BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JAMES LANIER, Claimant, vs. VERMEER MANUFACTURING CO., Employer, and EMC RISK SERVICES, Insurance Carrier, Defendants.	File No. 5066811.01 ARBITRATION DECISION Head Note No: 1700; 1800; 1803; 1803.01; 2200.

STATEMENT OF THE CASE

The claimant, James Lanier, filed a petition for arbitration seeking workers' compensation benefits from Vermeer Manufacturing Co. ("Vermeer") and its insurer, EMC Risk Services. Joanie Grife appeared on behalf of the claimant. William Scherle appeared on behalf of the defendants.

The matter came on for hearing on January 14, 2021, before Deputy Workers' Compensation Commissioner Andrew M. Phillips. An order issued on March 13, 2020, and updated June 1, 2020, August 14, 2020, and October 12, 2020, by the Iowa Workers' Compensation Commissioner, In the Matter of Coronavirus/COVID-19 Impact on Hearings (Available online at: https://www.iowaworkcomp.gov/order-coronavirus-covid-19 (last viewed April 5, 2021)) amended the hearing assignment order in each case before the Commissioner scheduled for an in-person regular proceeding hearing between March 18, 2020, and March 19, 2021. The amendment makes it so that such hearings will be held by Internet-based video, using CourtCall. The parties appeared electronically, and the hearing proceeded without significant difficulties. The matter was fully submitted on March 22, 2021, after briefing by the parties.

The record in this case consists of Joint Exhibits 1-7, Claimant's Exhibit 1-6, and Defendants' Exhibits A-F. Testimony under oath was also taken from the claimant, James Lanier. Theresa Kenkel was appointed the official reporter and custodian of the notes of the proceeding.

STIPULATIONS

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

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

2. The claimant sustained an injury which arose out of, and in the course of employment, on July 27, 2017.

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

4. That the alleged injury is a cause of permanent disability.

5. That the disability is a scheduled member disability to the right shoulder.

6. That the claimant was married, entitled to two exemptions, and had a weekly compensation rate of five hundred forty-seven and 50/100 dollars ($547.50).

7. That prior to hearing, the claimant was paid 12 weeks of compensation at the rate of five hundred forty-seven and 50/100 dollars ($547.50) per week.

Any entitlement to temporary disability and/or healing period benefits is no longer in dispute. Medical benefits are no longer in dispute. The defendants waived their affirmative defenses.

The parties are now bound by their stipulations.

ISSUES

The parties submitted the following issues for determination:

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

2. Whether the disability is an industrial disability or a scheduled member disability.

3. The commencement date for permanent partial disability benefits, if any are awarded.

FINDINGS OF FACT

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

James Lanier, the claimant, was 47 years old at the time of the hearing. (Testimony). He resides in Knoxville, Iowa. (Testimony). He graduated from high school in 1991. (Testimony). He completed two semesters of community college in 2005 in network service technology. (Testimony). He also completed one semester of training in logistics and transportation at Iowa Central Community College in 2011. (Testimony). In 2016-2017, Mr. Lanier returned to Indian Hills Community College where he earned a degree in machine technology in February of 2017. (Testimony). On July 27, 2017, Mr. Lanier worked for Vermeer. (Testimony). He worked as a machinist. (Defendants' Exhibit E:71). He then worked at Weiler Products and 3M in Knoxville, Iowa. (DE E:71).

Mr. Lanier visited Occupational Health at Pella Regional Health Center on July 27, 2017. (Joint Exhibit 2:7). He complained of shoulder pain. (JE 2:7). The medical provider in the emergency room diagnosed Mr. Lanier with a left shoulder strain and possible rotator cuff injury. (JE 2:7). Numbness and tingling in his left fingers decreased. (JE 2:7). Most of the pain is in the anterior shoulder. (JE 2:7). He could not lift above his shoulder. (JE 2:7). The provider found no AC joint tenderness, and no pain along the clavicle. (JE 2:7). The provider recommended that Mr. Lanier continue wearing a sling, and avoid work with his left arm. (JE 2:7-8). The provider also recommended physical therapy. (JE 2:8).

Later on July 27, 2017, Mr. Lanier reported to Vermeer Occupational Health Department. (JE 1:1-2). Michelle Wheaton, R.N., examined Mr. Lanier for complaints of left shoulder pain. (JE 1:1). Mr. Lanier reiterated his description of the work incident. (JE 1:1). His initial tingling in his left hand dissipated. (JE 1:1). He reported to Occupational Health wearing a sling. (JE 1:1). Mr. Lanier's range of motion in his left hand and fingers was normal. (JE 1:1). Ms. Wheaton noted limited range of motion to the left shoulder with increased pain and extreme tenderness. (JE 1:1). Mr. Lanier reported pain of 2 out of 10 to 6-8 out of 10. (JE 1:1). Mr. Lanier had restrictions that included no use of the left arm. (JE 1:1-2). Mr. Lanier also needed to wear a sling. (JE 1:1-2).

Mr. Lanier began physical therapy on July 28, 2017, at Kinetic Edge Physical Therapy. (JE 3:15-18). Mr. Lanier complained of left shoulder pain, and reported an injury while at work. (JE 3:15). When he lifted his shoulder above his head, his pain increased to 8 out of 10. (JE 3:15). When his arm was at rest, he had no pain. (JE 3:15). Mr. Lanier also complained of popping and clicking in his left shoulder. (JE 3:15). Therapy began during this visit. (JE 3:16-17).

Mr. Lanier followed up with Pella Regional Health Center Occupational Health on August 3, 2017. (JE 2:9-10). Mr. Lanier felt worse when he wore his sling, and expressed a desire to discontinue wearing it. (JE 2:9). Physical therapy provided significant improvement with his range of motion. (JE 2:9). Upon examination, Mr. Lanier displayed anterior shoulder tenderness along the insertion of the biceps tendon. (JE 2:9). Mr. Lanier was diagnosed with a strain of the insertion of the biceps tendon.

(JE 2:9). The provider also expressed concern for a possible labral tear. (JE 2:9). Mr. Lanier could discontinue the sling, avoid pushing or pulling over 15 pounds, and avoid lifting over 15 pounds. (JE 2:10). He was told to avoid work above the left shoulder level. (JE 2:10).

Mr. Lanier went to the Emergency Department at Pella Regional Health Center on August 6, 2017. (JE 4:33-35). Mr. Lanier reported left shoulder pain to Jeffrey Hartung, D.O. (JE 4:33). Mr. Lanier took NSAIDs, but had a reaction including gastrointestinal upset and blood in his stools. (JE 4:33). Mr. Lanier discontinued NSAIDs. (JE 4:33). He returned to work, but continued reporting left shoulder pain, so he was sent to the emergency room. (JE 4:33). Mr. Lanier felt that he could not perform his duties at work due to his continued left shoulder pain. (JE 4:33). Dr. Hartung found pain in the left shoulder with extension above 90 degrees, with internal rotation, and with any range of motion of the left shoulder. (JE 4:33). Dr. Hartung diagnosed Mr. Lanier with left shoulder pain with a possible rotator cuff strain versus tear. (JE 4:33). Dr. Hartung encouraged Mr. Lanier to continue physical therapy and use ice on his shoulder. (JE 4:33). Dr. Hartung also instructed the claimant to follow up with the Vermeer nurse to update his work restrictions. (JE 4:34). Dr. Hartung took Mr. Lanier off work for one day. (JE 4:34).

On August 7, 2017, Mr. Lanier visited Pella Regional Health Center Occupational Health for a follow-up of his left shoulder pain. (JE 2:11-12). He continued to have a constant, dull, throbbing pain in his left shoulder. (JE 2:11). He could not lift his arm above 90 degrees on the left side, and had pain with any range of motion. (JE 2:11). His grip strength on his left side was weaker than the right. (JE 2:11). The provider ordered an MRI with arthrogram of the left shoulder. (JE 2:11). The provider also placed Mr. Lanier on stricter restrictions of no lifting, pushing, or pulling over five pounds and no overhead lifting with the left shoulder. (JE 2:11-12). He was told to continue with physical therapy until the MRI is completed. (JE 2:11).

Mr. Lanier returned to Vermeer Occupational Health on August 8, 2017, where Ms. Wheaton examined him again. (JE 1:3). Mr. Lanier felt that the medication caused him to feel “loopy” and “high.” (JE 1:3). His shoulder pain increased during therapy. (JE 1:3). Mr. Lanier’s therapist recommended wearing a sling for about 2 hours after therapy to rest his shoulder. (JE 1:3). Ms. Wheaton found limited range of motion in the left shoulder. (JE 1:3). She also found weakened grip strength in Mr. Lanier’s left hand. (JE 1:3). Mr. Lanier’s restrictions included no lifting, pushing, or pulling above 5 pounds with his left upper extremity, no work at or above the shoulder height with the left upper extremity, and no work around machinery while on pain medication. (JE 1:3).

On August 8, 2017, Mr. Lanier also visited Kinetic Edge Physical Therapy for continued therapy. (JE 3:19-20). Mr. Lanier complained of more pain over the weekend, and ended up in the emergency room on Sunday. (JE 3:19). While using the pulleys during therapy, Mr. Lanier made audible noises of discomfort. (JE 3:19).

Mr. Lanier had an MRI of his left shoulder on August 15, 2017, at Knoxville Hospital & Clinics. (JE 5:36). Kraig Kirkpatrick, M.D., interpreted the MRI. (JE 5:36). Dr. Kirkpatrick found a SLAP type II tear with no paralabral cyst. (JE 5:36). The AC joint was anatomically aligned with mild osteoarthritis. (JE 5:36). The rotator cuff appeared intact. (JE 5:36).

On August 22, 2017, Mr. Lanier reported to Iowa Ortho in Pella, Iowa. (JE 6:39-42). Steven Aviles, M.D. examined Mr. Lanier. (JE 6:39-42). Mr. Lanier indicated that he had left shoulder pain radiating into his left arm. (JE 6:39). He described the pain as aching, burning, and dull. (JE 6:39). Mr. Lanier told Dr. Aviles that he had tingling in his arms. (JE 6:39). Dr. Aviles reviewed x-rays that showed calcification in the posterior superior glenoid with an unclear origin. (JE 6:41). Dr. Aviles also reviewed Mr. Lanier's left shoulder MRI, which showed a SLAP tear, and no evidence of bursitis, impingement, or calcification. (JE 6:41). Dr. Aviles noted, "[h]e has a fairly classic physical exam for SLAP tear and this is confirmed by his magnetic resonance imaging." (JE 6:41). Dr. Aviles felt that a calcification in the posterior superior glenoid was embedded in the soft tissue and could be free floating. (JE 6:41). Dr. Aviles recommended a left shoulder arthroscopy for a possible loose body removal and open biceps tenodesis. (JE 6:41). Dr. Aviles provided a 10 pound lifting restriction, and to avoid repetitive work above the shoulder level. (JE 6:42).

Thomas Hoehns, M.D. at Knoxville Hospital & Clinics examined Mr. Lanier for a pre-operative examination on August 24, 2017. (JE 7:69-71). Dr. Hoehns cleared Mr. Lanier for surgery. (JE 7:71).

Mr. Lanier had a left shoulder arthroscopy, glenohumeral debridement, subacromial decompression, and open biceps tenodesis, on September 5, 2017, at Pella Regional Health Center. (JE 6:43-46). Dr. Aviles diagnosed Mr. Lanier with a SLAP tear, post impingement of the left shoulder. (JE 6:43). Dr. Aviles allowed Mr. Lanier to return to modified work on September 11, 2017, with a restriction to wear a sling, and to perform desk duties only. (JE 6:46).

On September 5, 2017, Mr. Lanier had another appointment with Ms. Wheaton at Vermeer Occupational Health. (JE 1:4). He had surgery on the same day, and wore an immobilizer sling. (JE 1:4). Mr. Lanier could return to modified duty on September 11, 2017, provided he wore a sling at all times, did not drive, and worked in an office-type environment. (JE 1:4). Ms. Wheaton noted an order for physical therapy to begin on September 7, 2017. (JE 1:4).

Mr. Lanier continued his physical therapy appointments with Kinetic Edge Physical Therapy on September 7, 2017. (JE 3:21-23). He was dizzy while on pain medication, but did not have much pain. (JE 3:21). His therapy continued. (JE 3:22-23).

Mr. Lanier had his first postoperative visit with Dr. Aviles on September 19, 2017. (JE 6:47-50). He was doing "quite well" post-surgery. (JE 6:47). Dr. Aviles continued

to include restrictions including no use of the left arm, except for typing and writing. (JE 6:49-50).

On September 26, 2017, Mr. Lanier continued physical therapy at Kinetic Edge Physical Therapy. (JE 3:24-25). He indicated that his pain was 4 out of 10, and that his shoulder was more sore than normal. (JE 3:24). He returned to Vermeer the night before, which caused his pain to worsen. (JE 3:24). The therapist needed to remind Mr. Lanier of his flexion limitation throughout his visit. (JE 3:25).

On October 3, 2017, Mr. Lanier returned to Dr. Aviles' office for a reevaluation of his left shoulder. (JE 6:51-54). Mr. Lanier rated his pain 4 out of 10. (JE 6:51). Dr. Aviles opined that Mr. Lanier seemed to be doing great after his surgery. (JE 6:51). Dr. Aviles gave Mr. Lanier a 2 pound lifting restriction, as well as direction to avoid work above the shoulder level. (JE 6:53-54).

Dr. Aviles examined Mr. Lanier again on October 31, 2017. (JE 6:55-56). Mr. Lanier continued to do well and progressed nicely. (JE 6:55). He missed some internal rotation, but otherwise his range of motion returned. (JE 6:55). Dr. Aviles wanted Mr. Lanier to continue to work in therapy, and provided a 10 pound lifting restriction and instructions to avoid overhead activities. (JE 6:55-56).

Mr. Lanier returned to Kinetic Edge Physical Therapy on November 21, 2017, for continued physical therapy. (JE 3:26-27). This was Mr. Lanier's eighteenth session of physical therapy. (JE 3:26). His left shoulder felt 90 percent better from his first session. (JE 3:26).

On December 1, 2017, Mr. Lanier continued his physical therapy regimen with Kinetic Edge Physical Therapy. (JE 3:29-31). He reported little to no pain, and that work was going well. (JE 3:29). Mr. Lanier had full range of motion and "really good" strength in his left shoulder and left bicep. (JE 3:30). He was discharged from therapy due to how well he progressed. (JE 3:30).

Mr. Lanier returned to Dr. Aviles' office on December 5, 2017, for continued postoperative care. (JE 6:57-60). Mr. Lanier reported pain of 0 out of 10 in his left shoulder. He felt great, and Dr. Aviles noted that everything was coming along quite nicely. (JE 6:57). Mr. Lanier was eager to return to work. (JE 6:57). Dr. Aviles opined that Mr. Lanier reached maximum medical improvement ("MMI") as of this visit. (JE 6:59). Dr. Aviles allowed Mr. Lanier to return to work with no restrictions. (JE 6:60).

On January 8, 2018, Dr. Aviles wrote a letter to Reah Adamson at EMC Insurance Company. (DE F:75). In the letter, Dr. Aviles provided an impairment raring of 3 percent to the left upper extremity, which he converted to a 2 percent whole person impairment. (DE F:75). Dr. Aviles opined that Mr. Lanier reached MMI effective December 5, 2017. (DE F:75). Dr. Aviles also opined that Mr. Lanier required no restrictions. (DE F:75).

Lisa Balduchi, R.N., examined Mr. Lanier on April 3, 2018, at Vermeer Occupational Health. (JE 1:5). Mr. Lanier requested examination with Dr. Aviles in late March. (JE 1:5). Mr. Lanier felt that his popping in his shoulder increased since surgery. (JE 1:5). Mr. Lanier indicated that he had throbbing discomfort in his left shoulder. (JE 1:5).

On April 3, 2018, Mr. Lanier returned to Dr. Aviles' office. (JE 6:61-64). Mr. Lanier reported worsening, sharp pain in his left shoulder. (JE 6:61). Mr. Lanier told Dr. Aviles that one month prior to the visit, he was pushing metal into one of the machines when he felt a pop and had severe pain. (JE 6:61). Dr. Aviles recommended an MRI to properly evaluate the biceps. (JE 6:63). Dr. Aviles allowed Mr. Lanier to return to work with no restrictions. (JE 6:64).

Mr. Lanier had another MRI of his left shoulder on April 13, 2018, at Knoxville Hospital & Clinics. (JE 5:37-38). Mark Johnson, M.D. interpreted this MRI. (JE 5:38). Dr. Johnson found supraspinatus tendinosis with a minimal partial thickness articular-sided tearing or fraying. (JE 5:37). There was no full-thickness rotator cuff tear. (JE 5:37). The MRI also showed tearing involving the infraspinatus tendon, mild subscapularis tendinosis, a SLAP tear, moderate degenerative changes to the acromioclavicular joint, fatty atrophy of the teres minor muscle belly, and postsurgical changes from the prior biceps tenodesis. (JE 5:37-38).

On April 17, 2018, Mr. Lanier returned to Vermeer Occupational Health and Ms. Balduchi for a repeat evaluation. (JE 1:6). Mr. Lanier reported that his physician told him that his shoulder had inflammation and should resolve with time. (JE 1:6). Mr. Lanier was released to full duty with no additional restrictions, recommendations or treatment from a physician. (JE 1:6).

Dr. Aviles reexamined Mr. Lanier on April 17, 2018, for continued left shoulder complaints. (JE 6:65-68). Mr. Lanier had intermittent and worsening pain in his left shoulder. (JE 6:65). Lifting and movement aggravated his pain. (JE 6:65). Despite telling Dr. Aviles that he had no pain at the visit in December of 2017, Mr. Lanier noted that he continued to have pain. (JE 6:65). Dr. Aviles noted the MRI from April 13, 2018, showed no evidence of a biceps rupture, but did show an intact rotator cuff and mild bursitis. (JE 6:66). Dr. Aviles found no evidence of a new injury. (JE 6:67). Dr. Aviles again allowed Mr. Lanier to return to work with no restrictions. (JE 6:68).

Vermeer terminated Mr. Lanier effective August 2, 2018. (CE 6:33). Mr. Lanier's supervisor, Roberto Hernandez, noted several incidents for attendance and safety violations from August 30, 2017 to October 20, 2018. (CE 6:33). Mr. Hernandez noted that Mr. Lanier failed to timely report a work injury that occurred during his shift on July 28, 2018. (CE 6:33).

On August 7, 2018, Mr. Lanier followed up with Matt Doty, M.D., at Pella Regional Health Center Occupational Health. (JE 2:13-14). Mr. Lanier used a torque wrench the previous weekend, and felt a popping sensation and pain in his right

shoulder. (JE 2:13). His pain continued in his shoulder and radiated into the biceps muscle. (JE 2:13). Dr. Doty opined that it appeared that there may have been an old right shoulder injury to the supraspinatus tendon. (JE 2:14).

Mr. Lanier had an IME at Medix on June 18, 2019. (CE 1:1-19). John D. Kuhnlein, D.O., M.P.H., C.I.M.E., F.A.C.P.M., F.A.C.O.E.M., performed the IME, and issued a report on October 15, 2019. (CE 1:1). Dr. Kuhnlein is board certified in occupational and environmental medicine. (CE 1:18). Dr. Kuhnlein reviewed Mr. Lanier's injury and medical history. (CE 1:1-6). Dr. Kuhnlein noted two other dates of injury, which appear unrelated to this injury. (CE 1:1-6). Mr. Lanier planned on continuing to see his personal physician, Dr. Hoehns, regarding his shoulder areas. (CE 1:6). Mr. Lanier complained of constant dull aching pain in the superior right shoulder area with similar symptoms in the left shoulder area. (CE 1:7). Mr. Lanier had no physician-imposed restrictions, but used a hoist to lift anything over 35 pounds due to an injury at Hy-Vee. (CE 1:7). Mr. Lanier told Dr. Kuhnlein that his shoulder symptoms improved from six months prior. (CE 1:7).

Dr. Kuhnlein opined that Mr. Lanier's SLAP tear involved the origination of the long head of the biceps tendon, which necessitated the tenotomy and tenodesis. (CE 1:10). Dr. Kuhnlein echoed Dr. Aviles' diagnoses of a left SLAP tear and impingement syndrome with the surgery conducted on September 5, 2017. (CE 1:10). Further, Dr. Kuhnlein noted that Mr. Lanier had degenerative changes in the acromioclavicular joint that predated the July 27, 2017 injury. (CE 1:11). Dr. Kuhnlein engaged in an analysis to try to show that Mr. Lanier's injuries should be deemed injuries to the body as a whole, and not to the shoulder. (CE 1:12-16). Dr. Kuhnlein recommended that Mr. Lanier continue to take diclofenac for his lower back. (CE 1:16). Dr. Kuhnlein also recommended that Mr. Lanier continue a home exercise program for his shoulder and back. (CE 1:16). Dr. Kuhnlein opined that Mr. Lanier achieved MMI on April 17, 2018. (CE 1:16). Based upon his examination and deficits with range of motion, Dr. Kuhnlein opined that Mr. Lanier suffered a 3 percent left upper extremity impairment. (CE 1:17). Dr. Kuhnlein converted this to a 2 percent whole person impairment. (CE 1:17). Dr. Kuhnlein opined that Mr. Lanier should work within permanent restrictions assigned for his pre-existing low back condition. (CE 1:17). Mr. Lanier may need permanent restrictions for his left shoulder if he changed jobs. (CE 1:17). Considering only the left shoulder condition, Mr. Lanier could bend at the waist. (CE 1:17). Dr. Kuhnlein also recommended lifting 40 pounds occasionally from floor to waist, 40 pounds occasionally from waist to shoulder, and 30 pounds occasionally over the shoulder area. (CE 1:17). Dr. Kuhnlein noted that Mr. Lanier could work at or above shoulder area height occasionally. (CE 1:17). He had no restriction for gripping or grasping. (CE 1:17).

CONCLUSIONS OF LAW

The party who would suffer loss if an issue were not established has the burden of proving that issue by a preponderance of the evidence. Iowa R. App. P. 6.904(3).

Scheduled Member v. Industrial Disability

Under the Iowa Workers' Compensation Act, permanent partial disability is compensated either for a loss of use of a scheduled member under Iowa Code 85.34(2)(a)-(u) or for loss of earning capacity under Iowa Code 85.34(2)(v). The extent of scheduled member disability benefits to which an injured worker is entitled is determined by using the functional method. Functional disability is "limited to the loss of the physiological capacity of the body or body part." Mortimer v. Fruehauf Corp., 502 N.W.2d 12, 15 (Iowa 1993); Sherman v. Pella Corp., 576 N.W.2d 312 (Iowa 1998).

An injury to a scheduled member may, because of after effects or compensatory change, result in permanent impairment of the body as a whole. Such impairment may in turn be the basis for a rating of industrial disability. It is the anatomical situs of the permanent injury or impairment which determines whether the schedules in Iowa Code 85.34(a)–(u) are applied. Lauhoff Grain v. McIntosh, 395 N.W.2d 834 (Iowa 1986); Blacksmith v. All-American, Inc., 290 N.W.2d 348 (Iowa 1980); Dailey v. Pooley Lumber Co., 233 Iowa 758, 10 N.W.2d 569 (1943); Soukup v. Shores Co., 222 Iowa 272, 268 N.W. 598 (1936).

In 2017, the legislature made significant changes to Iowa Code Chapter 85. Among these changes, the legislature included Iowa Code section 85.34(2)(n), making the "shoulder" a scheduled member. The main dispute regarding permanency in this case is whether the claimant's disability is to his "shoulder" under Iowa Code section 85.34(2)(n), or an unscheduled disability under Iowa Code Section 85.34(2)(v).

In September of 2020, the Commissioner filed two appeal decisions addressing the 2017 addition of Iowa Code section 85.34(2)(n). The first such case was Deng v. Farmland Foods, Inc., File No. 5061883 (App. September 29, 2020). The Commissioner held in Deng that Iowa Code 85.34(2)(n) was ambiguous as to the definition of the shoulder. The Commissioner examined the intent of the legislature and determined:

> I recognize the well-established standard that workers' compensation statutes are to be liberally construed in favor of the worker, as their primary purposes is to benefit the worker. See Des Moines Area Reg'l Transit Auth. v. Young, 867 N.W.2d 839, 842 (Iowa 2015)(citations omitted); Xenia Rural Water Dist. v. Vegors, 786 N.W.2d 250, 257 (Iowa 2010)("We apply the workers' compensation statute broadly and liberally in keeping with its humanitarian objective. . . ."); Griffin Pipe Prods. Co. v. Guarino, 663 N.W.2d 862, 865 (Iowa 2003)("[T]he primary purpose of chapter 85 is to benefit the worker and so we interpret this law liberally in favor of the employee."). This liberal construction, however, cannot be performed in a vacuum. As discussed above, several of the principles of statutory construction indicate the legislature did not intend to limit the definition of "shoulder" under section 85.34(2)(n) to the glenohumeral joint.

> For these reasons, I conclude "shoulder" under section 85.34(2)(n) is not limited to the glenohumeral joint.
>
> Claimant's injury in this case was to the infraspinatus muscle. As discussed, the infraspinatus is part of the rotator cuff, and the rotator cuff's main function is to stabilize the ball-and-socket joint. As noted by both Dr. Bansal and Dr. Bolda, the rotator cuff is generally proximal to the joint. However, because the rotator cuff is essential to the function of the glenohumeral joint, it seems arbitrary to exclude it from the definition of "shoulder" under section 85.34(2)(n) simply because it "originates on the scapula, which is proximal to the glenohumeral joint for the most part." (Def. Ex. A, [Depo. Tr., 27]). In other words, being proximal to the joint should not render the muscle automatically distinct.
>
> Given the entwinement of the glenohumeral joint and the muscles that make up the rotator cuff, including the infraspinatus, and the importance of the rotator cuff to the function of the joint, I find the muscles that make up the rotator cuff are included within the definition of "shoulder" under section 85.34(2)(n). Thus, I find claimant's injury to her infraspinatus should be compensated as a shoulder under section 85.34(2)(n). The deputy commissioner's determination that claimant's infraspinatus injury is a whole body injury that should be compensated industrially under section 85.34(2)(v) is therefore respectfully reversed.

Deng at 10-11.

A second case, Chavez v. MS Technology, LLC, File No. 5066270 (App. September 30, 2020), applied the logic of Deng to another shoulder case. The Commissioner affirmed his holding in Deng, and further noted:

> . . . .[C]laimant's subacromial decompression was performed to remove scar tissue and fraying between the supraspinatus and the underside of the acromion. As discussed above, the acromion forms part of the socket and helps protect the glenoid cavity, and as such, I found it is closely interconnected with the glenohumeral joint in both location and function. And as discussed in Deng, I found the supraspinatus – a muscle that forms the rotator cuff – to be similarly entwined with the glenohumeral joint. Thus, claimant's subacromial decompression impacted two anatomical parts that are essential to the functioning of the glenohumeral joint; in fact, the procedure was actually performed to improve function of the joint. As such, I find any disability resulting from her subacromial decompression should be compensated as a shoulder under section 85.34(2)(n).
>
> I therefore find none of claimant's injuries are compensable as unscheduled, whole body injuries under section 85.34(2)(v). The deputy

> commissioner's finding that claimant sustained an injury to her body as a whole is therefore respectfully reversed.

Chavez at 6.

In Chavez, the claimant suffered injuries to her supraspinatus, infraspinatus, and subscapularis muscles. Id. at 3. She also suffered a tear to the biceps tendon and labrum, as discovered during an arthroscopic surgery. Id. She had a surgical repair of her rotator cuff, along with "extensive debridement of the labrum, biceps tendon, and subacromial space with biceps tenotomy, subacromial decompression." Id.

As noted in other cases, post Deng and Chavez, the key holdings of those cases include:

1. The definition of a "shoulder" is ambiguous in Section 85.34(2)(n). Deng at 4.

2. There is no "ordinary" meaning of the word shoulder. Deng at 5.

3. The appropriate way to interpret the statute is to examine the legislative history. Deng at 5.

4. The legislature did not intend to limit the definition of a "shoulder" to the glenohumeral joint. Rather, the legislature intended to include the entwinement of the glenohumeral joint and the muscles that make up the rotator cuff. Deng at 11.

See e.g. Retterath v. John Deere Waterloo Works, File No. 5067003 (Arb. Dec. 22, 2020).

In this case, Mr. Lanier suffered a SLAP tear and impingement of the left shoulder. Dr. Aviles performed an arthroscopic surgery to Mr. Lanier's left shoulder. While performing the arthroscopic surgery, Dr. Aviles performed a glenohumeral debridement, subacromial decompression, and an open biceps tenodesis.

"A SLAP tear is an injury to the labrum of the shoulder, which is the ring of cartilage that surrounds the socket of the shoulder joint." See e.g. https://www.orthoinfo.aaos.org/en/diseases--conditions/slap-tears/ (last visited April 7, 2021). The commissioner previously determined that the shoulder is the glenohumeral joint, and those portions of anatomy that are closely entwined with the glenohumeral joint in Deng and Chavez. In Chavez, the claimant suffered a tear to the biceps tendon and labrum. The claimant in Chavez also had a subacromial decompression. These injuries and procedures are largely the same as those in the instant matter. Additionally, an open biceps tenodesis is related to the shoulder based upon its anatomical location and entwinement with the glenohumeral joint. The glenohumeral debridement is clearly related to the glenohumeral joint, and thus, the shoulder. Therefore, the claimant should be compensated pursuant to Iowa Code section 85.34(2)(n), as he has not sustained an injury to the body as a whole.

Mr. Lanier's injuries constitute an injury to the shoulder as a scheduled member. Iowa Code section 85.34(2)(n) provides that a loss of a shoulder shall be compensated based upon 400 weeks.

Extent of Permanent Disability

Where an injury is limited to a scheduled member, the loss is measured functionally, not industrially. Graves v. Eagle Iron Works, 331 N.W.2d 116 (Iowa 1983).

Iowa Courts have repeatedly stated that for those injuries limited to the schedules in Iowa Code 85.34(2)(a)-(u), this agency must only consider the functional loss of the particular scheduled member involved, and not the other factors which constitute an "industrial disability." Iowa Supreme Court decisions over the years have repeatedly cited favorably language in a 85-year old case, Soukup v. Shores Co., 222 Iowa 272, 277, 268 N.W. 598, 601 (1936), which states:

> The legislature has definitely fixed the amount of compensation that shall be paid for specific injuries … and that, regardless of the education or qualifications or nature of the particular individual, or of his inability … to engage in employment … the compensation payable … is limited to the amount therein fixed.

Our court has even specifically upheld the constitutionality of the scheduled member compensation scheme. Gilleland v. Armstrong Rubber Co., 524 N.W.2d 404 (Iowa 1994). Permanent partial disabilities are classified as either scheduled or unscheduled. A specific scheduled disability is evaluated by the functional method; the industrial method is used to evaluate an unscheduled disability. Graves, 331 N.W.2d 116; Simbro v. DeLong's Sportswear, 332 N.W.2d 886, 887 (Iowa 1983); Martin v. Skelly Oil Co., 252 Iowa 128, 133, 106 N.W.2d 95, 98 (1960).

When the result of an injury is loss to a scheduled member, the compensation payable is limited to that set forth in the appropriate subdivision of Iowa Code 85.34(2). Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961). "Loss of use of a member is equivalent to "loss" of the member. Moses v. National Union Coal Mining Co., 194 Iowa 819, 184 N.W. 746 (1921). Pursuant to Iowa Code 85.34(2)(w), the workers' compensation commissioner may equitably prorate compensation payable in those cases wherein the loss is something less than that provided for in the schedule. Blizek v. Eagle Signal Co., 164 N.W.2d 84 (Iowa 1969).

Because the injury is to a scheduled member, claimant is not entitled to an evaluation of disability based upon loss of earning capacity. Only the functional loss can be awarded.

The commissioner, as the trier of fact, must "weigh the evidence and measure the credibility of witnesses." Id. The trier of fact may accept or reject expert testimony, even if uncontroverted, in whole or in part. Frye, 569 N.W.2d at 156. When considering the weight of an expert opinion, the fact-finder may consider whether the examination

occurred shortly after the claimant was injured, the compensation arrangement, the nature and extent of the examination, the expert's education, experience, training, and practice, and "all other factors which bear upon the weight and value" of the opinion. Rockwell Graphic Sys., Inc. v. Prince, 366 N.W.2d 187, 192 (Iowa 1985). Unrebutted expert medical testimony cannot be summarily rejected. Poula v. Siouxland Wall & Ceiling, Inc., 516 N.W.2d 910 (Iowa App. 1994).

In this case both Dr. Aviles and Dr. Kuhnlein provided impairment ratings. Dr. Aviles opined that Mr. Lanier suffered a 3 percent impairment to the left upper extremity or shoulder. Dr. Kuhnlein issued the same rating related to the left upper extremity or shoulder.

Therefore, I find that Mr. Lanier suffered a 3 percent impairment to the left shoulder. This represents 12 weeks (3 percent x 400 weeks = 12 weeks).

Date of Maximum Medical Improvement/Commencement of Benefits

Next, we turn to the commencement date of benefits. The claimant contends that permanent partial disability benefits should commence on April 17, 2018. The defendants contend that permanent partial disability benefits should commence on the claimant's last day of employment, August 2, 2018.

Iowa Code section 85.34(2) 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.

Dr. Kuhnlein opined that Mr. Lanier reached MMI on April 17, 2018, which was his last visit to Dr. Aviles regarding his condition. Dr. Aviles placed Mr. Lanier at MMI on December 5, 2017.

In this case, I find the opinions of Dr. Aviles to be more convincing regarding Mr. Lanier reaching MMI as he was Mr. Lanier's treating physician. Dr. Kuhnlein provided no information as to his reasoning that Mr. Lanier reached MMI on April 17, 2018. Therefore, benefits for permanent partial disability commenced on December 5, 2017.

IME Pursuant to Iowa Code section 85.39

Iowa Code 85.39(2) states:

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

> insurance carrier, be reimbursed by the employer the reasonable fee for a subsequent examination by a physician of the employee's own choice, and reasonably necessary transportation expenses incurred for the examination.

Iowa Code 85.39(2).

Defendants are responsible only for reasonable fees associated with claimant's independent medical examination. Claimant has the burden of proving the reasonableness of the expenses incurred for the examination. See Schintgen v. Economy Fire & Casualty Co., File No. 855298 (App. April 26, 1991). Claimant need not prove the injury arose out of and in the course of employment to qualify for reimbursement under section 85.39. See Dodd v. Fleetguard, Inc., 759 N.W.2d 133, 140 (Iowa App. 2008).

Iowa Code 85.39 was amended in 2017 to include:

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

Iowa Code 85.39(2) (2017).

The defendants received an impairment rating from treating physician Dr. Aviles on January 3, 2018. The defendants paid for the claimant's medical treatment with Dr. Aviles, and the impairment rating was provided to the defendants' insurer in a letter. The claimant subsequently had an IME with Dr. Kuhnlein. The defendants agreed in the hearing report to reimburse the claimant for Dr. Kuhnlein's IME. Reimbursement is appropriate pursuant to the statute, and the agreement of the parties.

Costs

The claimants requested Dr. Kuhnlein's IME report as a cost. The defendants previously agreed to reimburse the claimant for Dr. Kuhnlein's IME. Therefore, no analysis or ruling is required as to this issue.

Other Issues

The claimant noted some arguments in their brief regarding potential constitutional issues and ongoing medical care pursuant to Iowa Code 85.27. These

issues were not included in the hearing report. Therefore, the undersigned takes no action with regard to them.

ORDER

THEREFORE, IT IS ORDERED:

That the defendants are to pay unto the claimant twelve (12) weeks of permanent partial disability benefits at the rate of five hundred forty-seven and 50/100 dollars ($547.50) per week from the commencement date of December 5, 2017. Considering the credit to which the defendants are entitled, as stipulated, the claimant is owed nothing further for permanent partial disability benefits.

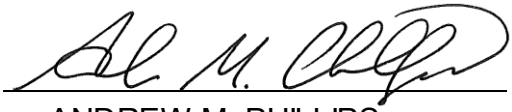
That the defendants shall pay accrued weekly benefits in a lump sum together with interest at an annual rate equal to the one-year treasury constant maturity published by the federal reserve in the most recent H15 report settled as of the date of the injury, plus two percent.

That the defendants are entitled to a credit of twelve (12) weeks of compensation at the rate of five hundred forty-seven and 50/100 dollars ($547.50) per week, as stipulated by the parties.

That the defendants are to reimburse the claimant four thousand one hundred twenty-two and 50/100 dollars ($4,122.50) for Dr. Kuhnlein's IME.

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

Signed and filed this ___27th_____ day of May, 2021.



ANDREW M. PHILLIPS
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Joanie Grife (via WCES)

William Scherle (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.