BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

MICHAEL RIFE, Claimant, vs. P.M. LATTNER MANUFACTURING COMPANY, Employer, and ACCIDENT FUND GENERAL INSURANCE COMPANY, Insurance Carrier, Defendants.	File No. 1652412.02 ARBITRATION DECISION Head Note Nos: 1402.40, 1802, 1803, 1806

STATEMENT OF THE CASE

Claimant, Michael Rife, filed a petition for arbitration against P.M. Lattner Manufacturing Company, as the employer and Accident Fund General Insurance Company, as the insurance carrier. The hearing occurred before the undersigned on September 21, 2020. This case was scheduled to be an in-person hearing occurring in Des Moines, Iowa. 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 CourtCall

The parties filed a hearing report at the commencement of the hearing. In 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 bound by their stipulations.

The evidentiary record consists of Joint Exhibits 1 through 11, Claimant's Exhibits 1 through 5, and Defendants' Exhibits A through G. Claimant testified on his own behalf. Dake Dietrich testified on behalf of defendants. The evidentiary record closed at the conclusion of the evidentiary hearing on September 21, 2020. The case was considered fully submitted upon submission of post-hearing briefs on October 23, 2020.

ISSUES

The parties submitted the following disputed issues for resolution:

1. Whether claimant is entitled to temporary total disability (TTD), temporary partial disability (TPD), or healing period benefits from July 24, 2019, to June 13, 2020;

2. Whether defendants are entitled to credit for overpayment of temporary disability benefits in the amount of $756.04;

3. Whether the claimant's stipulated August 6, 2018, work injury should be compensated with permanent disability benefits as a scheduled member injury to the shoulder, or as an unscheduled injury;

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

5. The 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.

FINDINGS OF FACT

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

Claimant Michael Rife was born on December 9, 1964, making him 55 years old as of the date of the evidentiary hearing. (Hearing Transcript, page 13) Mr. Rife resides in Cedar Rapids, Iowa. (Id.) According to Mr. Rife, he never graduated from high school; however, he did obtain a welding certificate from Kirkwood Community College. (Hr. Tr., p. 16)

Claimant's employment history largely consists of working as a welder for the defendant employer. He worked for the defendant employer from November 18, 2002, to July 24, 2019. (Hr. Tr., p. 14) Any employment history that existed prior to November 18, 2002, is not covered in the evidentiary record.

Claimant has a significant medical history that includes a prior surgical repair of the right rotator cuff. (Joint Exhibit 1, p. 1) Fred Pilcher, M.D. performed a manipulation arthroscopy of the glenohumeral joint with minimal debridement of the subscapularis and supraspinatus, and an arthroscopic subacromial decompression on March 20, 2009. (JE 2, p. 27) The right shoulder surgery was the result of a work-related injury that occurred when claimant pulled on a part that was attached to a crane. (JE 1, p. 14)

After recovering from this first surgery, claimant underwent a functional capacity evaluation (FCE). The FCE results placed claimant in the light to medium physical demand category. (JE 2, p. 22)

The prior work injury resulted in permanent functional impairment. Dr. Pilcher issued an impairment rating of 14 percent to the right arm, or 8 percent to the body as a whole. (JE 5, p. 80) Dr. Pilcher issued permanent restrictions limiting any type of work at shoulder level or above. (JE 5, p. 80) Charles Buck, M.D. opined claimant had an impairment rating of 12 percent to the right shoulder, or 7 percent to the body as a whole. (Ex. B, p. 18) Dr. Buck issued permanent restrictions of no significant use of the right arm above shoulder height. (Id.) Sunny Kim, M.D. issued an impairment rating of 15 percent to the right arm, or 9 percent to the body as a whole. (Ex. 1, p. 7) He recommended permanent restrictions of no lifting more than 40 pounds overhead and avoiding repetitive overhead lifting. (Id.)

Mr. Rife entered into a Full Commutation Settlement with the defendant employer on September 10, 2010. (Ex. B, p. 1) The settlement represented a stipulated permanent disability of 29.6 percent to the body as a whole. (Id.)

In spite of his prior injuries, claimant returned to work for the defendant employer. (See Hr. Tr., pp. 30-31)

Shifting gears to the current injury, claimant sustained an admitted injury while working at P.M. Lattner Manufacturing Company on August 6, 2018. (Hearing Report) While moving a blow-down separator, claimant heard a "pop" and felt a sharp pain in his right shoulder. (Hr. Tr., pp. 19-20) For reference, a blow-down separator is a large steel pipe that apparently requires a significant amount of welding to ensure it will not leak. He reported the injury immediately thereafter and the employer directed claimant to MercyCare South. (Hr. Tr., pp. 20-21)

Claimant first presented for medical treatment on August 7, 2018, with Andrew Patterson, M.D. (JE 3, p. 43) Claimant described the pain he had experienced in his right shoulder following his shift the day prior. After observing marked tenderness in the right anterior and lateral shoulder, Dr. Patterson diagnosed claimant with a right shoulder strain, provided claimant with a sling, and took him off work until his next appointment. (JE 3, p. 44; Hr. Tr., p. 21) Claimant would continue to treat with the physicians at MercyCare South until September 10, 2018. (JE 3, p. 31)

An August 17, 2018, MRI of the right shoulder revealed moderate superior rotator cuff tendinopathy without evidence of a partial or full-thickness tear and mild acromioclavicular joint degeneration. (JE 8, p.127)

Matthew White, M.D. of Physicians' Clinic of Iowa evaluated claimant on October 23, 2018. (JE 5, p. 78) Claimant described his work injury to Dr. White and relayed that the injury was associated with loss of range of motion, weakness, and discomfort. (Id.) He denied experiencing any numbness or tingling. Claimant's prior rotator cuff surgery is discussed, and it is noted that claimant had not been having any issues within his shoulder since that time. (Id.) Dr. White reviewed claimant's diagnostic imaging and diagnosed adhesive capsulitis. (JE 5, p. 79) Dr. White administered a cortisone injection and prescribed physical therapy. (Id.)

When conservative care failed to alleviate claimant's pain, Dr. White recommended and performed an extensive debridement of the labrum and rotator cuff, along with capsular release, and a subacromial decompression. (JE 2, p. 17) The surgery occurred on June 13, 2019. (Id.) Postoperatively, Dr. White diagnosed adhesive capsulitis, partial-thickness rotator cuff tear, partial thickness labral tear, and impingement. (Id.) Dr. White scheduled claimant for additional sessions of physical therapy; however, claimant missed several appointments. Of the appointments claimant did attend, he was hesitant to engage in the exercises. (See JE 4, p. 52)

Claimant ultimately attended an FCE on November 13, 2019, with E3. (Ex. G, p. 2) The FCE was deemed invalid due to claimant "performing inconsistently during a repeated measures protocol." (Id.) Claimant failed 7 of 7 validity criteria during the hand strength assessment. (Id.) Nevertheless, it is noted that claimant met the material handling demands for a Medium demand vocation. (Id.)

Dr. White reviewed the November 13, 2019, report, and recommended a repeat FCE. (Ex. 3, p. 18) Defendants attempted to schedule claimant for a repeat FCE with E3; however, claimant's attorney disagreed with the scheduling of the same. (See Ex. E) Claimant's attorney would later obtain a statement from Dr. White, providing he recommended an FCE be performed by a different provider after receiving the November 13, 2019, FCE report. (Ex. 3, p. 18)

Daryl Short, DPT administered an FCE with claimant on February 29, 2020. (Ex. 2, p. 9) Mr. Short determined that claimant gave consistent effort throughout the evaluation. Claimant demonstrated significant limitations with elevated work, reaching, lifting more than 20 pounds from waist-to-floor, 5 pounds from waist-to-crown, and front carrying up to 10 pounds. (Ex. 2, p. 10) Mr. Short opined that due to claimant's decreased range of motion, strength, and endurance "of his right ankle," he does not meet the capabilities of the sedentary category of physical demand. (Ex. 2, p. 11) Mr. Short recommended claimant limit material and non-material handling activities between shoulder and crown level to a rare basis and no overhead lifting with the right shoulder. (Id.)

Robert Townsend, a Clinical Consultant at Bardavon Health Innovations, LLC, reviewed the functional capacity evaluation completed by Mr. Short and provided a detailed critique with citations to multiple research articles. (Ex. F, p. 1) Mr. Townsend concluded there was "a lack of evidence that Mr. Rife provided a full effort when displaying function limits as reported in the FCE performed by Mr. Short." (Id.) Mr. Townsend opined there were numerous occasions where Mr. Rife demonstrated the ability to meet or exceed the sedentary physical demand category despite Mr. Short's findings that he did not meet the capabilities of the sedentary category. (Id.) Mr. Townsend criticized Mr. Short's use of increased body perspiration as a factor proving valid effort because conditions such as obesity abnormally increase perspiration, and at the time of the FCE, Mr. Rife was 400 pounds. (Ex. F, pp. 5-6) According to Mr. Townsend, the FCE performed by Mr. Short contained "essentially no built-in cross-validation methods to ensure the internal validity of the lifting data." (Ex. F, p. 7)

On April 6, 2020, defendants sent an electronic correspondence to Dr. White. (Ex. 5, p. 23) In response to the e-mail, Dr. White asked defendants if they would like for him to provide an impairment rating based on Mr. Short's FCE report. (Id.) Dr. White did not issue an impairment rating based on Mr. Short's FCE report; however, he eventually opined that he would expect some level of impairment to remain following the procedures he performed on June 13, 2019. (Ex. 3, p. 18)

After being released by Dr. White, claimant sought an independent medical examination (IME), performed by Sunny Kim, M.D., on July 24, 2020. (Ex. 1) As stated earlier, Dr. Kim previously assessed claimant following his February 4, 2009, work injury. Dr. Kim opined that claimant achieved maximum medical improvement (MMI) for his current injury on June 13, 2020. Dr. Kim assessed claimant with 19 percent right upper extremity impairment, or 11 percent of the whole person. (Ex. 1, p. 3) Dr. Kim did not distinguish between the 2009 and 2018 right shoulder injuries when assessing claimant's permanent impairment. Lastly, Dr. Kim recommended claimant avoid lifting more than 20 pounds with his right arm, and no pushing or pulling over 50 pounds. (Id.)

Defendants terminated claimant's employment on July 24, 2019, for excessive absenteeism. (Ex. D, p. 8) Claimant asserts his absenteeism was attributable to his work injury. Claimant applied for and received unemployment benefits following his termination from the defendant employer. (Hr. Tr., p. 47) Claimant subsequently applied for and received social security disability benefits. (See Hr. Tr., p. 41)

The initial disputed factual issue for me to decide is whether claimant is entitled to temporary total disability (TTD), temporary partial disability (TPD), or healing period benefits from July 24, 2019, to June 13, 2020. Claimant asserts entitlement based on the fact he was terminated on July 24, 2019, while working light duty, and he did not achieve maximum medical improvement until June 13, 2020.

Dake Dietrich testified that on June 28, 2019, the employer made an offer of light duty work to claimant in writing. (Hr. Tr., p. 58) The letter is dated June 28, 2019, and can be found at Exhibit D, page 7. The letter does not actually provide what light duty work claimant would be performing for the defendant employer. (See Ex. D, p. 7)

Contrary to defendants' assertion, there is no evidence that claimant refused the light duty work that was offered to him. In fact, the evidence in the record suggests just the opposite. Claimant returned to work on July 1, 2019, as instructed in the June 28, 2019, letter. Mr. Dietrich confirmed the same on cross-examination. (Hr. Tr., p. 60) Mr. Rife was then terminated for excessive unexcused absenteeism on July 24, 2019. (Ex. D, p. 8; Hr. Tr., pp. 58-59) There is no indication that claimant refused an offer of light duty work; rather, he simply refused to sign the June 28, 2019, letter. His actions in returning to work on July 1, 2019, demonstrate an acceptance of light duty work. I find claimant did not expressly or inadvertently refuse an offer of light duty work or suitable employment. I further find claimant did not return to work and was not medically capable of returning to substantially similar employment between July 24, 2019, and June 13, 2020.

The next disputed factual issue is whether the claimant's stipulated August 6, 2018, work injury should be compensated with permanent disability benefits as a scheduled member injury to the right shoulder, or as an unscheduled injury. For reasons that will be discussed in the Conclusions of Law section, I find claimant's injury is properly compensated as a scheduled member, right shoulder injury.

The parties stipulate that the right shoulder injury is a cause of permanent disability. The only physician to assess claimant's permanent disability is Dr. Kim. Dr. Kim placed claimant at MMI on June 13, 2020, and assessed claimant with 19 percent right upper extremity impairment, or 11 percent of the whole person. (Ex. 1, p. 3) Given that the parties stipulate that the right shoulder injury is a cause of permanent impairment, and the fact Dr. Kim is the only physician to assign an impairment rating, I accept Dr. Kim's opinions regarding permanency and find claimant sustained 11 percent whole person impairment as a result of the August 6, 2018, work injury.

The credit owed to defendants, if any, will be addressed in the Conclusions of Law section.

The parties dispute the commencement date of permanent partial disability (PPD) benefits. Rife correctly asserts a commencement date of June 14, 2020. For injuries occurring on or after July 1, 2017, the commencement date for permanent partial disability benefits is the date of maximum medical improvement.

Claimant asserts he is entitled to reimbursement for the fees associated with Dr. Kim's IME. On March 25, 2020, claimant's attorney asked defendants if they would be requesting an impairment rating from Dr. White. (Ex. 5, p. 24) Defendants replied, "The Defendants will request a rating." (Id.) I find claimant properly requested an impairment rating from defendants prior to seeking an impairment rating of his own. It was only after defendants held the impairment rating hostage that claimant obtained his own IME report. Defendants never obtained an impairment rating from an authorized treating physician or an independent expert physician.

Finally, claimant asserts that defendants unreasonably denied or delayed payment of temporary benefits to which he was due. Claimant further asserts that defendants unreasonably denied or delayed payment of weekly benefits to which he was due. Unfortunately, claimant did not raise the issue of penalty benefits on the hearing report or at the evidentiary hearing. Claimant first raised the issue in his post-hearing brief. The issue of penalty benefits must be pled. It was not. As such, I decline to address claimant's entitlement to penalty benefits in this case.

Costs will be discussed in the Conclusions of Law section.

CONCLUSIONS OF LAW

The fighting issue in this case is primarily a legal one. It involves the 2017 legislative changes to Iowa Code Chapter 85 which added the "shoulder" to the list of scheduled members in Iowa Code section 85.34(2) (2019). The specific issue in this

case is whether claimant's disability is a scheduled disability to his "shoulder" under Iowa Code section 85.34(2)(n) or an unscheduled disability under Section 85.34(2)(v).

Since this case was heard, the Commissioner filed two appeal decisions which are controlling on the legal issue. The first was Deng v. Farmland Foods, Inc., File No. 5061883 (Appeal September 29, 2020). In Deng, the Commissioner held that the 2017 amendments to Chapter 85 were ambiguous as to the definition of the shoulder. He therefore undertook an effort to construe the statute by looking to the intent of the legislature. Id. at 5. He ultimately concluded the following:

> 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); see also Jacobson Transp. Co. v. Harris, 778 N.W.2d 192, 197 (Iowa 2010); 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.
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> 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.
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> 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.

The second is Chavez v. MS Technology, LLC, File No. 5066270 (App. September 30, 2020), which was filed the day after Deng. In Chavez, the Commissioner affirmed his legal holding in Deng and applied his interpretation to the various impairments and disabilities sustained by the claimant in that case:

> Again, as explained in Dr. Peterson's operative note, claimant's subacromial decompression was performed to remove scar tissue and fraying between the supraspinatus and the underside of the acromion. As discussed above, the acromiom [*sic*] 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 the 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).
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> 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.

The key holdings of Deng and Chavez are (1) The definition of a “shoulder” is ambiguous in Section 85.34(2)(n); (2) There is no “ordinary” meaning of the word shoulder; (3) The appropriate way to interpret the statute is to examine at the legislative history; (4) The well-established history of “liberal construction” of workers' compensation statutes is inapplicable here because to do so would be to ignore the legislature's intent to limit compensation to injured workers in the 2017 amendments; and (5) 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 4-11.

Applying this interpretation of the facts of this case, I find the claimant suffered an injury to his “shoulder” under Iowa Code section 85.43(2)(n). As such, his disability shall be assessed as a scheduled member disability.

For injuries occurring on or after July 1, 2017, Iowa Code § 85.34(2)(x) disallows lay witness testimony and agency expertise from being considered as evidence of impairment. The only evidence to be considered regarding the extent of impairment is impairment ratings under the AMA Guide, Fifth Edition. Iowa Code section 85.34(2)(x)

Having reviewed the record as a whole, I find that the claimant has suffered 19 percent functional impairment to his right shoulder, as assigned by Dr. Kim. As such, claimant is entitled to 19 percent of 400 weeks or 76 weeks of compensation commencing on June 14, 2020, the date of MMI. Iowa Code section 85.34(2) ("Compensation for permanent partial disability shall begin when it is medically indicated that maximum medical improvement from the injury has been reached. . . ")

Defendants seek an apportionment of disability pursuant to Iowa Code section 85.34(7) for the February 4, 2009, and August 6, 2018, injuries. The apportionment statute in effect at the time of the injury is controlling. Brown v. Star Seeds, Inc., 614 N.W.2d 577, 581 (Iowa 2000)

Iowa Code section 85.34(7) provides:

> An employer is liable for compensating only that portion of an employee's disability that arises out of and in the course of the employee's employment with the employer and that relates to the injury that serves as the basis for the employee's claim for compensation under this chapter, or chapter 85A, 85B, or 86. An employer is not liable for compensating an employee's preexisting disability that arose out of and in the course of employment from a prior injury with the employer, to the extent that the employee's preexisting disability has already been compensated under this chapter, or chapter 85A, 85B, or 86. An employer is not liable for compensating an employee's preexisting disability that arose out of and in the course of employment with a different employer or from causes unrelated to employment.

Importantly, Iowa Code section 85.34 provides no mechanism for apportioning the loss between the present injury and the prior injury. This is in direct contrast to prior apportionment statutes, which explained how the offset was to be calculated when an employee suffers successive injuries while working for the same employer. Iowa Code section 85.34(7)(b) (2016) (". . . the employer is liable for the combined disability that is caused by the injuries, measured in relation to the employee's condition immediately prior to the first injury. In this instance, the employer's liability for the combined disability shall be considered to be already partially satisfied to the extent of the percentage of disability for which the employee was previously compensated by the employer.")

With respect to apportionment statutes, the Iowa Supreme Court has previously stated, "If the legislature wanted to require a credit or offset of disability benefits . . . it logically would have prescribed how [the credit or offset of disability benefits] should be determined." Roberts Dairy v. Billick, 861 N.W.2d 814, 822 (Iowa 2015)

In this instance, defendants assert that they are entitled to a credit of 29.6 percent to the body as a whole for Mr. Rife's prior right shoulder injury. However, Iowa Code section 85.34 provides no guidance on apportioning a prior industrial

disability award from a scheduled member impairment rating. Further, defendants provide little to no argument as to why they should receive a credit equivalent to 29.6 percent to the body as a whole. Defendants failed to obtain an impairment rating for the current right shoulder injury or an expert opinion apportioning the two right shoulder injuries.

With this in mind, claimant asserts it would be absurd to provide defendants a credit against a scheduled award for prior industrial disability benefits paid. I agree. If the undersigned accepted defendants' position on the matter, it would be difficult to imagine a scenario in which injured workers with successive shoulder injuries – assuming one of the shoulder injuries occurred prior to the 2017 amendments – would receive any additional compensation.

An argument could be made that defendants are entitled to a credit based upon the impairment ratings attributed to the first injury; however, in this case, it is unclear which impairment rating the parties adopted as part of the 2010 settlement. (See Ex. B) Dr. Pilcher issued an impairment rating of 14 percent to the right upper extremity. (JE 5, p. 80) Dr. Buck opined claimant had an impairment rating of 12 percent to the right upper extremity. (Ex. B, p. 18) Dr. Kim issued an impairment rating of 15 percent to the right upper extremity; however, it does not appear as though Dr. Kim's impairment rating was attached to the settlement documents. (Ex. 1, p. 7; see Ex. B, pp. 7-22) Moreover, Dr. Kim did not establish whether the impairment rating assigned in the July 24, 2020, report was in addition to, or inclusive of, the impairment rating assigned in the March 22, 2010, report.

The evidence does not establish that defendants are entitled to a credit for the loss of earning capacity assigned to claimant for his February 4, 2009, work injury under the version of Iowa Code section 85.34(7) that is now in effect.

The next issue to be addressed is claimant's alleged entitlement to additional temporary benefits. Claimant asserts he is entitled to additional healing period benefits. More specifically, claimant asserts he is entitled to additional healing period benefits from July 24, 2019, to June 13, 2020.

Healing period compensation describes temporary workers' compensation weekly benefits that precede an allowance of permanent partial disability benefits. Ellingson v. Fleetguard, Inc., 599 N.W.2d 440 (Iowa 1999). Section 85.34(1) provides that healing period benefits are payable to an injured worker who has suffered permanent partial disability until the first to occur of three events. These are: (1) the worker has returned to work; (2) the worker medically is capable of returning to substantially similar employment; or (3) the worker has achieved maximum medical recovery. Maximum medical recovery is achieved when healing is complete and the extent of permanent disability can be determined. Armstrong Tire & Rubber Co. v. Kubli, Iowa App., 312 N.W.2d 60 (Iowa 1981).

The central dispute on this issue is whether claimant is entitled to healing period benefits following his termination on July 23, 2019, up through Dr. Kim's placement of claimant at MMI on June 14, 2020. Defendants assert claimant refused an offer of light duty work by failing to sign the offer of light duty work.

I found claimant did not expressly or inadvertently refuse an offer of light duty work or suitable employment on June 28, 2019. There is no indication that claimant refused an offer of light duty work; rather, he simply refused to sign the June 28, 2019, letter. Iowa Code section 85.33(3)(b) does not prescribe the ways in which an employee can accept an offer of light duty work. Claimant's actions in returning to work on July 1, 2019, demonstrate an acceptance of light duty work.

Although not specifically argued by defendants, I find claimant's discharge for excessive absenteeism is not tantamount to a refusal of suitable work. An employee working with restrictions is not entitled to act with impunity toward the employer and the employer's interests. Nevertheless, not every act of misconduct justifies disqualifying an employee from workers' compensation benefits even though the employer may be justified in taking disciplinary action. Franco v. IBP, Inc., File No. 5004766 (App. February 28, 2005).

I found claimant did not return to work and was not medically capable of returning to substantially similar employment between July 24, 2019, and June 13, 2020. As such, I find claimant is entitled to healing period benefits from July 24, 2019, to June 13, 2020. Iowa Code section 85.34(1)

Mr. Rife seeks reimbursement for Dr. Kim's independent medical evaluation charges. Section 85.39 permits an employee to be reimbursed for subsequent examination by a physician of the employee's choice where an employer-retained physician has previously evaluated "permanent disability" and the employee believes that the initial evaluation is too low. The section also permits reimbursement for reasonably necessary transportation expenses incurred and for any wage loss occasioned by the employee attending the subsequent examination.

The Iowa Workers' Compensation Commissioner has noted that the Iowa Supreme Court adopted a strict and literal interpretation of Iowa Code section 85.39 in Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839 (Iowa 2015). See Cortez v. Tyson Fresh Meats. Inc., File No. 5044716 (Appeal December 2015). The Commissioner has taken a similar strict interpretation of the pre-requisites set forth in Iowa Code section 85.39. See Reh v. Tyson Foods, Inc., File No. 5053428 (Appeal March 2018).

Prior to the court's decision in Young, this agency had held that a release to full-duty work coupled with the failure to expressly opine as to impairment produces an inference that the employer-retained physician did not believe the injured worker sustained permanent impairment related to the injury. Countryman

v. Des Moines Metro Transit Authority, File No. 5009718 (App. March 16, 2006); Kuntz v. Clear Lake Bakery, Inc., File No. 1283423 (Rehearing July 13, 2004).

The supreme court's decision in Young, as well as several recent appeal decisions, support a finding that said inference is no longer applicable to open the door for injured workers to obtain a section 85.39 examination. Instead, there must be a definitive permanent impairment rating rendered by a physician selected by the defendants before the injured worker qualifies for an independent medical evaluation pursuant to Iowa Code section 85.39.

In cases where defendants have denied liability, the commissioner has concluded that medical opinions or reports obtained for the purposes of determining causation, regardless of whether they are obtained from a treating or expert physician, are not the equivalent of an impairment rating for purposes of Iowa Code section 85.39. See Reh, File No. 5053428 (App. March 2018); Soliz v. Farmland Foods, Inc., File No. 5047856 (App. March 2018).

In cases where defendants have accepted liability but have not obtained an impairment rating, the commissioner has concluded that a release to full-duty work and placement at MMI, coupled with a failure to expressly opine as to impairment, is not the equivalent of an impairment rating for purposes of Iowa Code section 85.39. Sainz v. Tyson Fresh Meats, Inc., File No. 5053964 (App. September 2018).

If defendants unduly delay in seeking an examination under section 85.39, or fail to obtain an evaluation of permanent impairment altogether, the supreme court has held that the injured worker's recourse is a request to the commissioner to appoint an independent physician to examine the injured worker and make a report. See Young, 867 N.W.2d 839, 845 (Iowa 2015); Iowa Code section 86.38. In practice, the looming threat of penalty benefits for failure to investigate the extent of permanent impairment, once communicated, should encourage timely action.

If an injured worker wants to be reimbursed for the expenses associated with a disability evaluation by a physician selected by the worker, the process established by the legislature must be followed. This process permits the employer, who must pay the benefits, to make the initial arrangements for the evaluation and only allows the employee to obtain an independent evaluation at the employer's expense if dissatisfied with the evaluation arranged by the employer. Young, at 847 (citing Iowa Code § 85.39)

In this case, no employer-retained physician specifically evaluated the extent of claimant’s permanent disability before Dr. Kim’s IME took place on July 24, 2020. There is no indication claimant sought authorization from defendants for an 85.39 examination. However, there is evidence that claimant requested an impairment rating or disability evaluation from Dr. White, prior to seeking his own. (Ex. 5, p. 24) Defendants agreed to request an impairment rating on March 25,

2020. (Ex. 5, p. 24) Defendants subsequently requested an impairment rating from Dr. White as early as April 6, 2020; however, no impairment rating was ever provided. (See Ex. 5, p. 23) Defendants essentially held the disability evaluation hostage when claimant refused to present for a repeat FCE with E3. (Ex. 5, p. 22) More specifically, defendants did not want Dr. White "to rely on the FCE done at Short Physical Therapy [when assessing claimant's permanent impairment], given the physical therapist's assessment of restrictions for non-work-related conditions." This, despite the fact Dr. White could have assessed claimant's permanent impairment on any number of other factors, including the surgery performed and claimant's loss of range of motion.

This case is distinguishable from Sainz, as claimant definitively requested a disability evaluation from defendants prior to seeking his own independent evaluation; he was not simply released by his authorized treating physician. Claimant's counsel actively participated in attempting to secure an impairment rating from Dr. White. (See Ex. 3, p. 20) Defendants agreed to obtain an impairment rating but never followed through on the same. Defendants cannot actively withhold an impairment rating or disability evaluation, and then assert claimant is not entitled to reimbursement under Iowa Code section 85.39 because they did not first obtain an impairment rating. This is particularly true given the 2017 amendments emphasis on the need for an impairment rating to assess permanent disability. Iowa Code section 85.34(2)(x)

As such, I conclude claimant met his burden of establishing entitlement to reimbursement of Dr. Kim's independent medical examination fees pursuant to Iowa Code section 85.39. I decline defendants' invitation to reduce the amount of the reimbursement. Dr. Kim opined the cost of the report is reasonable and customary in his geographical area. Dr. Kim did not address or assign impairment to claimant's left shoulder or right ankle.

In his post-hearing brief, claimant asserts a claim for penalty benefits. If penalty is claimed, it should be pled. Allen v. Tyson Fresh Meats, Inc., 913 N.W.2d 275 (Iowa Ct. App. 2018) In Allen v. Tyson Fresh Meats, although the claimant had raised the issue of entitlement to penalty benefits in answers to interrogatories, penalty was not pled, and the court concluded that since 876 IAC 4.2 states that "entitlement to denial or delay benefits provided in Iowa Code Section 86.13 shall be pled," the language was mandatory and required actual pleading of entitlement to penalty benefits.

Claimant's failure to plead entitlement to penalty benefits defeats any claim to the same. As such, this decision will not address claimant's entitlement to penalty benefits.

The final issue for determination is a specific taxation of costs pursuant to Iowa Code section 86.40 and rule 876 IAC 4.33. Claimant requests taxation of the cost of the filing fee ($100.00), the cost of Mr. Short's report ($900.00), and the cost of Dr. White's report ($1,000.00).

The cost of the filing fee is appropriate and assessed pursuant to 876 IAC 4.33(7).

Agency rule 4.33(6) permits the assessment of the reasonable costs of "obtaining no more than two doctors' or practitioners' reports." The agency has previously determined this administrative rule permits assessment of the cost of FCE expenses and vocational expert reports. Caven v. John Deere Dubuque Works, File Nos. 5023051, 5023052 (App. July 21, 2009); Pastor v. Farmland Foods, File No. 5050551 (Arb. April 2016); Bohr v. Donaldson Company, File No. 5028959 (Arb. November 23, 2010); Muller v. Crouse Transportation, File No. 5026809 (Arb. December 8, 2010). However, the Iowa Supreme Court has held that only the cost of drafting the expert's report is permissible in lieu of testimony. Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839, 845-846 (Iowa 2015).

Claimant's Motion for Taxation of Costs provides that Mr. Short attributed $350.00 to the cost of drafting the FCE report. This is the only portion of the FCE report that is reimbursable. Claimant's motion further provides Dr. White charged $1,000.00 for the cost of a telephone conference and subsequent report. I find the costs of Mr. Short's FCE report and Dr. White's consultation and report are appropriate and assessed pursuant to 876 IAC 4.33(6).

ORDER

THEREFORE, IT IS ORDERED:

Defendants shall pay healing period benefits from February 25, 2019, through June 13, 2020, at the stipulated weekly rate of five hundred four and 58/100 dollars ($504.58).

Defendants shall pay claimant seventy-six (76) weeks of permanent partial disability benefits commencing on June 14, 2020, at the stipulated weekly rate of five hundred four and 58/100 dollars ($504.58).

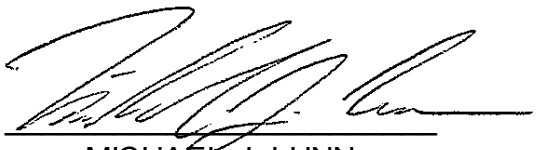
Defendants shall pay accrued weekly benefits in a lump sum together with interest payable at an annual rate equal to the one-year treasury constant maturity published by the federal reserve in the most recent H15 report settled as of the date of injury, plus two percent, as required by Iowa Code section 85.30.

Defendants shall reimburse claimant for Dr. Kim's independent medical evaluation pursuant to Iowa Code section 85.39 in the amount of two thousand two hundred fifty and 00/100 dollars ($2,250.00).

Defendants shall pay costs of one thousand four-hundred fifty and 00/100 dollars ($1,450.00).

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 ___20th_____ day of August, 2021.



MICHAEL J. LUNN
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Anthony Olson (via WCES)

Laura Ostrander (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.