

## BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JOHN TROST,

Claimant,

vs.

SHOTTENKIRK AUTOMOTIVE GROUP, INC.,

Employer,

and

BRICKSTREET MUTUAL INSURANCE COMPANY,

Insurance Carrier,  
Defendants.

File No. 19006587.01

ARBITRATION DECISION

Head Note Nos.: 1803, 2907

**STATEMENT OF THE CASE**

Claimant John Trost filed a petition in arbitration seeking worker's compensation benefits against Shottenkirk Automotive Group Inc., employer, and Brickstreet Mutual Insurance Company, insurer, for an accepted work injury date of November 11, 2019. The case came before the undersigned for an arbitration hearing on October 5, 2022. Pursuant to an order of the Iowa Workers' Compensation Commissioner, this case proceeded to a live video hearing via Zoom, with all parties and the court reporter appearing remotely. The hearing proceeded without significant difficulties.

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

The evidentiary record includes Joint Exhibits 1 and 2, Claimant's Exhibits 1 through 5, and Defendants' Exhibits A through F.

Claimant testified on his own behalf. The evidentiary record closed at the conclusion of the evidentiary hearing on October 5, 2022. The parties submitted post-hearing briefs on October 19, 2022, and the case was considered fully submitted on that date.

## ISSUES

1. The proper date for commencement of permanent partial disability benefits;<sup>1</sup> and,
2. Taxation of costs.

## FINDINGS OF FACT

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

Claimant's testimony was consistent as compared to the evidentiary record, and his demeanor at the time of hearing gave the undersigned no reason to doubt his veracity. Claimant is found credible.

At the time of hearing, claimant was a 62-year-old person. (Hearing Testimony). Claimant graduated from Valley High School in West Des Moines. (Defendants' Exhibit F; Deposition Transcript, p. 5) Claimant does not have any children and is not married. (Testimony)

Claimant started working for the defendant employer in July of 2014. (Def. Ex. F; Dep. Tr., p. 6) He was hired to work as a maintenance person, doing maintenance work and janitorial duties. Part of his job included opening the dealership for business in the morning. He was the first person to arrive, and his duties included "pulling trash," cleaning the floors, and in the winter, any snow removal that needed to be done. (Def. Ex. F; Dep. Tr., pp. 6-7)

Claimant was injured while working at Shottenkirk on November 11, 2019. (Def. Ex. F; Dep. Tr., p. 11) On the date of injury claimant was earning \$15.00 per hour, and working full time. (Testimony) Claimant was taking trash outside, and the concrete near the dumpster in the parking lot was slippery due to the weather. (Testimony) Claimant testified that there is a slight slope between the dumpster and the parking lot, and as he turned around after throwing away the trash, his left foot slipped out from under him, and he fell directly on his back and left shoulder. (Def. Ex. F; Dep. Tr., p. 12) Claimant had immediate pain in the top of his left shoulder, but was able to continue working and completed his shift that day. (Testimony; Def. Ex. F; Dep. Tr., pp. 12-13)

The next day, claimant sought medical care. (Def. Ex. F; Dep. Tr., pp. 13-14) Claimant had x-rays and attended physical therapy, and was taken off work. (Def. Ex. F; Dep. Tr., p. 14) He attempted to return to work on December 2, 2019, but was unable to complete his shift due to pain. (Def. Ex. F; Dep. Tr., p. 15) Kirby Singleton, PA-C, provided claimant with work restrictions of no over shoulder work and lifting up to 20 pounds occasionally on December 6, 2019. (Joint Exhibit 1, p. 1) Claimant then saw Timothy Vinyard, M.D., on December 19, 2019. (Jt. Ex. 2, p. 3) Dr. Vinyard noted that

---

<sup>1</sup> The hearing report indicates that the extent of permanent partial disability is also disputed. However, the parties' post-hearing briefs appear to stipulate that claimant is entitled to 10 percent of the shoulder.

claimant had no problems with his left shoulder until the work injury. He reported sharp, moderate pain over the anterolateral aspect of the shoulder, worse with activity. He also reported popping and weakness in the shoulder.

Dr. Vinyard reviewed the x-rays taken the day after the injury, and noted neutral alignment, no evidence of fracture, type II acromion, and moderate AC joint degenerative changes. (Jt. Ex. 2, p. 4) Dr. Vinyard recommended an MRI of the left shoulder, and allowed claimant to return to work with a 5-pound lifting restriction. (Jt. Ex. 2, p. 5)

Claimant testified that he returned to work with restrictions, but continued to do his normal job duties. (Def. Ex. F; Dep. Tr., p. 16) He eventually had an MRI on February 7, 2020. (Def. Ex. F; Dep. Tr., p. 17) After the MRI, his treatment changed to Des Moines Orthopedic Surgeons (DMOS), and he saw Barron Bremner, D.O., in early March 2020. (Def. Ex. F; Dep. Tr., p. 18; Claimant's Exhibit 2, p. 10) Dr. Bremner agreed with the 5-pound lifting restriction, and recommended surgery for a rotator cuff tear.

Claimant was scheduled for surgery in March 2020, but it seems the COVID-19 pandemic caused the surgery to be delayed.<sup>2</sup> The surgery was rescheduled for July 8, 2020. (Cl. Ex. 3, p. 17) Claimant testified that when surgery was being scheduled, he asked that aftercare services be provided, as he lives alone and does not have any family to help him. (Testimony; Def. Ex. F; Dep. Tr., p. 19) He testified that he was told that aftercare would be arranged. (Testimony) However, on the date of surgery, after he had been prepared and was waiting in his room, he asked what had been lined up, and was advised that no aftercare had been arranged. (Testimony; Def. Ex. F; Dep. Tr., pp. 19-20) As such, he advised that he could not go through with the surgery, and left. He has not had any treatment for his shoulder since that time. (Testimony)

Claimant continued working at Shottenkirk until February 2022. (Def. Ex. F; Dep. Tr., p. 23) At that time, he left Shottenkirk for a job at Wittern Group. (Def. Ex. F; Dep. Tr., p. 25) Wittern manufactures vending machines, and his job involves taking old vending machines apart, cleaning them, and putting them back together. The job involves working with small tools. (Def. Ex. F; Dep. Tr., pp. 27-28) Claimant was unsure of his exact pay at the time of his deposition, but estimated he makes about \$17.00 per hour. (Def. Ex. F; Dep. Tr., pp. 26-27)

Claimant attended an independent medical evaluation (IME) with Sunil Bansal, M.D., on August 24, 2022. (Cl. Ex. 1, p. 1) At the time of the IME, claimant reported continued constant shoulder pain, and difficulty raising his arm overhead and reaching behind his back. (Cl. Ex. 1, p. 2) He also stated his arm was weak and fatigues easily.

---

<sup>2</sup> Claimant testified at his deposition that the March surgery was cancelled because he changed his mind due to a lack of after-care, not due to the pandemic. (Def. Ex. F; Dep. Tr., p. 19) However, at hearing he testified that he could not remember why the March surgery was cancelled, but that the time he changed his mind was in July of 2020. Therefore, I find it is more likely that the March surgery was rescheduled due to the pandemic.

Dr. Bansal performed a physical examination and documented claimant's range of motion. (Cl. Ex. 1, pp. 2-3) He opined that in the absence of further treatment, claimant reached maximum medical improvement (MMI) on August 24, 2022, at the time of his evaluation. (Cl. Ex. 1, p. 4) Using the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, he provided a 10 percent upper extremity impairment related to the left shoulder. Dr. Bansal recommended permanent restrictions of no lifting more than 15-pounds with the left hand, and no overhead lifting with the left arm. Finally, Dr. Bansal recommended operative care for the left rotator cuff tear. (Cl. Ex. 1, p. 5)

Claimant testified at hearing that he continues to experience intermittent pain in the top of his shoulder. The pain is aggravated by certain movements, especially reaching upward too far. He also complains that his shoulder is weaker, which limits his ability to lift. While he has not sought any treatment since July of 2020, he understands that surgery is still recommended. He remains concerned about aftercare, which is why he has not had surgery.

### **CONCLUSIONS OF LAW**

As noted above, in their brief defendants acknowledge that Iowa Code section 85.34(2)(x) requires the adoption of Dr. Bansal's impairment rating, as it is the only medical evidence regarding the extent of functional disability. Dr. Bansal used the Fifth Edition of the AMA Guides, as required by Iowa law, and there is no other impairment rating in evidence. As such, claimant is entitled to 10 percent of the shoulder. Under section 85.34(2)(n), a shoulder is compensated based on the proportional loss relative to 400 weeks of benefits. Therefore, claimant is entitled to 40 weeks of permanent partial disability benefits.

The only issues that remain in dispute are the date for commencement of permanent partial disability (PPD) benefits, and costs. Claimant argues the correct date for commencement of PPD is December 9, 2019, when claimant returned to work. In the alternative, claimant states there are multiple dates between December 9, 2019 and July 8, 2020, that could serve as the commencement date for PPD. Defendants argue the proper date is August 24, 2022, the date Dr. Bansal placed claimant at MMI.

Iowa Code section 85.34(2), as amended in 2017, states:

Compensation for permanent partial disability shall begin when it is medically indicated that maximum medical improvement from the injury has been reached and that the extent of loss or percentage of permanent impairment can be determined by use of 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.

MMI is reached upon a “stabilization of the condition or at least a finding that the condition is ‘not likely to remit in the future despite medical treatment.’” Bell Bros. Heating & Air Conditioning v. Gwinn, 779 N.W.2d 193, 200 (Iowa 2010) (quoting AMA Guides to the Evaluation of Permanent Impairment 27 (6th ed. 2008)); see Armstrong Tire & Rubber v. Kubli, 312 N.W.2d 60, 65 (Iowa App.1981) (defining MMI as “that condition in which healing is complete and the extent of the disability can be determined”).

In this case, claimant returned to work on or around December 9, 2019. While he had work restrictions at that time, he testified that he continued to perform his regular job duties. Claimant had additional medical evaluations after that date, and surgery was recommended and scheduled twice. The second time surgery was scheduled, July 8, 2020, claimant left without having surgery, and has not sought additional care for his shoulder since that time.

Considering claimant has not had any treatment for his shoulder since July 8, 2020, it would have been appropriate to rate his impairment at that time. Dr. Bansal did not examine claimant until August 24, 2022. While he recommended operative treatment, he stated that claimant was at MMI in the absence of further treatment. I find that claimant’s condition had stabilized such that he was able to continue working without seeking additional medical care on July 8, 2020, when he made the decision to decline surgery. In addition, the extent of loss or percentage of permanent impairment could have been determined at that time. As such, PPD benefits shall commence on July 8, 2020.

Finally, claimant seeks costs. He claims \$103.00 for the filing fee for his petition; \$72.00 for the deposition transcript; and \$991.00 for Dr. Bansal’s IME report. (Cl. Ex. 5, pp. 21-23) Assessment of costs is a discretionary function of this agency. Iowa Code § 86.40. Costs are to be assessed at the discretion of the deputy commissioner or workers’ compensation commissioner hearing the case. 876 IAC 4.33. As claimant was generally successful in his claim, I use my discretion and award claimant costs in the total amount of \$1,166.00.

## **ORDER**

THEREFORE, IT IS ORDERED:

Defendants shall pay claimant forty (40) weeks of permanent partial disability benefits, commencing July 8, 2020, at the stipulated rate of three hundred eighty-five and 39/100 dollars (\$385.39).

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.

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

Defendants shall reimburse claimant's costs in the total amount of one thousand one hundred sixty-six and 00/100 dollars (\$1,166.00), representing the filing fee, deposition transcript, and IME report.

Signed and filed this 15<sup>th</sup> day of February, 2023.



---

JESSICA L. CLEEREMAN  
DEPUTY WORKERS'  
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Thomas Palmer (via WCES)

Bryan Brooks (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.