

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

---

JAMES GOODRICH,

Claimant,

vs.

CARE INITIATIVES HOSPICE,

Employer,  
Self-Insured,  
Defendant.

**FILED**  
JUL 01 2019  
WORKERS' COMPENSATION

File No. 5062188

ARBITRATION

DECISION

Head Notes: 1402.40, 2502

---

STATEMENT OF THE CASE

Claimant, James Goodrich, filed a petition in arbitration seeking workers' compensation benefits from Care Initiatives Hospice (Care Initiatives), self-insured employer. This matter was heard in Des Moines, Iowa on March 28, 2018 by Deputy Workers' Compensation Commissioner Erica Fitch. The record consists of Joint Exhibits 1 through 11, Claimant's Exhibits 1 through 2, Defendant's Exhibits A through N, and the testimony of claimant, Shirley Pospisil, M.D., and Angela Deters.

By order of delegation of authority, Deputy Workers' Compensation Commissioner Jim Christenson was appointed to prepare the findings of facts and proposed decision in this case.

The parties filed a hearing report at the commencement of the arbitration hearing. On the hearing report, the parties entered into various stipulations. All of those stipulations were accepted and are hereby incorporated into this arbitration decision and no factual or legal issues relative to the parties' stipulations will be raised or discussed in this decision. The parties are now bound by their stipulations.

ISSUES

1. Whether claimant is entitled to temporary benefits from October 24, 2016 through January 31, 2017.
2. Whether the injury is the cause of a permanent disability; and if so
3. The extent of claimant's entitlement to permanent partial disability benefits.

4. Commencement of benefits.
5. Whether there is a causal connection between the injury and the claimed medical expenses.
6. Whether claimant is entitled to reimbursement for an independent medical evaluation (IME) under Iowa Code section 85.39.
7. Whether claimant is entitled to alternate medical care.
8. Costs.

In a 61-page brief, defendant's counsel spends a substantial portion of the brief arguing claimant failed to carry his burden of proof he sustained an injury that arose out of and in the course of employment. On the hearing report, defendant's counsel stipulated claimant sustained an injury that arose out of and in the course of employment. At hearing, the issue of whether claimant sustained an injury that arose out of and in the course of employment was not identified as an issue in dispute. (Transcript pages 6-7)

Defendant stipulated claimant sustained an injury that arose out of and in the course of employment. As a result, the issue of whether claimant sustained an injury that arose out of and in the course of employment is agreed to by the parties and will not be discussed in this decision.

#### FINDINGS OF FACT

Claimant was 60 years old at the time of hearing. Claimant graduated from high school. He has an undergraduate degree from Ohio State. Claimant has a Masters of Divinity from Ashland Theological Seminary. Claimant attended the Fuller Seminary in California for post-graduate work but did not complete a Ph.D. (Tr. p. 11)

Claimant has worked as a youth pastor. Claimant worked as a full-time pastor since approximately 1982. Claimant worked for the post office for two and a half years. Claimant also worked as a pastor for numerous churches in Ohio and Iowa. (Tr. pp. 12-16)

Claimant began with Care Initiatives in approximately February of 2014. Claimant worked as a spiritual care bereavement counselor. In that job claimant provided spiritual and pastoral care for patients and their families. He also provided counseling for families after the death of a family member in Hospice. Claimant testified that while working for Care Initiatives, he also worked as a pastor with the Presbyterian church in Mechanicsville, Iowa. At the time of hearing, claimant was still employed as a pastor with the church in Mechanicsville. (Tr. pp. 16-18)

While with Care Initiatives claimant worked approximately 40 hours a week with some overtime. Claimant earned \$22.00 per hour. (Tr. pp. 19-20)

Claimant's prior medical history is relevant. Claimant testified in deposition he had three prior back surgeries in February of 1992, September of 1992, and October of 2000. Claimant testified he was never completely pain free from back pain after those surgeries. (Exhibit L, p. 7; Deposition p. 25; Ex. B, p. 3)

In September of 2010 claimant was treated for neck and head aches due to a car accident. (Joint Ex. 1, p. 1)

Claimant testified he has diabetes and uses both insulin and pills to control his diabetes. (Ex. L, p. 7; Depo. pp. 22-23) Records indicate claimant has had paresthesia in his feet due to diabetes. (Jt. Ex. 1, p. 3; Jt. Ex. 2, pp. 12, 23)

Claimant testified he did not have any prior shoulder problems.

On February 1, 2016 claimant was walking from his car at a Care Initiatives facility when he slipped on ice. On February 1, 2016 claimant was treated at UnityPoint Clinic with complaints of mid-back pain caused by a fall on ice. No other injuries were identified. Claimant was assessed as having back pain. (Jt. Ex. 3, pp. 1-2)

On February 3, 2016, two days later, claimant returned to a UnityPoint clinic complaining of a fall on ice and injuring his right shoulder and back. Claimant indicated he was sitting in a meeting when his right shoulder began to hurt. Claimant had tenderness over the top part of the scapula. Claimant was assessed as having right shoulder pain. (Jt. Ex. 3, pp. 4-6)

On February 11, 2016 claimant was evaluated by Michael Toth, D.O. Claimant fell on his right shoulder and buttocks. Claimant complained of lower back pain and right shoulder pain. Claimant had clicking when moving his arm. Claimant was limited to lifting up to two pounds and recommended to avoid forceful pushing and pulling. (Jt. Ex. 4, pp. 5-6)

On February 15, 2016 claimant was evaluated by Dr. Pospisil. Dr. Pospisil specializes in occupational medicine. (Tr. p. 78) Claimant said he landed on his right shoulder and then his buttocks. Claimant was assessed as having a fall on his right shoulder and back pain. (Jt. Ex. 4, p. 7)

Claimant returned to Dr. Pospisil on February 18, 2016. Claimant was given restrictions limiting him to lifting up to two pounds. An MRI of the right shoulder was recommended. (Jt. Ex. 4, p. 9)

On February 26, 2016 claimant underwent an MRI of the right shoulder. It showed a superior labral anterior to posterior (SLAP) tear on the right shoulder and a partial-thickness tear of the distal supraspinatus and infraspinatus tendons. (Jt. Ex. 5, pp. 3-4)

Claimant returned to Dr. Pospisil on March 8, 2016. Claimant's MRI was discussed. Claimant was referred to Brian Wolf, M.D. at The University of Iowa

Hospitals and Clinics (UIHC). Claimant was again given a two-pound lifting restriction. (Jt. Ex. 4, pp. 10-11)

Claimant returned to Dr. Pospisil on March 28, 2016. Claimant had lower back and shoulder pain that had increased. A lumbar MRI was recommended. (Jt. Ex. 4, p. 12)

On March 31, 2016 claimant had a lumbar MRI. No significant pathologies were identified. Disc bulging was noted at multiple levels. There was no indication in that MRI of significant neural impingement. Claimant returned in follow up with Dr. Pospisil on April 6, 2016. Claimant was assessed as having a left shoulder strain with internal derangement and lower back pain with no evidence of a severe disc pathology. (Jt. Ex. 4, p. 13; Jt. Ex. 5, pp. 6-7))

On April 6, 2016 claimant was assessed by Dr. Wolf, an orthopedic surgeon. Claimant complained of a fall on the right shoulder. Claimant's MRI was reviewed. Claimant was assessed as having a possible subscapular tear with a proximal bicep tendon subluxation and a partial-thickness tear of the infraspinatus and supraspinatus on the right shoulder. Claimant was limited to no lifting, pulling or pushing more than two pounds. He was given an injection in the shoulder. (Jt. Ex. 7, pp. 1-5)

Claimant returned to Dr. Pospisil on March 20, 2016. Claimant said he fell down stairs at home when his right leg gave out. Claimant's work day was decreased to four to six hours per day. (Jt. Ex. 4, pp. 16-17)

Claimant returned to Dr. Pospisil on April 25, 2016. Claimant complained of both back and shoulder pain. Claimant was using a TENS unit. Claimant was kept on a four to six-hour work day. He was continued on a two-pound lifting restriction. (Jt. Ex. 4, p. 18)

Between May 4, 2016 and May 22, 2016 claimant was put under surveillance. Much of the surveillance footage shows claimant getting in and out of a silver Chevrolet on the passenger side. Claimant testified he needed to exit and enter the car on the passenger side, as the driver's side door was broken. (Tr. pp. 31-32)

On May 4, 2016 claimant was surveilled sitting in a car for approximately 22 minutes and getting out of the car. The surveillance also showed claimant driving and exiting a van. (Exs. H, I)

On May 5, 2016 claimant was surveilled getting in a car, driving a van and walking. (Exs. H, I)

In a May 6, 2016 note, claimant indicated to his employer he had a tire blow out and that he got his tire changed. (Ex. D, p. 2)

Claimant returned to Dr. Pospisil on May 9, 2016. Claimant still had shoulder pain. He was discharged from care but told to complete his follow up with Dr. Wolf. (Jt. Ex. 4, p. 20)

On May 11, 2016 claimant returned to Dr. Wolf. Claimant indicated the injection had given him no relief. Claimant still had right shoulder pain and pain with any overhead activity. Surgery was discussed and chosen as a treatment option. (Jt. Ex. 7, pp. 6-8)

On May 13, 2016 claimant was surveilled getting in and out of a vehicle and driving. (Exs. H, I)

On May 14, 2016 claimant was surveilled. In the video claimant is seen lifting four to five large buckets from a shopping cart and putting them into the trunk of his car. Claimant was also surveilled changing a tire and changing a shock absorber on his car. Claimant is seen jacking the vehicle up, putting jack stands under the rear of the car, and taking off lug nuts with a spinner wrench. Claimant is seen moving an air compressor. Claimant is also seen in the video using a wrench and a long cheater bar, that appears to be over six feet, to break bolts or nuts in the area of the right rear tire of the car. Claimant is seen in the surveillance lying beneath the rear of the car on his left side while working underneath the car stabilizing himself by holding onto the trunk of the car with his right arm. Claimant is also seen backing the car out of, and back into, the garage. (Exs. H, I)

Claimant testified that on that day he was changing a tire and a shock absorber on his car. (Tr. p. 57) Claimant testified he did this work, as Dr. Wolf told him he would be in a sling for approximately four weeks, and would take approximately four to six months to recuperate. (Tr. pp. 67-68)

On May 20, 2016 claimant was surveilled getting in and out of a car and walking.

On May 22, 2016 claimant was surveilled getting in and out of a car and walking. (Exs. H, I)

Claimant testified he knew some of the activities shown in the surveillance footage violated his work restrictions. He testified he did the jobs shown in the surveillance footage to complete tasks before surgery. He testified some of the activities shown in the surveillance footage caused him pain. (Ex. L, pp. 35-37)

In a May 25, 2016 letter, Dr. Pospisil indicated she saw video footage of the May 14, 2016 surveillance that showed activity different from what claimant exhibited at the clinic. She observed claimant doing activities, as described above on May 14, 2016. Dr. Pospisil noted claimant did not appear in pain in the video and did not favor his right arm. She indicated claimant was not following restrictions in the video. She noted claimant did not exhibit any symptoms of having a labral tear requiring surgery. She did

not believe claimant required surgery. She found claimant had no restrictions and no permanent impairment. (Jt. Ex. 4, pp. 22-23)

At hearing, Dr. Pospisil testified when she examined claimant he had a hard time moving his right shoulder. She said claimant told her typing aggravated his shoulder. She said on exam claimant had a hard time moving his right arm. She said on one occasion she asked claimant to move his arm, and he had to pick it up with his left arm. She said claimant told her he could not lift his right arm by himself. (Tr. pp. 80-81)

Dr. Pospisil reviewed the surveillance video. She said seeing the footage made her sad, disappointed, and made her feel as if she had been duped. (Tr. p. 83)

Dr. Pospisil said after she sent claimant to Dr. Wolf she mostly provided treatment for claimant's lower back condition. She did discuss claimant's right shoulder with him. (Tr. p. 88)

Dr. Pospisil testified there is no indication in the medical records claimant had a prior shoulder injury. She said after viewing the surveillance footage, she did not believe claimant was a candidate for surgery. (Tr. p. 109)

In a May 25, 2016 letter, Dr. Wolf indicated he had reviewed footage of the May 14, 2016 surveillance. He noted the video footage was inconsistent with pain and disability shown and verbalized by claimant when he was at the UIHC. Based on inconsistencies shown in the video, Dr. Wolf believed claimant did not require surgery and questioned any disability claimant might have sustained. (Jt. Ex. 7, p. 10)

On June 3, 2016 claimant was called in to work. Claimant said he was shown the surveillance footage and asked to resign. Claimant testified he did not voluntarily resign. He said he was told he was being terminated and was called a fraud. Claimant testified he was only shown footage of his shopping at Menards. (Ex. C, p. 13; Tr. pp. 21, 51)

Angela Deters testified she was employed with Care Initiatives. Ms. Deters testified she was initially employed as a team director for Care Initiatives in Waterloo and an interim director for the Cedar Rapids facility. She said when she arrived in Cedar Rapids, claimant had already had his accident. (Tr. pp. 112-113)

Ms. Deters said she called claimant in to the office in 2016 to show him the surveillance footage. She said claimant saw the entire footage. She said no one called claimant a fraud. She said claimant was asked to explain the discrepancies between the surveillance footage and his alleged injury. (Tr. pp. 113-114)

Ms. Deters said the intention for the meeting was to make claimant terminate his employment with Care Initiatives. (Tr. p. 117)

On October 20, 2016 claimant was evaluated by Daniel Fabiano, M.D. for right shoulder pain. Claimant was assessed as having a rupture of the bicipital tendon of the

right arm and a right impingement syndrome with a partial tear. Surgery was chosen as a treatment option. (Jt. Ex. 9, pp. 5-8)

On October 24, 2016 claimant underwent surgery with Dr. Fabiano. Surgery consisted of a debridement of a labral tear, biceps tenotomy and a subacromial decompression. (Jt. Ex. 9, p. 23)

Claimant returned to Dr. Fabiano in follow up on January 31, 2017. Claimant was given a cortisone injection in the subacromial bursa. (Ex. 9, pp. 19-21)

On February 12, 2017 claimant was again put under surveillance. Surveillance footage shows claimant walking into a store and getting into his car and driving. (Exs. H, I)

On February 15, 2017 claimant was surveilled. Claimant is seen in the surveillance walking, driving, and getting in and out of his car. (Jt. Exs. H, I)

On February 16, 2017 claimant was again put under surveillance. In the surveillance he is seen getting in and out of his car and driving and walking out of a store. (Exs. H, I)

In a February 27, 2017 report Brian Crites, M.D., gave his opinion of claimant's condition following an IME. The report indicates Dr. Crites reviewed the May 14, 2016 surveillance video. This included, but was not limited to, footage of claimant working on a car and moving buckets from a shopping cart to the trunk of his car. Claimant had continued right shoulder pain, especially with overhead activities. (Jt. Ex. 8, pp. 1-3)

Regarding the surveillance footage, Dr. Crites noted claimant's activity in the video was not within restrictions given by Drs. Wolf and Pospisil. Dr. Crites noted claimant's activity in the surveillance footage does not disprove or preclude clinical symptoms. Dr. Crites noted Dr. Fabiano's surgical records are consistent with findings on the MRI taken prior to his activity in the surveillance video. In brief, since no new pathology was found, between the time of the MRI and the surgery, claimant's activity in the video did not cause or significantly damage the right shoulder. Based on this, Dr. Crites opined the damage to claimant's shoulder was secondary to the February of 2016 work injury. (Jt. Ex. 8, p. 4)

Dr. Crites opined claimant had a 5 percent permanent impairment to the body as a whole based upon the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition. He restricted claimant to no repetitive overhead work and no lifting greater than 15 to 25 pounds. He opined claimant's fall was a substantial or an aggravating factor to claimant's shoulder injury. He did not believe claimant had reached maximum medical improvement (MMI) for the injury. (Jt. Ex. 8, p. 5)

In an April 17, 2017 letter, written by claimant's counsel, Dr. Fabiano agreed claimant's February 1, 2016 fall was a direct cause of claimant's right shoulder injury and need for surgery. Dr. Fabiano did not see surveillance footage, but he reviewed Dr.

Crites' IME report. Dr. Fabiano agreed with Dr. Crites' conclusions and opinions regarding causation and permanent impairment. (Jt. Ex. 9, pp. 22-23)

In a January 11, 2018 report Derek Burdeny, M.D. gave his opinions of claimant's condition following a records review. Dr. Burdeny is a radiologist. He opined the findings shown on the MRI of February 26, 2016 are due to natural degenerative processes. He opined there was no posttraumatic finding related to the February 1, 2016 injury. He opined the follow up MRI showed no postoperative changes other than early adhesive capsulitis. Dr. Burdeny opined the capsulitis was related to claimant's diabetes. He opined the right shoulder pain suffered by claimant is a natural progression of the preexisting degenerative processes present before February 1, 2016. He opined the February 1, 2016 injury did not cause structural damage or the need for surgery. (Jt. Ex. 11)

At the time of hearing, claimant was still working as a pastor at the Presbyterian church in Mechanicsville. Claimant earned \$150.00 a week. Claimant was looking for a job as a full-time pastor.

Claimant testified he still has right shoulder pain. He testified he has lost strength and range of motion in his arms. Claimant has problems with sleep due to right shoulder pain. (Tr. pp. 35-36)

#### CONCLUSIONS OF LAW

As noted under the "issues" section of this decision, defense counsel spent a substantial portion of the brief arguing claimant's injuries did not arise out of and in the course of employment. As noted, defendant stipulated claimant's injury arose out of and in the course of employment.

The first issue to be determined is whether claimant's need for shoulder surgery, which lead to claimant being off work from October 24, 2016 through January 31, 2017, was caused by the stipulated February 1, 2016 date of injury.

The record indicates claimant did not have a prior shoulder injury before the February 1, 2016 incident.

Claimant did have an MRI on February 26, 2016. It showed a SLAP tear. It also showed a partial tear of the infraspinatus and supraspinatus on the right shoulder. (Jt. Ex. 5, pp. 2-4; Jt. Ex. 7, p. 3)

Based, in part on the MRI, and in part on claimant's subjective complaints, Dr. Pospisil referred claimant to Dr. Wolf, an orthopedic surgeon. Claimant was given a two-pound lifting restriction at that time. (Jt. Ex. 4, pp. 10-11)

On April 6, 2016 claimant was seen by Dr. Wolf. Dr. Wolf reviewed the February of 2016 MRI. Claimant complained of shoulder pain with eating, typing and driving. At



that time claimant was given an injection and a two-pound lifting restriction. (Jt. Ex. 7, pp. 1-5)

In early May of 2016 claimant was put under surveillance. After claimant was put under surveillance, claimant returned to Dr. Wolf on May 11, 2016. Claimant continued to have pain with overhead activity and activity away from his body. Surgery was chosen as a treatment option. Claimant was again limited with the restriction of no lifting, pulling or pushing greater than two pounds. (Jt. Ex. 7, pp. 6-9)

Three days after the exam by Dr. Wolf, claimant was surveilled. In the surveillance footage claimant is seen lifting large buckets out of a shopping cart and putting them in the trunk of his car. Claimant is seen moving an air compressor. Claimant is seen jacking up a car in his garage. He is seen changing a tire with a spinner wrench. The surveillance footage shows claimant climbing underneath the car and steadying himself by holding onto the rear of the car with his right hand. Based, in part on claimant's testimony, claimant is seen removing both a tire and a shock absorber on the right rear of his vehicle. When claimant is unable to break a bolt or a nut with a wrench, claimant uses a cheater bar that appears to be over six feet long to gain greater leverage with the wrench. (Exs. H, I)

The video shows claimant using what appears to be a lot of force with the right arm with a spinner wrench, with a wrench under his car and with a cheater bar. The video does not show claimant exhibiting any pain or guarding his right arm as a result of using it to do work on his car. (Exs. H, I)

Claimant testified he was performing the activity shown in the surveillance video, as he was told he would be in a sling for four to six weeks and recuperating for another four to six months after surgery. (Ex. L, pp. 35-37)

Dr. Pospisil reviewed the video footage. Dr. Pospisil noted when she treated claimant he had a hard time using his right shoulder. On one occasion claimant used his left hand to lift up his right arm. She testified the activity claimant shows in the video was very different from his symptoms exhibited during treatment. Based on the surveillance footage, she did not feel claimant required surgery or had a permanent impairment. (Jt. Ex. 4, pp. 22-23; Tr. pp. 80-109)

Dr. Wolf also reviewed the surveillance footage. He noted the footage was inconsistent with the pain and disability shown and verbalized by claimant in treatment. Based on the inconsistency of claimant's symptoms, Dr. Wolf did not believe claimant needed surgery and questioned if claimant had any disability. (Jt. Ex. 7, p. 10)

Dr. Burdeny, a radiologist, performed a records review. He opined the findings shown on the February 26, 2016 MRI were due to degenerative processes and were not posttraumatic findings related to the February 1, 2016 injury. (Jt. Ex. 11)

Dr. Fabiano performed right shoulder surgery and follow up care on claimant. He opined claimant's February 1, 2016 fall was a direct cause of claimant's shoulder injury and need for surgery. However, Dr. Fabiano's opinions on causation and permanent impairment are problematic for several reasons. Dr. Fabiano specifically notes in his opinion he did not see any of the surveillance footage, specifically the May 14, 2016 surveillance footage showing claimant working on his car and exhibiting force on his right upper extremity using wrenches and a cheater bar. As Dr. Fabiano did not see any of the surveillance footage, his opinions regarding causation, the need for surgery, and permanent impairment are found not convincing. (Jt. Ex. 9, pp. 22-23)

Dr. Crites evaluated claimant on occasion when he performed an IME on claimant. Dr. Crites did see the May 14, 2016 surveillance footage. He opined the surveillance does not disprove or preclude claimant's clinical symptoms. He opined the changes to claimant's shoulder were secondary to the February 1, 2016 work injury. (Jt. Ex. 8, p. 4)

Dr. Crites' opinions regarding causation, the need for surgery and permanent impairment are also problematic for several reasons. As noted in the report, Dr. Crites only saw the March 14, 2016 surveillance footage. He did not review any of the other surveillance footage. Dr. Crites' causation opinion also misses the point. Defendants do not appear to contend claimant injured or further injured his shoulder due to the activity shown in the February 14, 2016 surveillance. The problem is with the inconsistency and the credibility of claimant's subjective complaints, in treatment, compared with the activity claimant engages in in the May 14, 2016 surveillance. Dr. Pospisil referred claimant to an orthopedic surgeon based, in part, on claimant's subjective complaints. Dr. Wolf recommended surgery based, in part on claimant's subjective complaints. Dr. Crites does not offer any rationale or explanation to reconcile records of a patient who needs to use his left arm to lift up his right arm in treatment, with surveillance footage showing claimant lifting a compressor, taking off a tire, and executing a great deal of force with wrenches and a cheater bar.

Based on this lack of explanation regarding the inconsistencies between claimant's subjective complaints before May of 2016, and claimant's activities shown in the May 14, 2016 video, Dr. Crites' opinion regarding causation, the need for surgery and permanent impairment are found not convincing.

Claimant contends his February 1, 2016 work injury resulted in a need for shoulder surgery. Claimant indicated in February of 2016 he had difficulty putting on a shirt and lifting anything more than light weight. (Jt. Ex. 6, pp. 1-2) Dr. Pospisil noted claimant wanted to continue to keep his arm by his side. (Jt. Ex. 4, p. 10) Claimant told Dr. Pospisil he had difficulty with overhead activity and activities away from his body. (Jt. Ex. 7, pp. 6-8) Claimant indicated he had shoulder pain sitting in meetings and driving. (Jt. Ex. 3, p. 4; Jt. Ex. 4, p. 1; Ex. 11, Depo. p. 19) Claimant indicated he had shoulder pain from dressing, eating and typing. (Jt. Ex. 6, pp. 6, 22, 24, 29-30; Jt. Ex. 7, p. 1) Claimant indicated shoulder pain with preparing food, opening jars and washing his back. (Jt. Ex. 10; pp. 2-3) As noted, Dr. Pospisil testified that on one occasion,

when asked to move his right arm, claimant had to pick his right arm up with his left arm and could not lift it up by himself. (Tr. pp. 80-81)

As noted, the activity in the surveillance footage, specifically footage from May 14, 2016, contradicts claimant's complaints provided to care providers. Based on this inconsistency, it is found claimant's testimony regarding his February 1, 2016 injury, his need for surgery, and any kind of permanent disability, is found not convincing.

Dr. Pospisil and Dr. Wolf did not believe claimant required surgery and did not believe he had any disability from the February 1, 2016 injury. Dr. Burdeny opined the findings in the February of 2016 MRI were consistent with the degenerative processes and were not due to a traumatic injury. The opinions of Dr. Crites and Dr. Fabiano regarding causation, the need for surgery, and permanent impairment are found not convincing. Claimant's subjective complaints given to care providers is found not convincing and inconsistent. Given this record, claimant has failed to carry his burden of proof his need for his right shoulder surgery was caused by the February 1, 2016 work injury.

This is a difficult case. There is no evidence in the record claimant had prior right shoulder problems. Claimant's February 26, 2016 MRI did reveal a SLAP tear on the right shoulder. However, claimant has the burden of proof to prove his need for surgery is caused by the February of 2016 incident and if the injury resulted in permanent disability. It is difficult to find in claimant's favor when the activities shown on surveillance footage contradict his prior subjective complaints given to healthcare providers.

As claimant has failed to carry his burden of proof his need for surgery was caused by the February 1, 2016 injury, claimant has failed to carry his burden of proof he is entitled to temporary benefits from October 24, 2016 through January 13, 2017.

The next issue to be determined is if the injury was a cause of permanent disability.

As noted above, Drs. Pospisil, Wolf and Burdeny did not believe claimant's February 1, 2016 injury resulted in a permanent disability. Dr. Crites and Dr. Fabiano's opinions regarding permanent disability are found not convincing. Claimant's testimony regarding any disability caused by the February 1, 2016 injury is also found not convincing. Based on the above, claimant has failed to carry his burden of proof his February 1, 2016 injury resulted in a permanent disability.

As claimant failed to carry his burden of proof his February 1, 2016 injury resulted in the need for surgery or resulted in a permanent disability, all other issues as detailed above are moot, except for claimant's entitlement to reimbursement for the IME by Dr. Crites.

The final issue to be determined is whether claimant is entitled to reimbursement of the IME by Dr. Crites.

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

Regarding the IME, the Iowa Supreme Court provided a literal interpretation of the plain-language of Iowa Code section 85.39, stating that section 85.39 only allows the employee to obtain an independent medical evaluation at the employer's expense if dissatisfied with the evaluation arranged by the employer. Des Moines Area Reg'l Transit Auth. v. Young, 867 N.W.2d 839, 847 (Iowa 2015).

Under the Young decision, an employee can only obtain an IME at the employer's expense if an evaluation of permanent disability has been made by an employer-retained physician.

Iowa Code section 85.39 limits an injured worker to one IME. Larson Mfg. Co., Inc. v. Thorson, 763 N.W.2d 842 (Iowa 2009).

The Supreme Court, in Young noted that in cases where Iowa Code section 85.39 is not triggered to allow for reimbursement of an independent medical examination (IME), a claimant can still be reimbursed at hearing the costs associated with the preparation of the written report as a cost under rule 876 IAC 4.33. Young at 846-847.

Dr. Pospisil, the employer-retained physician opined in a February 25, 2016 report claimant had no permanent impairment. (Jt. Ex. 4, pp. 22-23) In a February 27, 2017 report, Dr. Crites, the employee-retained physician found claimant had a 5 percent permanent impairment. (Jt. Ex. 8, pp. 1-3) Given the chronology of the reports, claimant is entitled to reimbursement for the Crites' IME.

#### ORDER

Therefore, it is ordered:


That claimant shall take nothing in the way of benefits from this proceeding.

That defendant shall reimburse claimant for costs associated with Dr. Crites' IME.

That both parties shall pay their own costs.

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

Signed and filed this 15<sup>th</sup> day of July, 2019.



JAMES F. CHRISTENSON  
DEPUTY WORKERS'  
COMPENSATION COMMISSIONER

Copies to:

Christopher D. Spaulding  
Attorney at Law  
2423 Ingersoll Ave.  
Des Moines, IA 50312-5233  
[chris.spaulding@sbsattorneys.com](mailto:chris.spaulding@sbsattorneys.com)

Joseph D. Thornton  
Attorney at Law  
PO Box 249  
Council Bluffs, IA 51502  
[jdthornton@smithpeterson.com](mailto:jdthornton@smithpeterson.com)

JFC/sam

**Right to Appeal:** This decision shall become final unless you or another interested party appeals within 20 days from the date above, pursuant to rule 876-4.27 (17A, 86) of the Iowa Administrative Code. The notice of appeal must be in writing and received by the commissioner's office within 20 days from the date of the decision. The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday. The notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 1000 E. Grand Avenue, Des Moines, Iowa 50319-0209.