BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

MIGUEL GARCIA RUBALCAVA, Claimant, SIOUXPREME EGG PRODUCTS, INC., Employer, and BERKSHIRE HATHAWAY HOMESTATE INSURANCE COMPANY, Insurance Carrier, Defendants.	File No. 5066865 ARBITRATION DECISION Head Note Nos.: 1402.40, 1803, 1803.01, 2907

STATEMENT OF THE CASE

Miguel Garcia Rubalcava, claimant, filed a petition for arbitration against Siouxpreme Egg Products (hereinafter referred to as "Siouxpreme Egg"), as the employer and Berkshire Hathaway Homestate Insurance Company as the insurance carrier. This case came before the undersigned for an arbitration hearing on May 4, 2020. This case was scheduled to be an in-person hearing occurring in Des Moines. However, due to the outbreak of a pandemic in Iowa, the Iowa Workers' Compensation Commissioner ordered all hearings to occur via video means, using CourtCall. Accordingly, this case proceeded to a live video hearing via Court Call with claimant's counsel appearing remotely from two locations, claimant appearing remotely from one of his attorney's office, defense counsel appearing remotely, and the court reporter also 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 through 11 and Defendants' Exhibits A through E. All exhibits were received without objection.

Claimant testified on his own behalf. Defendants called Brett Kleve to testify. The evidentiary record closed at the conclusion of the evidentiary hearing on May 4, 2020.

However, counsel for the parties requested an opportunity to file post-hearing briefs. This request was granted and both parties filed briefs simultaneously on May 29, 2020. The case was considered fully submitted to the undersigned on that date.

ISSUES

The parties completed a hearing report prior to the commencement of hearing and submitted the following disputed issues for resolution:

1. Whether the claimant's stipulated November 29, 2017 work injury should be compensated with permanent disability benefits as a scheduled member injury to the right shoulder, or as an unscheduled injury.

2. Whether claimant's permanent disability claim is ripe for determination or whether he remains in a running healing period.

3. If compensable as an unscheduled injury, whether claimant's permanent disability benefits should be compensated using a functional method due to his return to work or using an industrial disability analysis.

4. The extent of claimant's entitlement to permanent disability, if any.

5. The proper commencement date for permanent disability benefits, if any.

6. Whether claimant is entitled to reimbursement to some or all of his independent medical evaluation fee pursuant to Iowa Code section 85.39.

7. Whether costs should be assessed against either party and, if so, in what amount.

At the commencement of hearing, the parties informed the undersigned they had reached an agreement regarding reimbursement of claimant's independent medical evaluation. Defendants were verbally ordered to reimburse those fees. Defendants should honor that agreement and reimburse claimant for his independent medical evaluation fees, if they have not done so already. However, the parties' agreement and the verbal order at hearing resolve this as a disputed issue. No further discussion, findings, conclusions, or award will be made relative to the issue of claimant's independent medical evaluation.

FINDINGS OF FACT

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

Miguel Garcia Rubalcava is a 57-year-old gentleman, who lives in Sioux Center, Iowa. He was born in Mexico and came to the United States at the age of 17 or 18. He attended six years of schooling in Mexico and has no additional education.

Mr. Garcia Rubalcava's native language is Spanish. However, he has learned how to speak English since being in the United States. He is not able to read or write in the English language, however.

Claimant began working for the employer, Siouxpreme Egg, in 1992 and continued his employment with the employer at the time of the arbitration hearing. On November 29, 2017, Mr. Garcia Rubalcava sustained an injury when he was lifting boxes overhead. The employer admitted the injury and sent claimant for medical care.

Following unsuccessful attempts at conservative care, claimant was referred to an orthopaedic surgeon, Steven J. Stokesbary, M.D. Dr. Stokesbary diagnosed claimant with a "Right shoulder partial thickness rotator cuff tear with impingement and SLAP lesion." (Joint Ex. 4, p. 43) Dr. Stokesbary attempted conservative measures, including injections into the right shoulder area. Ultimately, however, Dr. Stokesbary recommended and took claimant to surgery on June 22, 2018. (Joint Ex. 4, p. 46)

The operative note indicates that Dr. Stokesbary performed a "Right shoulder arthroscopy with limited debridement, biceps tenotomy, and [sic] mini open rotator cuff repair, and subacromial decompression." (Joint Ex. 4, p. 46) Unfortunately, the surgical intervention did not alleviate all of Mr. Garcia Rubalcava's symptoms. In his October 1, 2018 office note, Dr. Stokesbary noted that claimant was making minimal progress and that "he wants to be made completely disabled, and he wants to collect a check, retire, and move to Mexico." (Joint Ex. 4, p. 50) Claimant denies he ever said this to Dr. Stokesbary. However, this is a statement I would expect a physician to remember and document when made by a patient. I find that Mr. Garcia Rubalcava likely did make a comment similar to the recorded statement in Dr. Stokesbary's medical record, though I recognize that such a statement may have been made in frustration given the lack of improvement in claimant's symptoms and condition.

Dr. Stokesbary opined in the October 1, 2018 office note that claimant was capable of returning to one-handed work. He imposed work restrictions that included no use of claimant's right arm and released Mr. Garcia Rubalcava from his care on that date. (Joint Ex. 4, p. 50)

Nevertheless, claimant returned for further evaluation by a nurse practitioner at Dr. Stokesbary's office on November 19, 2018. The nurse practitioner noted that claimant continued to stretch his shoulder but was not performing his home exercise program. She also noted that claimant complained of pain with any overhead motion. (Joint Ex. 4, p. 51) The nurse ordered another MRI of claimant's right arm.

The MRI demonstrated a traumatic incomplete tear of the right rotator cuff. (Joint Ex. 4, pp. 55-56) Dr. Stokesbary re-evaluated Mr. Garcia Rubalcava on December 27, 2018 and performed another injection into claimant's right shoulder.

On January 8, 2019, claimant again presented for evaluation by Dr. Stokesbary. Dr. Stokesbary confirmed that the MRI demonstrated findings consistent with a possible

partial thickness tear of a rotator cuff tendon. (Joint Ex. 4, p. 58) Dr. Stokesbary performed an injection of the long head of claimant's biceps tendon at this evaluation. (Joint Ex. 4, p. 58)

On February 14, 2019, Dr. Stokesbary again evaluated claimant. At this appointment, claimant's most significant complaint was his right elbow and Dr. Stokesbary ordered an MRI of the right elbow. Dr. Stokesbary diagnosed claimant with a possible partial right distal biceps tear. (Joint Ex. 4, p. 60)

On February 28, 2019, claimant presented to a partner of Dr. Stokesbary for an injection of his right distal biceps tendon. The injection provided significant pain relief immediately. (Joint Ex. 4, p. 64) At a March 28, 2019 follow-up, Dr. Stokesbary documented that claimant had good relief from the biceps injection. He noted that claimant had full range of motion in the right shoulder and elbow. However, he also noted decreased strength with forward flexion and abduction and pain with right shoulder adduction. Given the ongoing symptoms in claimant's right shoulder, Dr. Stokesbary referred claimant for evaluation by one of his surgical partners, Brian D. Johnson, M.D. (Joint Ex. 4, p. 69)

Dr. Johnson evaluated Mr. Garcia Rubalcava on April 1, 2019 and assessed claimant with "likely an upper rolled margin subscapularis tear," as well as "bicipital cramping with clear Popeye deformity from tenotomy." (Joint Ex. 4, p. 72) Dr. Johnson recommended surgical intervention when claimant felt the symptoms required surgical intervention. (Joint Ex. 4, p. 72) Shortly thereafter, claimant did request a second surgical procedure.

Dr. Johnson performed a second surgery on claimant on May 22, 2019. Specifically, Dr. Johnson performed an arthroscopic procedure that included anterior and superior labral debridement, a revision of the prior distal clavicle excision, a revision of the prior subacromial decompression, as well as an arthroscopic repair of the subscapularis rotator cuff tendon, and a repair of the subscapularis rotator cuff tendon. (Joint Ex. 4, p. 85) Following surgery, Dr. Johnson recommended in his February 10, 2020 office note that claimant continue physical therapy until he felt those therapy sessions were no longer helpful. Dr. Johnson also opined that claimant could continue improving for up to a year after his surgery in May 2019. (Joint Ex. 4, p. 84) Mr. Garcia Rubalcava did not return for evaluation by Dr. Johnson between February 10, 2020 and the hearing date. However, he was scheduled to return to be evaluated by Dr. Johnson in June 2020. (Claimant's testimony)

Defendants scheduled an independent medical evaluation, performed by Michael J. Morrison, M.D., on February 6, 2020. Dr. Morrison noted current symptom complaints from claimant that included neck pain that radiated to his chest wall and down his right arm. (Joint Ex. 5, p. 89; Defendants' Ex. A) Claimant testified at the time of trial that he believes and asserts that his back and neck conditions are causally related to his November 2017 work injury.

However, Dr. Morrison opined that these symptoms are not related to the work injury in November 2017. (Joint Ex. 5, p. 89; Defendants' Ex. A) I find that opinion to be unrebutted in this record. Dr. Morrison's opinion is bolstered by a physical therapy record in February 2018, which indicates that claimant denied neck pain at that time. (Joint Ex. 9, p. 124) Therefore, I accept Dr. Morrison's medical causation opinion pertaining to the alleged neck injury and find that claimant failed to prove he sustained a neck injury as a result of the November 29, 2017 work injury.

Dr. Morrison noted that Mr. Garcia Rubalcava was eight months post-surgery at the time of his evaluation. Dr. Morrison opined that no further physical therapy would likely be helpful and that claimant had reached maximum medical improvement by at least the date of his evaluation on February 6, 2020. (Joint Ex. 5, p. 90; Defendants' Ex. A) Utilizing the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, Dr. Morrison further opined that no additional treatment was necessary and that claimant sustained a 15 percent permanent functional impairment of his right upper extremity as a result of the November 2017 work injury. Dr. Morrison recommended a functional capacity evaluation (FCE) be performed to determine permanent work abilities and restrictions. (Joint Ex. 5, p. 90; Defendants' Ex. A)

Claimant attended an FCE on March 13, 2020. The evaluating therapist opined that claimant provided a valid FCE and recommended work limitations that included 40 pounds occasional lifting with lower amounts (20 pounds occasionally) over shoulder and no prolonged or repetitious work over head. The therapist also recommended no frequent forward reaching with the right arm. (Joint Ex. 6, p. 92)

Claimant then sought an independent medical evaluation, performed by David R. Archer, M.D., on March 25, 2020. Dr. Archer opined that claimant's injury in November 2017 resulted in chronic pain and a loss of active range of motion. He opined that Mr. Garcia Rubalcava sustained a 21 percent permanent functional impairment of the right upper extremity, which is equivalent to 13 percent of the whole person. (Joint Ex. 7, p. 103) Dr. Archer concurred that claimant was at maximum medical improvement. He opined that claimant should lift up to 20 pounds maximum with his right arm and avoid overhead reaching and lifting with the right arm. (Joint Ex. 7, pp. 103-104)

Dr. Archer is the only physician in this record that provides any in-depth explanation or analysis of the anatomy of claimant's injury. He reviewed the surgical procedures performed by Dr. Stokesbary and Dr. Johnson and explained that "The glenoid labrum comprises part of the proximal articulation of the scapula w/ [sic] the humerus, acromion process is part of the scapula which is the proximal part of the shoulder joint, and the distal end of the clavicle which was excised is proximal to the shoulder joint." (Joint Ex. 7, p. 101) Dr. Archer's explanation of the anatomy comprising and surrounding claimant's right shoulder is accepted as accurate and unrebutted.

Given Dr. Archer's medical and anatomic explanation, I find that the glenoid labrum is joined with the scapula and connects the arm (humerus) to the scapula. Arguably, this is part of the shoulder joint because it is necessary to connect the arm and shoulder. However, I provide no specific finding whether the labrum is specifically part of the shoulder joint or not.

I find that the acromion process is part of the scapula and is the proximal part of the shoulder joint. I find that the acromion process and the decompression performed in this area was done on the shoulder joint.

However, the distal clavicle is proximal to the shoulder joint according to Dr. Archer. (Joint Ex. 7, p. 101) Again, this medical opinion is not rebutted or refuted by other evidence in this record. I find that the distal clavicle is proximal to the shoulder joint and that the distal clavicle excision performed by Dr. Stokesbary and the revision of the distal clavicle excision by Dr. Johnson extended beyond and proximal to the shoulder joint.

I also note that claimant sustained tears to three rotator cuff tendons. None of the physicians in this record explains the origination point, termination point, purpose, or location of these rotator cuff tendons.

Having considered all of the medical evidence and physician's opinions, I find the opinions of Dr. Morrison and Dr. Archer to be convincing on the issue of maximum medical improvement. Although Dr. Johnson recommended some additional therapy and suggested that claimant may improve through May 2020, both Dr. Morrison and Dr. Archer opined that claimant achieved maximum medical improvement. Claimant had no ongoing medical care and his symptoms do not appear to have significantly improved before the date of hearing. I find the opinions of Dr. Morrison and Dr. Archer to be most convincing and accurate on the issue of maximum medical improvement. Specifically, I find that claimant achieved maximum medical improvement by the date of Dr. Morrison's evaluation, or February 6, 2020.

Dr. Morrison and Dr. Archer both offered opinions about permanent functional impairment. In comparing those two opinions, I note that Dr. Morrison specifically references and opined that his impairment is pursuant to the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition. Dr. Archer provides his impairment rating without explanation or confirmation that it is issued pursuant to the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition. I find the opinion of Dr. Morrison more credible given his specific reference and use of the AMA Guides.

Therefore, I find claimant has proven a 15 percent permanent functional impairment of the right upper extremity as a result of the November 2017 work injury. This converts, or is equivalent, to 9 percent of the whole person according to Table 16-3 of the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, page 439.

As noted previously, claimant has returned to work for the employer. He currently earns a higher hourly wage and higher weekly earnings than he did on the date of injury in November 2017. (Claimant's testimony) The employer's representative testified that claimant is actually working overtime hours in 2020. (Testimony of Brett Kleve)

CONCLUSIONS OF LAW

The initial disputed issue submitted by the parties is whether claimant's stipulated November 29, 2017 work injury should be compensated as a scheduled member disability or as an unscheduled injury. Claimant alleged and asserted at trial that he sustained a neck injury as a result of the November 29, 2017 work injury. However, claimant asserts that the neck claim is not yet ripe for determination.

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).

In this instance, I conclude that there is definitive medical evidence in the record about causation. I conclude the issue is ripe for determination. I accepted the unrebutted medical causation opinion offered by Dr. Morrison and found that claimant failed to prove his neck injury is causally related to the November 2017 work injury. Therefore, I conclude that claimant cannot recover benefits for the alleged neck injury and the alleged neck injury does not convert this claim into an unscheduled injury.

Claimant also asserts that his work injury extends beyond the right shoulder into the body as a whole. Specifically, claimant argues that at least some of the injured areas are proximal to the glenohumeral joint and, as such, the injury should be determined to be an unscheduled injury compensated with industrial disability pursuant to Iowa Code section 85.34(2)(v) (2017).

Defendants contend that the injury is limited to the right shoulder and should be compensated as a scheduled member injury pursuant to Iowa Code section 85.34(2)(n) (2017). In the alternative, defendants contend that even if the injury is determined to be an unscheduled injury, it should be compensated with a functional impairment analysis and award pursuant to Iowa Code section 85.34(2)(v).

Prior to July 1, 2017, injuries to the shoulder were considered proximal to the arm, extending beyond the arm, and compensated with industrial disability as an unscheduled injury pursuant to prior Iowa Code section 85.34(2)(u) (2016). See Alm v. Morris Barick Cattle Co., 240 Iowa 1174, 38 N.W.2d 161 (1949). The Iowa legislature enacted significant amendments to the Iowa workers' compensation laws, which took

effect in July 2017. As part of those amendments, the legislature specified that injuries to the shoulder should be compensated as scheduled member injuries on a 400-week schedule. Iowa Code section 85.34(2)(n) (2017). It has long been understood that an injury must be compensated as a scheduled injury if the legislature saw fit to list the injured body part in Iowa Code section 85.34(2)(a)-(u). Williams v. Larsen Construction Co., 255 Iowa 1149, 125 N.W.2d 248 (1963).

Claimant contends that the legislature did not define what constitutes the "shoulder" or provide guidance as to the anatomic parts that are to be considered a "shoulder." Claimant contends that the "shoulder" delineated in Iowa Code section 85.34(2)(u) (2017) refers to the glenohumeral joint. Therefore, Mr. Garcia Rubalcava asserts that the injuries he sustained involve anatomical body parts that are proximal to the glenohumeral joint and necessarily extend beyond the glenohumeral joint, or "shoulder." Defendants contend, "No doctor has provided any opinion that Claimant injured any part of his body beyond his shoulder." (Defendants' Post-Hearing Brief, p. 5) Defendants assert that claimant's injuries are limited to the right shoulder and should be compensated as scheduled member injuries of the shoulder pursuant to Iowa Code section 85.34(2)(n) (2017).

The Iowa Supreme Court made it clear in Alm v. Morris Barick Cattle Co., 240 Iowa 1174, 1177, 38 N.W.2d 161, 163 (1949) that when the injury "extended beyond the scheduled area, the schedule of course does not apply." The Court noted, "where there is injury to some scheduled member and also to parts of the body not included in the schedule," the injury is not compensated under a scheduled member analysis. Id.

It appears undisputed that claimant's injury resulted in a distal biceps injury, anterior and superior labral debridement, a repair of three rotator cuff tendons, including the subscapularis, supraspinatus and infraspinatus tendons. It also resulted in a subacromial decompression and revision of that decompression, as well as a distal clavicle excision and revision of that excision. (Joint Ex. 4, p. 85) Therefore, the first question to be determined in this case is whether the injuries to claimant's rotator cuff, and specifically the subscapularis, supraspinatus and infraspinatus tendons, constitute "shoulder" injuries or should be considered injuries to anatomic body parts proximal to the shoulder and compensated as unscheduled injuries. Alternatively, or perhaps in conjunction, it must be determined whether repair of a labral tear, a subacromial decompression and/or a distal clavicle excision results in injury to an anatomic body part proximal to the shoulder. These issues are relatively untested before the agency with no known decisions from the Iowa Workers' Compensation Commissioner, the district courts, or the Iowa appellate courts interpreting what anatomic body parts constitute the "shoulder" pursuant to Iowa Code section 85.34(2)(n).

This agency has issued at least six deputy-level decisions considering post-July 1, 2017 "shoulder" injury claims. In three of those decisions, it appears that no argument was made, or no supporting medical evidence was introduced, to establish that the injury extended beyond the "shoulder" to become an unscheduled injury. See Arroyo v. Smithfield Foods, Inc., File No. 5066288 (Arbitration Decision, February 6,

2020); Agee v. EFCO Corp., Inc., File No. 5065304, 5064099 (Arbitration Decision, October 22, 2019); Hospardsky v. Quaker Oats Co., File No. 5061912 (Arbitration Decision, October 30, 2019). In two recent decisions, a deputy commissioner specifically considered whether torn rotator cuff tendons were "shoulder" injuries or unscheduled injuries to the body as a whole.

In Chavez v. Technology, L.L.C., File No. 5066270 (Arbitration Decision, February 5, 2020) and Deng v. Farmland Foods, Inc., File No. 5061883 (Arbitration Decision, February 25, 2020), the deputy commissioner concluded that rotator cuff tendons attach proximal to the glenohumeral joint and are unscheduled injuries, not shoulder injuries. The injuries in Chavez and Deng were both rotator cuff injuries. In Chavez, the injured worker tore the infraspinatus and supraspinatus tendons, similar to this case. In Deng, the injured worker suffered a torn infraspinatus tendon. Both those cases also appear to have had relevant medical opinions that documented and explained the relative anatomy of the shoulder joint and surrounding structures.

The issue also came before the undersigned recently in Smidt v. JKB Restaurants, File No. 5067766 (Arbitration Decision, May 6, 2020). In Smidt, I found that injuries to the infraspinatus and supraspinatus tendons and corresponding muscles were injuries proximal to the glenohumeral joint. After performing a statutory construction analysis, the undersigned concluded the claimant in Smidt proved factually that his injury extended proximal to the glenohumeral joint and concluded that the injury should be compensated as an unscheduled injury, rather than being limited to a "shoulder" injury.

This agency and the courts have had to consider similar issues with respect to different body parts in the past. For instance, carpal tunnel injuries involve the wrist. Disputes arose before this agency whether carpal tunnel injuries were "hand" injuries or "arm" injuries pursuant to Iowa Code section 85.34(2). Ultimately, carpal tunnel and wrist injuries were determined to be proximal to the hand and compensated as "arm" injuries. Miranda v. IBP, File No. 5008521 (Appeal Decision, August 2, 2005). Injuries to the hip were determined to be proximal to the leg and determined to be unscheduled injuries. Lauhoff Grain Co. v. McIntosh, 395 N.W.2d 834 (Iowa 1986); Dailey v. Pooley Lbr Co., 233 Iowa 758, 10 N.W.2d 569 (1943). Injuries involving the joint between the finger and the hand were determined to be hand injuries. Miranda v. IBP, File No. 5008521 (Appeal Decision, August 2, 2005).

As noted, injuries to the shoulder area, including rotator cuff tears, were previously considered and determined to be proximal to the arm and considered unscheduled injuries prior to the 2017 statutory changes. Second Injury Fund of Iowa v. Nelson, 544 N.W.2d 258 (Iowa 1995). The courts and this agency have held that injuries proximal to the scheduled member are awarded based upon the more proximal body part, or as an unscheduled injury if the injury extends beyond all scheduled members. Id.; Miranda v. IBP, File No. 5008521 (Appeal Decision, August 2, 2005). Therefore, the legal question to be answered in this case is whether tears of three rotator cuff tendons (the subscapularis, the infraspinatus, and the supraspinatus

tendons) constitute a "shoulder" injury or an unscheduled injury. In conjunction, or alternatively, it must be determined whether injuries resulting in labral tears, subacromial decompression, and/or distal clavicle excisions constitute injuries proximal to the shoulder joint such that they should be compensated as unscheduled injuries.

When conducting statutory interpretation, the goal is to determine the intent of the legislature. When the plain language of the statute is clear as to its meaning, courts apply the plain language and do not search for legislative intent beyond the express terms of the statute. Denison Municipal Utilities v. Iowa Workers' Compensation Com'r, 857 N.W.2d 230 (Iowa 2014). A statute is only ambiguous if reasonable minds could differ or be uncertain as to the meaning of the statute. Iowa Ins. Institute v. Core Group of Iowa Ass'n for Justice, 867 N.W.2d 58 (Iowa 2015).

Statutes should be read as a whole, rather than looking at specific words or phrases in isolation. Id. Moreover, when making statutory changes, the legislature is deemed to have known and understood the status of the law, including any interpretations made by this agency and the Iowa Supreme Court as to existing statutes. Roberts Dairy v. Billick, 861 N.W.2d 814, 821 (Iowa 2015) (as amended); State v. Fluhr, 287 N.W.2d 857, 862 (Iowa 1980). When enacting the 2017 amendment, the legislature presumably understood that shoulder injuries were previously compensated as unscheduled injuries and that limiting a shoulder injury to a scheduled injury would result in significantly less compensation to an injured worker. Therefore, the legislature made a conscious decision to add the "shoulder" as a scheduled member injury, rather than compensate it as an unscheduled injury.

Presumably, the legislature was also aware that rotator cuff injuries were previously awarded as unscheduled injuries because they were proximal to the arm. Second Injury Fund of Iowa v. Nelson, 544 N.W.2d 258, 262 (Iowa 1995). In Nelson, the Iowa Supreme Court did not discuss the anatomy but referred to the rotator cuff injury as a "shoulder" injury. Therefore, it is possible that the legislature intended that rotator cuff injuries should be compensated as "shoulder" injuries. However, in 2017, the legislature also should have been aware that anatomic parts proximal to the specified scheduled member have been determined to be compensable to the more proximal body part or body as a whole. Id.

With this in mind, the legislature likely understood that the rotator cuff tendons and corresponding muscles attach proximal to the glenohumeral joint. With this understanding, it is also possible that the legislature decided to allow prior legal analysis to govern torn rotator cuff injuries as proximal to the glenohumeral, or "shoulder," joint.

As noted, this agency and the courts have interpreted legislative intent and determined the specific meanings of various portions of Iowa Code section 85.34(2). For instance, this agency has had to clarify when injuries are considered finger versus hand injuries, hand versus arm injuries, and leg versus whole body injuries. The generic language used in other subsections of Iowa Code section 85.34(2) have required context, definition, and judicial interpretation. Yet, in spite of this history, the

legislature elected to use relatively generic language to include the "shoulder" as a scheduled member when amending Iowa Code section 85.34(2).

The legislature certainly did not delineate the anatomic parts of the body that constitute the "shoulder" within the terms of the statute. As the Iowa Court of Appeals noted, "Medical terminology used to describe an area of the body is not always compatible with the statutory terminology used to described [sic] an area of the body to classify a scheduled injury. This can present a problem when distinguishing scheduled losses from unscheduled losses." Prewitt v. Firestone Tire & Rubber Co., 564 N.W.2d 852, 854 (Iowa App. 1997). Yet, the legislature also must have known that, in prior case law, this agency and the courts have determined that when in doubt, the law is interpreted to the benefit of the worker. Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839 (Iowa 2015). If this analysis is followed to its logical conclusion, the legislature in 2017 knew that any body parts proximal to the "shoulder" joint would result in an injury being compensated to the whole person yet chose not to incorporate or specifically include rotator cuff injuries or distal clavicle excisions as "shoulder" injuries.

As noted in the findings of fact, Dr. Archer provided an undisputed medical explanation and opinion stating that the distal clavicle excision performed by Dr. Stokesbary and revised by Dr. Johnson is anatomically located proximally to the glenohumeral, or shoulder, joint. Given the undisputed anatomic explanation provided by Dr. Archer, the 2017 statutory amendment, at best, leaves doubt and ambiguity as to what constitutes a "shoulder" pursuant to Iowa Code section 85.34(2)(n) (2017).

On the other hand, an injured worker is likely to report "shoulder" pain when experiencing a torn rotator cuff injury or surgical repairs of the labrum, a distal clavicle excision, or a subacromial decompression. Physicians order an MRI of the "shoulder" to diagnose torn rotator cuff tendons and assess the shape and type of the acromion. "Shoulder" surgeons repair torn rotator cuff injuries, perform labral repairs, subacromial decompressions, and distal clavicle excisions. Dr. Johnson and Dr. Stokesbary refer to claimant's injury and symptoms as located within the right shoulder. They obtained and relied upon right shoulder MRI's to diagnose and repair claimant's injuries. Tears of the infraspinatus and supraspinatus (two tendons of the rotator cuff involved in this case as well) are often referred to as shoulder injuries in medical records, by physicians, by patients, and by this agency. See May v. Menard, Inc., File No. 5041559 (Arbitration Decision, June 2, 2015) (affirmed by agency in December 2016).

In Farmer v. Second Injury Fund of Iowa, File No. 5021559 (Appeal, November 20, 2008), the Iowa Workers' Compensation Commissioner noted, "the deltoid muscle is part of the muscle complex which operates the shoulder joint." While the Commissioner was, obviously, not addressing the specific anatomic structure or delineating the specifics of the "shoulder" in 2008, the Commissioner nonetheless recognized a difference between the "shoulder joint" and the "muscle complex" which operates the shoulder joint. Again, carrying this to the logical conclusion, the legislature was aware

of this pre-existing definition by the Iowa Workers' Compensation Commissioner and elected not to modify this definition or clearly define what constitutes a "shoulder."

The AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, offers permanent impairment for loss of range of motion, loss of strength, and joint replacement of the shoulder. Range of motion and strength ratings necessarily would be affected by tendons and muscles (such as the rotator cuff) that make the shoulder joint operational. However, the Guides do not define what constitutes a shoulder and, in fact, evaluate the shoulder impairment as an upper extremity, or arm. The Guides are not terribly insightful or helpful in determining whether a torn rotator cuff is a shoulder injury or an injury proximal to the shoulder joint. Ultimately, I conclude that the language selected by the Iowa legislature and enacted as Iowa Code section 85.34(2)(n) is ambiguous as to whether a "shoulder" includes the rotator cuff tendons, labral tears, subacromial decompression, and/or a distal clavicle excision.

When a statute leaves ambiguity as to its meaning or intent, it has long been the law of Iowa that a statutory provision in the Iowa Workers' Compensation Acts should be interpreted liberally in favor of the injured worker. Bluml v. Dee Jay's, Inc., 920 N.W.2d 82 (Iowa 2018); Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839 (Iowa 2015); Iowa Ins. Institute v. Core Group of Iowa Ass'n for Justice, 867 N.W.2d 58 (Iowa 2015); Denison Municipal Utilities v. Iowa Workers' Compensation Com'r, 857 N.W.2d 230 (Iowa 2014); Ewing v. Allied Const. Services, 592 N.W.2d 689 (Iowa 1999); Myers v. F.C.A. Services, Inc., 592 N.W.2d 354 (Iowa 1999); Danker v. Wilimek, 577 N.W.2d 634 (Iowa 1998); Haverly v. Union Const. Co., 18 N.W.2d 629, 236 Iowa 278 (1945); Conrad v. Midwest Coal Co., 3 N.W.2d 511, 231 Iowa 53 (1942); Miranda v. IBP, Inc., File No. 5008521 (Appeal, August 2, 2005). As the Iowa Supreme Court stated, "[t]he primary purpose of the workers' compensation statute is to benefit the worker and his or her dependents, insofar as statutory requirements permit." McSpadden v. Big Ben Coal Co., 288 N.W.2d 181, 188 (Iowa 1980).

Ultimately, the Iowa Workers' Compensation Commissioner and likely the Iowa Supreme Court are going to have to give the statutory language some context and define the parameters of what constitutes a "shoulder" pursuant to Iowa Code section 85.34(2)(n) (2017). Given the uncertainty and ambiguity left by the generic term "shoulder" used in the statutory amendment, I apply the overriding principle of workers' compensation statutory interpretation. Specifically, I conclude that it is appropriate and required that I interpret Iowa Code section 85.34(2)(n) (2017) liberally for the benefit of the injured worker. Bluml v. Dee Jay's, Inc., 920 N.W.2d 82 (Iowa 2018).

In this instance, applying such an interpretation, I found that the distal clavicle excision performed by Dr. Stokesbary and the revision of that distal clavicle excision by Dr. Johnson were surgical interventions proximal to the glenohumeral joint. Relying upon my prior decision in Smidt, I further conclude that the supraspinatus and infraspinatus rotator cuff tendons and corresponding muscles attach and originate proximal to the glenohumeral joint. Therefore, I conclude that claimant has produced

unrebutted medical evidence in this case and established through prior agency precedent that his injuries extend proximal to the shoulder joint.

Unscheduled injuries are compensated on a 500-week schedule and the industrial disability award can exceed the permanent functional impairment. "Shoulder" injuries are compensated on a 400-week schedule and are limited to the functional impairment rating. Iowa Code section 85.34(2)(n), (v), (x). Claimant can recover additional benefits by asserting and proving an unscheduled injury as opposed to being limited to a shoulder injury. Therefore, recalling that the statute should be interpreted for the benefit of the injured worker when ambiguity exists, I conclude that it is beneficial for claimant if his injury is compensated as an unscheduled injury.

Given that the injured anatomic structures (rotator cuff tendons and distal clavicle excision) originate or are located proximal to the glenohumeral joint, I conclude that the injuries to claimant's supraspinatus and infraspinatus tendons, as well as the distal clavicle excision, result in an injury proximal to the shoulder joint. I found, pursuant to unrebutted medical evidence, that the labral tears are part of the shoulder joint and that the subacromial decompression is also a surgical procedure to part of the shoulder joint. I provide no findings relative to the subscapularis tendon tear, as there is not sufficient medical evidence in this case to support a finding that condition is distal to, proximal to, or part of the glenohumeral "shoulder" joint. Therefore, having found claimant proved injuries proximal to the shoulder, I conclude that claimant has proven his injury results in an injury to the body as a whole, or an unscheduled injury.

Unscheduled injuries are compensated pursuant to Iowa Code section 85.34(2)(v) (2017). Iowa Code section 85.34(2)(v) provides that unscheduled injuries should be compensated based upon a 500-week schedule. However, amendments in 2017 changed the traditional industrial disability analysis in at least a couple of ways. First, industrial disability is not awarded if the claimant "returns to work or is offered work for which the employee receives or would receive the same or greater salary, wages, or earnings than the employee received at the time of the injury." Iowa Code section 85.34(2)(v) (2017).

The Iowa Supreme Court has also made it clear that a determination of and award of permanent disability is not ripe unless and until the injured worker has achieved maximum medical improvement and substantial improvement is no longer expected. Bell Bros. Heating and Air Conditioning v. Gwinn, 779 N.W.2d 193 (Iowa 2010). In this case, claimant asserts that he remains in a running healing period and that he has not yet achieved maximum medical improvement because he has additional medical treatment scheduled into the future.

Having accepted the medical opinions of Dr. Morrison and Dr. Archer on the issue of maximum medical improvement, I found that Mr. Garcia Rubalcava achieved maximum medical improvement by the date of Dr. Morrison's evaluation, or February 6, 2020. I acknowledge claimant's arguments that he has a return appointment with Dr. Johnson. However, his condition has not required significant, ongoing medical

treatment and two physicians evaluating claimant Dr. Johnson have concluded that he has achieved maximum medical improvement. I found those opinions convincing.

If additional treatment options are identified and commenced, claimant may qualify for an intermittent healing period. Evenson v. Winnebago Industries, Inc., 881 N.W.2d 360 (Iowa 2016). However, I conclude that claimant is at maximum medical improvement and that his claim for permanent disability benefits is ripe at this time.

Mr. Garcia Rubalcava asserts a claim for industrial disability benefits. In this case, defendants contend that claimant returned to work and that any permanent partial disability benefits are limited to an award under the functional impairment methodology of Iowa Code section 85.34(2)(v) (2017).

The pertinent portion of Iowa Code section 85.34(2)(v) (2017) provides:

> If an employee who is eligible for compensation under this paragraph returns to work or is offered work for which the employee receives or would receive the same or greater salary, wages, or earnings than the employee received at the time of the injury, the employee shall be compensated based only upon the employee's functional impairment resulting from the injury, and not in relation to the employee's earning capacity.

In this case, I found that Mr. Garcia Rubalcava did return to work for the employer and continued to work for the employer at the time of trial. He earned more per hour and more per week at the time of trial than he did on the date of injury. Therefore, I conclude that the above provision of Iowa Code section 85.34(2)(v) (2017) is applicable. Claimant's recovery is statutorily limited, at this time, to the functional impairment resulting from his injury.

In this case, I considered the impairment ratings offered by Dr. Morrison and Dr. Archer. I recognized that Dr. Morrison rendered his impairment in accordance with and referenced the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition. Dr. Archer did not clarify whether his impairment was rendered pursuant to the Fifth Edition of the AMA Guides.

Iowa Code section 85.34(2)(x) (2017) specifically provides:

> [W]hen determining functional disability and not loss of earning capacity, the extent of loss or percentage of permanent impairment shall be determined solely by utilizing the guides to the evaluation of permanent impairment, published by the American Medical Association, as adopted by the workers' compensation commissioner by rule pursuant to chapter 17A.

The Iowa Workers' Compensation Commissioner has enacted an administrative rule, which adopts the Fifth Edition of the AMA Guides to the Evaluation of Permanent

Impairment for determining the extent of loss of percentage of impairment for permanent partial disabilities not involving analysis of a loss of earning capacity. 876 IAC 2.4 Therefore, I conclude that the Iowa legislature, in conjunction with the commissioner's administrative rule have adopted the Fifth Edition of the AMA Guides as the appropriate method to determine permanent functional impairment in this case.

I found Dr. Morrison's opinion to be more credible and accurate with respect to the issue of permanent impairment. It also specifically complies with Iowa Code section 85.34(2)(x) (2017) and 876 IAC 2.4. Therefore, I found that claimant proved a 15 percent permanent functional impairment of the right upper extremity. I converted that impairment to 9 percent of the whole person pursuant to the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition. Therefore, I conclude that claimant has proven a 9 percent permanent functional loss of the whole person as a result of his November 29, 2017 work injury.

Pursuant to Iowa Code section 85.34(2)(v) (2017), an unscheduled injury is compensated on a 500-week schedule. Nine percent of 500 weeks is equivalent to 45 weeks. I conclude that Mr. Garcia Rubalcava is entitled to an award of 45 weeks of permanent partial disability benefits. Iowa Code section 85.34(2)(v).

The parties also dispute when permanent disability benefits should commence. Claimant contends that he remains in a running healing period. Having rejected that argument, I must determine the applicable commencement date for permanent disability benefits.

Pursuant to Iowa Code section 85.34(2) (2017):

> Compensation for permanent partial disability shall begin when it is medically indicated that maximum medical improvement form 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 pursuant to chapter 17A.

Having found that maximum medical improvement occurred by February 6, 2020, I conclude that permanent partial disability benefits commence on February 7, 2020. Iowa Code section 85.34(2) (2017).

Finally, claimant seeks assessment of costs. Assessment of costs is a discretionary function of the agency. Iowa Code section 86.40. The parties reached an agreement for reimbursement of claimant's independent medical evaluation. Therefore, that expense does not need to be addressed as a cost even though it is listed on claimant's statement of costs at Joint Exhibit 11.

The other costs sought by claimant include his filing fee, service costs, and transcription fees for his deposition. Claimant has prevailed and assessment of his filing fee ($100.00) and service costs ($6.70) are reasonable and permitted pursuant to 876 IAC 4.33(3) and (7). Defendants elected to introduce claimant's deposition transcript as an exhibit. Therefore, it is reasonable to also tax claimant's cost ($70.00) for a copy of that transcript pursuant to Rule 876 IAC 4.33(2).

ORDER

THEREFORE, IT IS ORDERED:

Defendants shall pay claimant forty-five (45) weeks of permanent partial disability benefits commencing on February 7, 2020.

All weekly benefits shall be payable at the stipulated weekly rate of five hundred twenty-eight and 45/100 dollars ($528.45) per week.

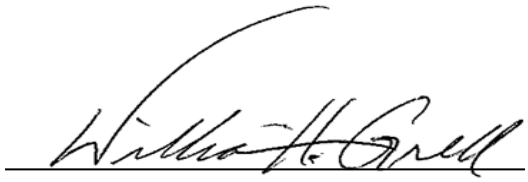
Interest shall be payable on all past-due weekly benefits at an annual rate equal to the one-year treasury constant maturity published by the federal reserve in the most recent H15 report settled as of the date of injury, plus two percent. See Gamble v. AG Leader Technology File No. 5054686 (App. Apr. 24, 2018).

Defendants are entitled to the credit the parties stipulated to in the hearing report against any benefits awarded in this decision.

Defendants shall reimburse claimant's costs totaling one hundred seventy-six and 70/100 dollars ($176.70).

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.

Signed and filed this 23rd day of June, 2020.



WILLIAM H. GRELL
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Judy L. Freking, (via WCES)

Janece Valentine (via WCES)

Robert Gainer (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.