that he can "find a solution to this." (Testimony).

On June 8, 2022, Matthew Bollier, M.D., F.A.O.A., an orthopedic surgeon affiliated with Musculoskeletal Consulting, LLC, performed a records review on behalf of the defendants. (DE H:27-31). Mr. Pena testified that he never visited with Dr. Bollier. (Testimony). Dr. Bollier diagnosed Mr. Pena with right shoulder chronic anterior inferior labral tear and resolved left shoulder pain. (DE H:30). Dr. Bollier continued by opining that Mr. Pena's bilateral shoulder pain was "not caused or aggravated by a work injury at LeClaire Manufacturing in 2020." (DE H:30). Dr. Bollier agreed with Dr. Frederick's causation opinion and Mr. Witt's causation analysis. (DE H:30). Dr. Bollier continued, "[t]his opinion is based on the fact that there was no discrete work injury to either shoulder, no clear mechanism of injury, and no acute structural tearing on the shoulder MRI." (DE H:30). Dr. Bollier then opined that the anterior inferior chronic labral tear seen on the February of 2021 MRI of the right shoulder was "not caused by a work injury." (DE H:30). This is because, according to Dr. Bollier, "[i]t is very common to see small non-displaced shoulder labral tears on MRI that are related to wear and tear over time." (DE H:30). Dr. Bollier noted that there were no signs of an acute labral tear on the MRI, such as bone bruising, a Hill-Sachs lesion, or bony edema. (DE H:30).

Dr. Bollier opined that the claimant may require treatment for a chronic right shoulder labral tear, but that this was not work related. (DE H:31). According to Dr. Bollier, Mr. Pena required no further treatment for his shoulder related to a work injury. (DE H:31). Dr. Bollier offered no restrictions for either the left or right shoulder, and allowed Mr. Pena to continue working. (DE H:31). Dr. Bollier placed Mr. Pena at MMI effective January 13, 2021, and concluded that Mr. Pena was not doing damage to the chronic anterior inferior labral tear by using his right arm. (DE H:31). Dr. Bollier concluded that the claimant had no permanent partial disability to either upper extremity based upon the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition. (DE H:31).

During his time off, the claimant applied for short-term disability. (DE I; DE D:21). The application for short-term disability did not arise out of employment. (DE D:21). As a result, the application was silent as to whether a workers' compensation claim was filed. (DE D:21). Of note, it is unclear whether the claimant filled out the form himself, and there is no indication regarding this issue. (DE D:21).

Subsequent to his injury, the employer accommodated Mr. Pena's restrictions. (Testimony). First, they had Mr. Pena cleaning up different areas of the plant. (Testimony). Once his restrictions decreased, they "moved him along." (Testimony). He is now working full time with no restrictions. (Testimony). He also has not requested any devices for accommodation. (Testimony).

As of the time of his hearing, Mr. Pena continued to work for LeClaire. (Testimony). He worked full duty with no restrictions. (Testimony). He worked full-time hours including overtime, which amounted to about 58 hours per week. (Testimony). He testified that he uses air hammers at work, and that the vibrations from the air hammers cause him to tire and lose strength. (Testimony). He worked in a saw position where he cuts parts. (Testimony).

When he is at home, he has problems mowing his lawn. (Testimony). Keeping his right shoulder in certain positions causes him to have pain. (Testimony). He continued to perform his home exercise plan and lifting small dumbbells. (Testimony).

Ralf Valle testified that he worked for LeClaire since 1999. (Testimony). He worked a variety of positions before progressing to his current management position. (Testimony). He is currently the molding manager. (Testimony). He speaks to each individual employee, and then supports supervisors. (Testimony). At the time of the claimant's alleged injury, Mr. Valle was a mold supervisor. (Testimony). He was the claimant's direct supervisor. (Testimony). He testified that on the alleged date of injury, Mr. Pena was working on parts that weighed 50 pounds. (Testimony). He indicated that he checked the production schedule for that day, which indicated the weight of the part in question. (Testimony). He further testified that Mr. Pena would drag the part from one table to the next, would saw off certain parts, and then would pick up and move the part. (Testimony). The table upon which Mr. Pena worked is at waist height, according to Mr. Valle. (Testimony). He felt that Mr. Pena is a good worker, and a credible person. (Testimony).

CONCLUSIONS OF LAW

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 Rule of Appellate Procedure 6.904(3).

Causation

Before beginning any analysis of the other issues, I must first examine whether the claimant's injury arose out of and in the course of his employment with LeClaire. The claimant contends that his job duties caused his right shoulder injury. The defendants allege that the claimant had a personal condition, and that his alleged right shoulder injury did not arise out of, or in the course of his employment with LeClaire.

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

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

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

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

The question of medical causation is "essentially within the domain of expert testimony." Cedar Rapids Cmty. Sch. Dist. v. Pease, 807 N.W.2d 839, 844-45 (Iowa 2011). The commissioner, as the trier of fact, must "weigh the evidence and measure the credibility of witnesses." Id. The trier of fact may accept or reject expert testimony, even if uncontroverted, in whole or in part. Frye, 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). Unrebutted expert medical testimony cannot be summarily rejected. Poula v. Siouxland Wall & Ceiling, Inc., 516 N.W.2d 910 (Iowa App. 1994). Supportive lay testimony may be used to buttress expert testimony, and therefore is also relevant and material to the causation question.

While a claimant is not entitled to compensation for the results of a preexisting 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). 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).

There also is some discussion that the claimant may have sustained a cumulative trauma. While the claimant does not explicitly allege this, they seem to imply that the claimant may have sustained a cumulative trauma.

A personal injury contemplated by the workers' compensation law means an injury, the impairment of health or a disease resulting from an injury which comes about, not through the natural building up and tearing down of the human body, but because of trauma. The injury must be something that acts extraneously to the natural processes of nature and thereby impairs the health, interrupts or otherwise destroys or damages a part of all of the body. Although many injuries have a traumatic onset, there is no requirement for a special incident or unusual occurrence. Injuries which result from cumulative trauma are compensable. However, increased disability from a prior injury, even if brought about by further work, does not constitute a new injury. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); Ellingson v. Fleetguard, Inc., 599 N.W.2d 440 (Iowa 1999); McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985). An occupational disease covered by Iowa Code 85A is specifically excluded from the definition of personal injury. Iowa Code 85.61(4)(b); Iowa Code 85A.8; Iowa Code 85A.14.

When the injury develops gradually over time, the cumulative injury rule applies. The date of injury for cumulative injury purposes is the date on which the disability manifests. Manifestation is best characterized as that date on which both the fact of injury and the causal relationship of the injury to the claimant's employment would be plainly apparent to a reasonable person. The date of manifestation inherently is a fact-based determination. The fact-finder is entitled to substantial latitude in making this determination and may consider a variety of factors, none of which is necessarily dispositive in establishing a manifestation date. Among others, the facts may include missing work when the condition prevents performing the job, or receiving significant medical care for the condition. For time limitation purposes, the discovery rule then becomes pertinent. The statute of limitations does not begin to run until the employee, as a reasonable person, knows or should know, that the cumulative injury condition is serious enough to have permanent, adverse impact on his or her employment. Herrera v. IBP, Inc., 633 N.W.2d 284 (Iowa 2001); Oscar Mayer Foods Corp. v. Tasler, 483 N.W.2d 824 (Iowa 1992); McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985).

First, I must consider whether the claimant's alleged right shoulder injury arose out of his employment with LeClaire. The claimant testified that he was working for about two hours, and had lifted several parts weighing, what he alleged, to be upwards of 80 pounds. He testified that he felt a pain in his shoulders while lifting the part. He also felt a pop. He also testified that the parts were hot and had to be carried away from his body in order to avoid the heat. There is also a contemporaneous report and the claimant's supervisor testified that the claimant reported an injury on this date. Using his arms and lifting items was a part of the claimant's employment with LeClaire. Therefore, an injury to a shoulder is a rational consequence of a hazard connected with his employment. Additionally, Dr. Kreiter concluded that the claimant's injury was caused by his work at LeClaire. Dr. Kreiter further concluded that the claimant's injury was the result of repetitive or cumulative trauma.

On the other hand, I am concerned with the inconsistent reports of the claimant to his medical providers. While the claimant does not speak fluent English, his

providers utilized translators when meeting with him. First, the claimant has consistently told his providers, including Dr. Kreiter, that the part he was lifting weighed 80 pounds. The claimant attempts to explain this away in his posthearing brief by arguing that this amount includes other parts of the cast and therefore his estimate is accurate. Mr. Valle testified that he reviewed the specifications for the parts cast at the time that the claimant alleges the injury, and noted that they weighed 50 pounds. He also testified that the claimant would drag a part from one table to the next, and saw off certain parts of the casting, before lifting the casting. Therefore, the claimant's argument that the part weighed 80 pounds does not seem accurate.

During his September 9, 2020, visit to Genesis, the claimant indicated his right shoulder pain began on August 31, 2020, and his left shoulder pain began several days later. He was consistent with his hearing testimony insofar as he described carrying an 80-pound part; however, there was some inconsistency in that he testified at the hearing that he immediately dropped the part. He told the provider that the part did not slip or jerk.

When he met with a new provider at Genesis on October 28, 2020, through a translator, Mr. Pena noted that he did not remember lifting a specific item before his right shoulder pain. He also reported that his pain began in his left side, and then progressed to his right side several days later. He again told the provider that he lifted parts up to 80 pounds from chest height to the floor. This does not seem to align with the other evidence in the record. The provider at this visit opined that Mr. Pena's report as to his mechanism of injury did not paint a clear picture of causation. She recommended a job evaluation and an MRI. That MRI revealed an anterior inferior labral tear without an underlying cartilage defect.

On December 30, 2020, Dr. Frederick saw the claimant. He again described carrying an 80-pound part when he felt a pop in his bilateral shoulders. He was consistent in that he denied that the part slipped or jerked before his pain occurred.

Genesis at Work performed a functional job analysis. I did not find this to be of much importance in reviewing the causation elements of this particular case. However, it was the basis for Dr. Frederick's opinion that the claimant's right labral tear was not causally related to the claimant's work activities. She recommended that he see an orthopedic doctor for his non-work-related right shoulder issues.

The claimant also saw Dr. Darmafall. Dr. Darmafall reviewed the claimant's clinical and imaging findings, and diagnosed him with multidirectional instability. She also released him to full duty and opined that the claimant's injury was not work related.

The only provider to opine that the claimant's right shoulder injury was related to his work was Dr. Kreiter. Dr. Kreiter was retained by the claimant to provide opinions regarding the claimant's condition. Of note, there are more inconsistencies with Dr. Kreiter's examination of the claimant. Dr. Kreiter opined that the claimant had a cumulative trauma to his right shoulder, and that the claimant had right shoulder instability which increased and became more painful on August 31, 2020. Dr. Kreiter's report indicates that Mr. Pena told him that his pain "came on rather slowly, increasing over time." (CE 3:11). This contradicts Mr. Pena's testimony and his reports to other

providers. Mr. Pena testified to having no shoulder issues prior to August 31, 2020. It calls into question the validity of Dr. Kreiter's opinions and the veracity of Mr. Pena's testimony.

Perhaps the most convincing piece of evidence comes from Dr. Bollier. While Mr. Pena was never examined by Dr. Bollier, Dr. Bollier reviewed medical records, and both of the right shoulder MRIs. It appears from the report and Dr. Bollier's commentary on the same, that he reviewed the actual MRI studies. Dr. Bollier's report is based upon the objective medical records, and was not influenced by some of the inconsistencies noted above. Dr. Bollier opined that the February of 2021 MRI showed an anterior inferior small chronic labral tear. According to Dr. Bollier, this was very common and related to wear and tear over time. Dr. Bollier indicated that there were no signs of acute labral tear in the right shoulder, such as bone bruising, a Hill-Sachs lesion, or bony edema. Most convincingly, Dr. Bollier indicated that acute anterior labral tears were caused by shoulder dislocation or subluxation.

Dr. Bollier concluded that the claimant did not require any treatment for his right shoulder that was related to a work injury. He opined that the claimant required additional care, but that it was for his chronic, non-work-related condition.

When taking Dr. Bollier's opinions in conjunction with the opinions of other treating doctors, and the inconsistencies in the claimant's iterations of the mechanism of his injury, I find that the claimant failed to carry his burden to show that the right shoulder injury arose out of his employment with LeClaire.

Having ruled that the claimant's injury did not arise out of his employment with LeClaire, any discussions regarding whether the injury occurred in the course of his employment with LeClaire are moot. Additionally, whether the injury caused temporary disability and/or permanent disability and the accompanying disputes with regard to those issues is also moot.

Payment of Medical Expenses

The claimant requests reimbursement for certain medical expenses.

The employer shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance, and hospital services and supplies for all conditions compensable under the workers' compensation law. The employer shall also allow reasonable and necessary transportation expenses incurred for those services. The employer has the right to choose the provider of care, except where the employer has denied liability for the injury. Iowa Code 85.27. Holbert v. Townsend Engineering Co., Thirty-second Biennial Report of the Industrial Commissioner 78 (Review-Reopening, October 1975).

Pursuant to Iowa Code 85.27, claimant is entitled to payment of reasonable medical expenses incurred for treatment of a work injury. Claimant is entitled to an order of reimbursement if he/she has paid those expenses. Otherwise, claimant is entitled only to an order directing the responsible defendants to make such payments directly to the provider. See Krohn v. State, 420 N.W.2d 463 (Iowa 1988).

In cases where the employer's medical plan covers the medical expenses, claimant is entitled to an order of reimbursement only if he has paid treatment costs; otherwise, the defendants are ordered to make payments directly to the provider. See Krohn, 420 N.W.2d at 463. Where medical payments are made from a plan to which the employer did not contribute, the claimant is entitled to a direct payment. Midwest Ambulance Service v. Ruud, 754 N.W.2d 860, 867-68 (Iowa 2008) ("We therefore hold that the commissioner did not err in ordering direct payment to the claimant for past medical expenses paid through insurance coverage obtained by the claimant independent of any employer contribution."). See also Carl A. Nelson & Co. v. Sloan, 873 N.W.2d 552 (Iowa App. 2015)(Table) 2015 WL 7574232 15-0323.

The employee has the burden of proof to show medical charges are reasonable and necessary, and must produce evidence to that effect. Poindexter v. Grant's Carpet Service, I Iowa Industrial Commissioner Decisions, No. 1, at 195 (1984); McClellan v. Iowa S. Util., 91-92, IAWC, 266-272 (App. 1992).

The employee has the burden of proof in showing that treatment is related to the injury. Auxier v. Woodward State Hospital School, 266 N.W.2d 139 (Iowa 1978), Watson v. Hanes Border Company , No. 1 Industrial Comm'r report 356, 358 (1980) (claimant failed to prove medical charges were related to the injury where medical records contained nothing related to that injury) See also Bass v. Vieth Construction Corp., File No 5044438 (App. May 27, 2016)(Claimant failed to prove causal connection between the injury and claimed medical expenses); Becirevic v. Trinity Health, File No. 5063498 (Arb. December 28, 2018) (Claimant failed to recover on unsupported medical bills)

Nothing in Iowa Code section 85.27 prohibits an injured employee from selecting his or her own medical care at his or her own expense following an injury. Bell Bros. Heating and Air Conditioning v. Gwinn, 779 N.W.2d 193, 205 (Iowa 2010). In order to recover the reasonable expenses of the care, the employee must still prove by a preponderance of the evidence that unauthorized care was reasonable and beneficial. Id. The Court in Bell Bros. concluded that 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.

As previously discussed, the claimant failed to prove by a preponderance of the evidence that his right shoulder injury arose out of his employment with LeClaire. Therefore, the medical care regarding the right shoulder would be the responsibility of the claimant.

Reimbursement for IME pursuant to Iowa Code section 85.39

Iowa Code 85.39(2) states:

> If an evaluation of permanent disability has been made by a physician retained by the employer and the employee believes this evaluation to be too low, the employee shall, upon application to the commissioner and upon delivery of a copy of the application to the employer and its insurance carrier, be reimbursed by the employer the reasonable fee for a subsequent

> examination by a physician of the employee's own choice, and reasonably necessary transportation expenses incurred for the examination.
>
> . . .
>
> An employer is only liable to reimburse an employee for the cost of an examination conducted pursuant to this subsection if the injury for which the employee is being examined is determined to be compensable under this chapter or chapter 85A or 85B. An employer is not liable for the cost of such an examination if the injury for which the employee is being examined is determined not to be a compensable injury. A determination of the reasonableness of a fee for an examination made pursuant to this subsection shall be based on the typical fee charged by a medical provider to perform an impairment rating in the local area where the examination is conducted.

Iowa Code section 85.39(2).

Defendants are responsible only for reasonable fees associated with claimant's independent medical examination. Claimant has the burden of proving the reasonableness of the expenses incurred for the examination. See Schintgen v. Economy Fire & Casualty Co., File No. 855298 (App. April 26, 1991). Claimant need not prove the injury arose out of and in the course of employment to qualify for reimbursement under section 85.39. See Dodd v. Fleetguard, Inc., 759 N.W.2d 133, 140 (Iowa App. 2008). An opinion finding a lack of causation is tantamount to a zero percent impairment rating. Kern v. Fenchel, Doster & Buck, P.L.C., 2021 WL 3890603 (Iowa App. 2021).

The claimant requests reimbursement for the IME of Dr. Kreiter. They argue that, even if causation is not found, the IME should be reimbursed. I previously found that the claimant did not sustain a right shoulder injury that arose out of his employment with LeClaire. Based upon the claimant failing to prove by a preponderance of the evidence that his injury arose out of his employment with LeClaire, he is not entitled to reimbursement for the costs of Dr. Kreiter's IME.

Alternate Care pursuant to Iowa Code section 85.27

Iowa Code 85.27(4) provides, in relevant part:

> For purposes of this section, the employer is obligated to furnish reasonable services and supplies to treat an injured employee, and has the right to choose the care…. The treatment must be offered promptly and be reasonably suited to treat the injury without undue inconvenience to the employee. If the employee has reason to be dissatisfied with the care offered, the employee should communicate the basis of such dissatisfaction to the employer, in writing if requested, following which the employer and the employee may agree to alternate care reasonably suited to treat the injury. If the employer and employee cannot agree on such alternate care,

> the commissioner may, upon application and reasonable proofs of the necessity therefor, allow and order other care.

Iowa Code 85.27(4). See Pirelli-Armstrong Tire Co. v. Reynolds, 562 N.W.2d 433 (Iowa 1997).

"Iowa Code section 85.27(4) affords an employer who does not contest the compensability of a workplace injury a qualified statutory right to control the medical care provided to an injured employee." Ramirez-Trujillo v. Quality Egg, L.L.C., 878 N.W.2d 759, 769 (Iowa 2016) (citing R.R. Donnelly & Sons v. Barnett, 670 N.W.2d 190, 195, 197 (Iowa 2003)). "In enacting the right-to-choose provision in section 85.27(4), our legislature sought to balance the interests of injured employees against the competing interests of their employers." Ramirez-Trujillo, 878 N.W.2d at 770-71 (citing Bell Bros., 779 N.W.2d at 202, 207; IBP, Inc. v. Harker, 633 N.W.2d 322, 326-27 (Iowa 2001)).

The employer has the right to choose the provider of care, except where the employer has denied liability for the injury. Iowa Code 85.27. Holbert v. Townsend Engineering Co., Thirty-second Biennial Report of the Industrial Commissioner 78 (Review-Reopening, October 16, 1975). An employer's right to select the provider of medical treatment to an injured worker does not include the right to determine how an injured worker should be diagnosed, evaluated, treated, or other matters of professional medical judgment. Assmann v. Blue Star Foods, File No. 866389 (Declaratory Ruling, May 19, 1988). Reasonable care includes care necessary to diagnose the condition, and defendants are not entitled to interfere with the medical judgment of its own treating physician. Pote v. Mickow Corp., File No. 694639 (Review-Reopening Decision, June 17, 1986).

The employer must furnish "reasonable medical services and supplies *and* reasonable and necessary appliances to treat an injured employee." Stone Container Corp. v. Castle, 657 N.W.2d 485, 490 (Iowa 2003)(emphasis in original). Such employer-provided care "must be offered promptly and be reasonably suited to treat the injury without undue inconvenience to the employee." Iowa Code section 85.27(4).

By challenging the employer's choice of treatment - and seeking alternate care – claimant assumes the burden of proving the authorized care is unreasonable. See e.g. Iowa R. App. P. 14(f)(5); Bell Bros. Heating and Air Conditioning v. Gwinn, 779 N.W.2d 193, 209 (Iowa 2010); Long v. Roberts Dairy Co., 528 N.W.2d 122 (Iowa 1995). An injured employee dissatisfied with the employer-furnished care (or lack thereof) may share the employee's discontent with the employer and if the parties cannot reach an agreement on alternate care, "the commissioner may, upon application and reasonable proofs of the necessity therefor, allow and order the care." Id. "Determining what care is reasonable under the statute is a question of fact." Long, 528 N.W.2d at 123; Pirelli-Armstrong Tire Co., 562 N.W.2d at 436. As the party seeking relief in the form of alternate care, the employee bears the burden of proving that the authorized care is unreasonable. Id. at 124; Gwinn, 779 N.W.2d at 209; Pirelli-Armstrong Tire Co., 562 N.W.2d at 436. Because "the employer's obligation under the statute turns on the question of reasonable necessity, not desirability," an injured employee's dissatisfaction

with employer-provided care, standing alone, is not enough to find such care unreasonable. Id.

The Iowa Supreme Court has held that, "when evidence is presented to the commissioner that the employer-authorized medical care has not been effective and that such care is 'inferior or less extensive' than other available care requested by the employee, . . . the commissioner is justified by section 85.27 to order the alternate care." Pirelli-Armstrong Tire Co., 562 N.W.2d at 437.

The claimant requested alternate care in the form of a second opinion from an orthopedic doctor at the University of Iowa, as recommended by Dr. Kreiter. Having previously found that the claimant failed to prove by a preponderance of the evidence that his shoulder condition arose out of his employment with LeClaire, I likewise find that the claimant is not entitled to alternate care.

Costs

Claimant seeks the award of costs as outlined in Claimant's Exhibit 12. Costs are to be assessed at the discretion of the deputy commissioner hearing the case. See 876 Iowa Administrative Code 4.33; Iowa Code section 86.40. 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, including convenience fees incurred by using the WCES payment gateway, and (8) costs of persons reviewing health service disputes.

Pursuant to the holding in Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839 (Iowa 2015), only the report of an IME physician, and not the examination itself, can be taxed as a cost according to 876 IAC 4.33(6). The Iowa Supreme Court reasoned, "a physician's report becomes a cost incurred in a hearing because it is used as evidence in lieu of the doctor's testimony," while "[t]he underlying medical expenses associated with the examination do not become costs of a report needed for a hearing, just as they do not become costs of the testimony or deposition." Id. (noting additionally that "[i]n the context of the assessment of costs, the expenses of the underlying medical treatment and examination are not part of the costs of the report or deposition"). The commissioner has found this rationale applicable to expenses incurred by vocational experts. See Kirkendall v. Cargill Meat Solutions Corp., File No. 5055494 (App. Dec., December 17, 2018); Voshell v. Compass Group, USA, Inc., File No. 5056857 (App. Dec., September 27, 2019).

The claimant requests reimbursement of costs as follows:

• Filing Fee	$ 100.00
• Certified Mail	$ 13.34
• IME Report of Dr. Kreiter	$1,000.00
• Hearing Transcript	Left Blank
Total:	$1,113.34

In my discretion, I decline to award the claimant costs in this matter.

ORDER

THEREFORE, IT IS ORDERED:

That the claimant shall take nothing further.

That the defendants shall file subsequent reports of injury (SROI) as required by this agency pursuant to 876 Iowa Administrative Code 3.1(2) and 876 Iowa Administrative Code 11.7.

Signed and filed this ___25th__ day of October, 2022.

ANDREW M. PHILLIPS
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Andrew Bribriesco (via WCES)

Lori Scardina Utsinger (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.