BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

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| JAGER HALSTEAD,<br><br>Claimant,<br><br>vs.<br><br>CONNERLY CONSTRUCTION, INC.,<br><br>Employer,<br><br>and<br><br>SOCIETY INSURANCE,<br><br>Insurance Carrier,<br>Defendants. | File No. 5064649<br><br>ARBITRATION DECISION<br><br>Head Note Nos.: 1803, 2500 |

## STATEMENT OF THE CASE

Jager Halstead, the claimant, filed a petition in arbitration, seeking workers' compensation benefits from the defendants, employer Connerley Construction, Inc. (CC) and insurance carrier Society Insurance (Society), for alleged injuries to his right arm and body as a whole. The agency held a hearing in the case on February 20, 2020, in Cedar Rapids, Iowa, with the undersigned deputy workers' compensation commissioner presiding.

## ISSUES

Under rule 876 IAC 4.149(3)(f), the parties jointly submitted a hearing report defining the claims, defenses, and issues submitted for determination. The hearing report was approved and entered into the record via an order because it is a correct representation of the disputed issues and stipulations in this case. The parties identified the following disputed issues in the hearing report:

1) What were Halstead's gross earnings per week for purposes of calculating his weekly benefit amount and what is his weekly benefit amount?

2) Is Halstead entitled to more temporary disability or healing period benefits from June 29, 2018, through December 30, 2018?

3) What is the nature and extent of Halstead's permanent disability relating to the stipulated work injury, if any?

4) Is Halstead entitled to recover the cost of an independent medical examination (IME) under Iowa Code section 85.39?

5) Are the defendants responsible for payment of certain medical expenses?

6) Are costs taxed against the defendants under Iowa Code section 86.40?

## STIPULATIONS

In the hearing report, the parties entered into the following stipulations:

1) An employer-employee relationship existed between Halstead and CC at the time of the stipulated work injury.

2) Halstead sustained an injury on June 28, 2018, which arose out of and in the course of his employment with CC.

3) If the defendants are liable for the alleged injury, Halstead is entitled to temporary disability or healing period benefits from June 29, 2018, through December 30, 2018.

4) Although entitlement to temporary disability or healing period benefits cannot be stipulated, Halstead was off work from June 29, 2018, through December 30, 2018.

5) The stipulated injury is a cause of permanent disability to Halstead's right arm.

6) The commencement date for permanent partial disability benefits, if any are awarded, is December 31, 2018.

7) At the time of the stipulated injury:

    a) Halstead was single.

    b) Halstead was entitled to one exemption.

8) The defendants are entitled to a credit for 35 weeks of compensation at the rate of $224.80 per week.

The parties' stipulations in the hearing report are accepted and incorporated into this arbitration decision. This decision contains no discussion of any factual or legal issues relative to the parties' stipulations, except as may be needed for clarity. The parties are bound by their stipulations.

## FINDINGS OF FACT

The evidentiary record in this case consists of the following:

- Joint Exhibits (Jt. Ex.) 1 through 2;
- Claimant's Exhibits (Cl. Ex.) 1 through 4;
- Defendants' Exhibits (Def. Ex.) A through L; and
- Hearing testimony by Halstead and Allen Connerley, the owner of CC.

After careful consideration of the evidentiary record in this case, the undersigned hereby makes the following findings of fact.

Halstead was 26 years old at the time of hearing. (Hrg. Tr. p. 12) He obtained his GED in 2012. (Hrg. Tr. p. 12) Halstead had obtained no postsecondary degrees or certificates as of the date of hearing. (Hrg. Tr. p. 12)

Halstead worked on and off at CC. (Hrg. Tr. pp. 14–15) In 2017, he worked full time at CC before Connerley discharged him. (Hrg. Tr. pp. 15–16; Cl. Ex. 2, pp. 28–31) The evidence shows CC paid Halstead by paycheck in 2017, issued by its bookkeeper, with appropriate tax withholdings and an IRA contribution. (Ex. 2, pp. 28–31)

Halstead returned to employment with CC after Connerley rehired him in April of 2018. (Hrg. Tr. pp. 15, 49) Halstead believed he was returning to work full time for CC. (Hrg. Tr. p. 15) The parties dispute Halstead's status as employee when he returned to employment with CC in April of 2018. Halstead contends he was a full-time employee, working 40 hours per week. CC asserts Halstead was a part-time employee. From this disagreement stems the parties' dispute regarding Halstead's weekly earnings leading up to the work injury.

He testified that CC required employees to meet at its shop at 7:00 a.m. each morning, Monday through Friday (and sometimes on Saturday), and he did so before reporting to his assigned job sites. (Hrg. Tr. p. 15) Connerley offered slightly different testimony, stating CC employees report at 7:00 a.m. to the shop only if they need to be reassigned to a new job; if the job to which an employee is assigned is not done, the employee reports to the job site, not the CC shop. (Hrg. Tr. p. 66)

Connerley's testimony on when CC employees report to its shop before going to a job site is more credible. Requiring the type of daily reporting Halstead described would create wasted time on the clock and unnecessary travel for CC employees. It is more likely that CC had employees report to job sites when that work was ongoing and to the CC shop when they needed a new assignment or supplies.

Further, Connerley testified that CC did not have any full-time hourly employees at the time it re-hired Halstead. (Hrg. Tr. pp. 47–48) According to Connerley, CC does not "always offer full-time work, it's as a general work. At that point in time there was probably not enough hours to get what would be considered full-time work." (Hrg. Tr. p. 47) The reason being Connerley was "contemplating shutting down" CC due to

"financial distress" and therefore "reducing costs anywhere [he] could." (Hrg. Tr. pp. 48, 56)

According to Halstead, CC rehired him as a full-time employee working 40 hours per week. (Hrg. Tr. p. 14) Halstead testified that CC paid him with a paycheck "when [he] first started working, when [he] first came back." (Hrg. Tr. p. 16) According to Halstead, Connerley approached him about whether he would be willing to accept pay for his work with CC in cash to help save the company money on his IRA, unemployment insurance contributions, and workers' compensation insurance premiums. (Hrg. Tr. p. 16–17)

Connerley testified that CC's revenue troubles prevented it from being able to pay its normal bookkeeper, so she left the company. (Hrg. Tr. p. 52) Connerley did not know how to issue paychecks with the bookkeeper gone, so he took to paying CC workers in cash. (Hrg. Tr. p. 52) As Connerley tells it, he kept notes of the workers' hours and then an unidentified person entered the information into QuickBooks for purposes of paying taxes and other expenses. (Hrg. Tr. p. 52)

Halstead contends he was a full-time employee of CC before the stipulated injury. Because CC reported to Society he worked less than 40 hours per week most weeks, Halstead argues his rate is too low. In support of his position, Halstead contends:

1) He worked full time for CC when the company employed him in 2017.

2) He agreed to be paid in cash to help CC save money in 2018. CC then recorded his hours as part-time in its books to help the company save money on insurance, taxes, and his IRA contribution.

3) He performed work on the house he rented from Connerley.

4) He indicated he was a full-time employee on his initial claim for unemployment insurance (UI) benefits and CC did not protest his eligibility for such benefits.

The parties agree Halstead worked 40 or more hours per week in 2017, as a full-time employee. However, that does not mean Halstead was also a full-time employee when re-hired in 2018. The evidence establishes CC was struggling as a business in 2018 and did not have any employees guaranteed at least 40 hours per week. Rather, CC gave its employees the hours it had available based on the jobs it secured.

Next consider CC's plan, as described by Halstead, and its implementation. As an initial matter, if Halstead's allegations are true with respect to CC's actions and motivation, the scheme did not work very well. Under Halstead's description of the scheme, CC recorded fewer hours and less wages in its books to save money on taxes and IRA contributions. Consider a comparison between the week of May 27 through May 31, 2018, when the payroll records indicate Halstead worked 10.75 hours, and

June 15 through June 21, 2018, when they show he worked 41 hours. The following chart is based on the itemizations shown in Claimant's Exhibit 2 for these two weeks.

| Contribution Type | May 25–31 | June 15–21 | Difference |
|---|---|---|---|
| IRA | $7.77 | $17.43 | $9.66 |
| FUTA | $1.56 | $3.49 | $1.93 |
| SS | $16.06 | $36.02 | $19.96 |
| Med | $3.76 | $8.42 | $4.66 |
| IA SUI | $19.43 | $43.57 | $24.14 |
| Total | $48.58 | $108.93 | $60.35 |

As Halstead describes CC's plan to under-document his hours and wages in order to save money on its IRA and tax contributions, the company would save about $60.35 between a week in which it fudged his hours as compared to one in which it apparently accurately recorded them. If CC consistently implemented the practice, it could save about $250.00 in a month on Halstead and exponentially more if it implemented the practice across its business. But such reasoning is faulty, in part, because Halstead did not produce sufficient evidence to show the practice was uniform across CC's employees. Even accepting *arguendo* Halstead's representation of CC's practice, the evidence shows it did not engage in the practice uniformly for him. The records show he worked 40 or more hours and was paid for it during some weeks.

Moreover, if CC planned to under-record Halstead's hours and wages to save money, why would the company record him as having worked over 40 hours during the weeks of June 15 through June 21 and June 22 through June 28, 2018? It defies logic to either not uniformly implement or abandon the scheme less than three months in, if CC's intent was to save money in this way. If CC's plan was to save money by under-reporting Halstead's hours and wages, it would not have fully documented both for multiple weeks during the time period in question.

Connerley and Halstead also had a landlord-tenant relationship for a time. (Hrg. Tr. pp. 17, 50) Halstead lived in a house Connerley owned for about four years. (Hrg. Tr. pp. 17, 50) In or around April of 2018, Halstead ended his lease and moved out of the house. (Hrg. Tr. pp. 17, 50) After Halstead moved out, Connerley entered the house and determined there was approximately $7,000.00 in damage. (Hrg. Tr. p. 50)

According to Connerley, CC authorized its workers to work on the house Halstead damaged after they performed work on other jobs. (Hrg. Tr. p. 50) Connerley held Halstead responsible for damage to the house during the term of the lease, so he refused to pay wages to him for work he did on the house he had leased and damaged. (Hrg. Tr. pp. 17, 50) According to Connerley, Halstead would typically only work 45 to 90 minutes on the house at the end of a workday. (Hrg. Tr. p. 51)

Connerley testified he owned multiple businesses. (Hrg. Tr. p. 46) Halstead did not present evidence rebutting this assertion. Nor did Halstead present evidence establishing CC owned the residence in which he lived. There is an insufficient basis in the evidence from which to conclude Halstead's employer, CC, owned the residence. All of this is to say that there is an insufficient basis in the record from which to conclude the 45 to 90 minutes per day Halstead spent working on fixing up his former residence was work for CC.

Lastly, Halstead's argument with respect to the inference to be drawn from the parties' actions or inaction during his claim for UI benefits is not persuasive. The Iowa Employment Security Law, Iowa Code chapter 96 (IESL), governs our state's unemployment insurance (UI) system. Under the IESL, the weekly benefit amount (WBA) for an individual, is a fraction of the "the individual's total wages in insured work paid during that quarter of the individual's base period in which such total wages were highest." Iowa Code § 96.3(4)(*a*). The "base period" is "the period beginning with the first day of the five completed calendar quarters immediately preceding the first day of an individual's benefit year and ending with the last day of the next to the last completed calendar quarter immediately preceding the date on which the individual filed a valid claim." Id. at § 96.1A(3).

In order to allow Iowa Workforce Development (IWD) to determine an individual's WBA, an employer must report an employee's wages to IWD every quarter. See id., at § 96.11(6)(*a*); see also 871 IAC 22, 23. After an individual files an initial claim for UI benefits, the agency sends the individual a monetary record, which is "a notification consisting of a statement of the individual's weekly benefit amount, total benefits, base period wages, and other data pertinent to the individual's benefit rights." 871 IAC 24.9(1)(*a*). The monetary record constitutes "a final [agency] decision unless newly discovered facts which affect the validity of the original determination or a written request for reconsideration is filed by the individual within ten days of the date of the mailing of the monetary record." 871 IAC 24.9(1)(*b*).

Thus, the agency provides a claimant such as Halstead the information it has regarding his wages to help ensure the accuracy of the WBA calculation. If the claimant feels that the information is incorrect (for example, that the wages the employer reported to the agency are too low because he worked more hours and earned more money than what the agency has in its records) the claimant may file a request for reconsideration and provide additional information to the agency (for example, that he earned more wages than the employer reported because he worked more hours). The agency may then use this new information to recalculate the claimant's WBA. Under the Iowa Employment Security Law and Administrative Code, the impetus was on Halstead, not CC, to challenge his wages, which indirectly reflect the number of hours he worked for CC.

Consequently, Halstead's argument that the fact CC did not protest his eligibility for UI benefits, after he indicated he was a full-time employee on the initial claim form, is not persuasive evidence that he worked full time for the company in 2018. Based on the evidence, it is more likely than not that CC did not protest Halstead's claim for UI

benefits because it thought he was eligible due to the reason for his separation from employment with the company. See Iowa Code § 96.5 (causes for disqualification from benefits). Checking the full-time employee box did not impact CC's rights in a meaningful way since its tax liability is based in part on benefits paid to former employees, the amount of which is based in part on the wages CC reported to IWD. Rather, Iowa law and agency procedures put the onus on claimants like Halstead to challenge the wages reported by an employer like CC if the employee believes the wages as reported are too low. For these reasons, the evidence supports the inference that CC did not feel it had anything to protest because it had reported Halstead's wages as required by the agency and he was more likely than not eligible for benefits due to the nature of his separation from employment with the company.

Halstead has failed to meet his burden of proof on the question of his gross earnings. The evidence does not establish by a preponderance of the evidence that he worked as a full-time employee for CC during each of the weeks between him being re-hired in April of 2018 and the date of the stipulated injury. Rather, the evidence establishes it is more likely than not CC properly recorded his hours worked and wages. Halstead's average weekly wage for purposes of this claim was $258.08.

On June 18, 2018, Halstead worked for CC on a project that required removing siding from a home. (Hrg. Tr. p. 19) Halstead was removing siding while standing on a plank suspended between two ladders. (Hrg. Tr. p. 19) He could not reach a piece of siding, so he scaled one of the ladders, which stood 16 feet tall, in order to reach it. (Hrg. Tr. p 20) Halstead fell approximately 16 feet from the ladder onto concrete. (Hrg. Tr. p. 20)

Halstead tried to walk off the pain, but noticed his right elbow was swollen. (Hrg. Tr. p. 20) Halstead felt pain in his elbow, so he knocked on the back door of the house he was working on, but no one answered. (Hrg. Tr. p. 20) Halstead then drove to get his mom, who lived on the route between the work site and Mercy Hospital in Cedar Rapids. (Hrg. Tr. p. 20) His mom then drove him to the emergency room (ER). (Hrg. Tr. p. 20) Halstead's mother sent Connerley a text message to notify him of Halstead's injury and need for emergency care. (Hrg. Tr. p. 53)

At the Mercy ER, Melissa Olthoff, P.A.C., examined Halstead. (Jt. Ex. 1, p. 1) She noted Halstead complained of right shoulder and elbow pain "after a fall from [a] ladder while at work." (Jt. Ex. 1, p. 3) Olthoff noted, "Imaging with comminuted radial head fracture in addition to slightly displaced fracture of distal humerus. No proximal humerus or shoulder fracture noted." (Jt. Ex. 1, p. 3)

Halstead could not use his mobile telephone because the battery had run out. (Hrg. Tr. p. 21) He consequently telephoned Connerley using a hospital telephone to notify him of the fall and that he felt his injury was fairly serious. (Hrg. Tr. p. 21) He also shared with Connerley that he might need surgery. (Hrg. Tr. p. 54) Halstead asked Connerley what he should do about the work injury. (Hrg. Tr. p. 22) Connerley told Halstead he would take care of the medical bills if it was a minor injury, without reporting it as a workers' compensation claim. (Hrg. Tr. pp. 22, 64)

Olthoff provided Halstead with a splint and sling. (Jt. Ex. 1, p. 4) She arranged an appointment with Peter Pardubsky, M.D., for the following morning. (Jt. Ex. 1, p. 4; Hrg. Tr. p. 22) Thus ended Halstead's emergency care for his broken arm.

Halstead saw Dr. Pardubsky the following morning as scheduled. (Hrg. Tr. p. 22) During the appointment, Halstead lied, as Connerley instructed him to do, stating he fell while working at home. (Hrg. Tr. p. 22; Jt. Ex. 2, p. 28) Dr. Pardubsky advised Halstead he needed surgery on his broken arm. (Jt. Ex. 2, p. 30) Dr. Pardubsky did not immediately perform surgery on Halstead because there was not an immediate need for the procedure.

After the appointment with Dr. Pardubsky, Halstead informed Connerley that he needed surgery. (Hrg. Tr. pp. 23, 54) Connerley told Halstead that he could not afford to pay for the surgery. (Hrg. Tr. p. 23) Connerley told Halstead they would submit the injury as a workers' compensation claim. (Hrg. Tr. p. 23) Ultimately, the defendants accepted liability for the injury. (Hrg. Tr. p. 23) There is an insufficient basis in the evidence from which to conclude that CC, which learned through its owner/operator, Connerley, of Dr. Pardubsky's surgery recommendation on the day he made it, or Society objected to the recommended procedure or sought a second opinion on the question of whether Halstead needed surgery between Dr. Pardubsky's recommendation and the procedure.

Halstead moved forward with the surgery. On July 2, 2018, Halstead underwent a pre-surgery physical and was advanced for the procedure. (Jt. Ex. 2, pp. 32–37) On July 6, 2018, about a week after the injury, Dr. Pardubsky performed surgery as scheduled. (Jt. Ex. 1, p. 26–27)

Halstead treated with Dr. Pardubsky after the procedure. (Jt. Ex. 2, pp. 38) Dr. Pardubsky removed Halstead's cast, prescribed physical therapy, and prescribed medication to help manage Halstead's pain. (Jt. Ex. 2, p. 38–48) A case manager participated on behalf of the defendants in some of Halstead's appointments with Dr. Pardubsky. (Jt. Ex. 2, pp. 40, 44, 47) Dr. Pardubsky also prescribed work restrictions until December 31, 2018, when he released Halstead to return to work full duty. (Jt. Ex. 2, p. 48, 52–55) However, Dr. Pardubsky did not find Halstead to be at maximum medical improvement (MMI) for his right-arm injury at that time. (Jt. Ex. 2, p. 48)

After Dr. Pardubsky released Halstead to return to work, Halstead sent a text message to Connerley asking if he could return to work for CC. (Hrg. Tr. p. 18–19, 65) Connerley replied via text message, "No." (Hrg. Tr. p. 18–19, 65) Halstead was unemployed due to the rejection of his request.

Halstead was involved in a car crash on January 23, 2019. (Hrg. Tr. p. 35; Jt. Ex. 1, p. 5) The Mercy ER performed X-rays of his back and right elbow. (Hrg. Tr. p. 35–36; Jt. Ex. 1 p. 22) Glenn Hammer, M.D., reviewed them and noted:

> There is no evidence of acute fracture or dislocation. No right elbow joint effusion evident. Unchanged appearance of right radial head prosthesis

> and 2 metallic screws in the capitellum of the distal humerus. Small bony spur projecting from the volar aspect of the radial neck and small spur projecting distally from the medial epicondyle of the distal humerus appear new since the prior study.

(Jt. Ex. 1, p. 23) Dr. Hammer concluded there were no acute bony findings. (Jt. Ex. 1, p. 23) There is an insufficient basis in the evidence from which to conclude Halstead sustained an injury to his right elbow in the January 23, 2019 car crash that is the cause of any permanent disability.

The Marion Police Department arrested Halstead on the night of January 25, 2019. (Def. Ex. J) The district court acquitted Halstead of all charges brought against him in a bench trial. (Hrg. Tr. p. 25) The substance of those charges are irrelevant to this proceeding. However, some of the events during Halstead's incarceration by the Marion Police Department merit discussion because they relate to Halstead's right arm health.

Officer Patrick Schmidt completed a report documenting in pertinent part the following altercation involving Halstead at the jail:

> When [Officer] Petersen was placing Jager back into the holding cell, I heard a commotion. Petersen said that he went to seize a phone from Jager. There was a struggle over the phone. I turned the corner of the cell and saw [P]etersen pushing himself away from Jager and Jager giving complaint of arm pain. Jager was holding his right arm. Jager's reaction to the claimed arm pain worsened and he started swearing at officers. I called for Marion Rescue to come and look at Jager's arm. I went to Jager's cell and told him that I called to have paramedics look at his arm. When I looked through the window, I saw Jager jam his elbow of his injured arm into the concrete block wall while he was sitting. He continued to yell, scream and swear at officers.

(Def. Ex. J, p. 29) Officer Trent Stotler noted in his report that he heard Halstead complain of arm pain, though he did not witness the incident. (Jt. Ex. J, p. 32) Halstead testified at hearing that his right arm was "affected," and not injured. (Hrg. Tr. p. 40)

The paramedics informed Schmidt they did not see any marks or swelling. (Def. Ex. J, p. 29) Schmidt rode with the paramedics and Halstead to Mercy Hospital. (Def. Ex. J, p. 29) According to Schmidt's report, Halstead calmed down after they left the police department "and hardly said a word about arm pain on the way to the hospital." (Def. Ex. J, p. 29) Schmidt noted that at Mercy, Halstead "told staff he has permanent nerve damage in his arm" due to the work injury, limited range of motion, and his right hand shakes periodically for no reason. (Def. Ex. J, p. 29)

On February 11, 2019, Halstead followed up with Dr. Pardubksy, (Jt. Ex. 2, p. 28) Dr. Pardubsky explained the reason for the appointment as follows:

> [Halstead] is concerned by the possibility of a recurrent injury to his right elbow. On 1/23/19 he was driving a vehicle when he was rear-ended and suffered a blow to his right elbow against the center console. Subsequent x-rays were obtained at Mercy Medical Center as part of a more thorough evaluation. On 1/25/19 he was detained by the Marion police and reports a twisting injury to his right elbow. Since this event, he has noticed a dramatic decrease in elbow range of motion as well as increased tremoring in his right arm. He has not been able to find work since he was last seen in construction due to seasonal limitations. He presents today for further evaluation of his right elbow.

(Jt. Ex. 2, p. 50)

Dr. Pardubsky ordered new x-rays. (Jt. Ex. 2, p. 5) He reviewed the x-rays Mercy Medical Center took on January 23 and 25, 2019. (Jt. Ex. 2, pp. 50–51) He conducted a physical examination of Halstead and compared the new x-rays to those taken at Mercy and to x-rays dated December 31, 2018. (Jt. Ex. 2, p. 51) Dr. Pardubsky concluded, "Reassurance was provided today. I cannot identify any further injury objectively on clinical examination or with his series of x-rays from Mercy Medical Center or new films today." (Jt. Ex. 2, p. 51) It is more likely than not that neither the car crash nor Halstead's time in the custody of the Marion police caused a right-arm injury that resulted in permanent disability.

The defendants engaged Dr. Pardubsky on multiple occasions regarding the impact of Halstead's work injury. On May 20, 2019, Angie Bonlander sent a letter to Dr. Pardubsky on behalf of Society. (Jt. Ex. 2, p. 58) The letter solicited Dr. Pardubsky's expert medical opinion on the question of what, if any, permanent disability Halstead sustained from the work injury. (Jt. Ex. 2, p. 58) Dr. Pardubsky responded to Society's request for his opinion on Halstead's permanent disability in a letter dated July 19, 2019, stating:

> I am responding to your letter dated 5/20/19 received via FAX. I last evaluated Mr. Halstead on 7/19/19 and determined he had reached MMI and he was released from my care. Clinical measurements were completed at that visit. MMI was discussed.
>
> 1. MMI was reached effective 7/19/19.
> 2. Using the *AMA Guides to the Evaluation of Permanent Impairment, 5th Edition*, and based upon a diagnosis of reduced elbow and forearm range of motion, using Chapter 16 tables and figures, his right upper extremity impairment is 14%.**
> 3. I do not anticipate any need for further medical treatment unless he develops further stiffness or posttraumatic arthritis necessitating removal of his radial head prosthesis. There is no indication for any intervention at this time that would alter his course of recovery in the future.
> 4. He has no permanent restrictions as a result of his right arm injury.

(Jt. Ex. 2, p. 58) Dr. Pardubsky ended the letter to Society with: "If you have further questions or concerns, please contact me at PCI." (Jt. Ex. 2, p. 58) In a footnote created by the double asterisk in Paragraph No. 2, Dr. Pardubsky explained his impairment rating calculations thusly:

> Using Figure 16-34, p. 472, his loss of extension results in 6% upper extremity impairment (UEI) while his loss of flexion results in 4% UEI. Using Figure 16-37, p. 474, his loss of supination results in 2% UEI while loss of pronation results in 2% UEI. These values are added for his total UEI as a result of his elbow injury and loss of motion for a total 14% UEI.

(Jt. Ex. 2, p. 58)

The defendants paid Halstead permanent partial disability (PPD) benefits based on the permanent impairment rating Dr. Pardubsky provided them. Thus, Dr. Pardubsky performed a service for the defendants at their request. They solicited his expert medical opinion on what, if any, permanent disability Halstead sustained as a result of the work injury to his right arm that arose out of and in the course of his employment with CC and then the defendants used that rating to pay Halstead the benefits to which he was entitled, in their estimation, under Iowa law. (Hrg. Tr. pp. 44–45)

After CC discharged Halstead, he filed a claim for unemployment insurance benefits. (Hrg. Tr. p. 18) On the initial claim form, a claimant such as Halstead must indicate what his employment status was before his separation from employment, full-time or part-time. Halstead indicated he had been a full-time employee at CC on the form. (Hrg. Tr. p. 18) CC did not dispute the claim. (Hrg. Tr. p. 18)

Halstead obtained employment in construction and home improvement during the summer of 2019, but had trouble performing the job duties due to his physical limitations. (Def. Ex. B, p. 3; Hrg. Tr. pp. 26–28) In July of 2019, Tradesman International hired Halstead and on or about August 1, 2019, he injured his right arm while on the job. (Def. Ex. B, p. 3; Hrg. Tr. pp. 27–28)

Halstead saw Farid Manshadi, M.D., for an IME. Halstead's attorney, who arranged the IME, sent Dr. Manshadi a letter dated July 31, 2019, with a summary of the case and a series of questions. (Cl. Ex. 1, pp. 1–5) On August 15, 2019, Dr. Manshadi saw Halstead for the IME. (Cl. Ex. 1, p. 7)

Dr. Manshadi documented Halstead's complaints thusly:

> Currently Mr. Halstead reports that he has constant pain and a popping sensation with movement of the right elbow. The pain radiates to the right wrist with tingling and numbness in the 4th and 5th right digits. He has not been able to find a job and when he found one, he was let go because he could not do the work due to heavy lifting. He cannot even hammer anymore. He reports he has done construction most of his life since age 18. He also reports the right hand is shaky all the time. He feels the right

> hand grip is very weak now. He has been learning to use his left hand for hygiene purposes and for lifting as well. Even feeding himself with his right hand is hard. Driving is hard and at times he needs someone else to drive him places. He takes 800 mg of Ibuprofen in the morning and 800 mg at nighttime so he can sleep at nighttime.

(Cl. Ex. 1, p. 9)

Dr. Manshadi performed a physical examination of Halstead as part of the IME. (Cl. Ex. 1, pp. 9–10) In the discussion section of the IME, Dr. Manshadi noted in pertinent part:

> Currently he remains with significantly reduced range of motion of the right elbow, which is his dominant hand. Further, he also has evidence of ulnar neuropathy at the elbow with reduced sensation and weakness of the right hand.
>
> Let it be known that at this point it is unknown when the numbness and weakness of the right hand and the right ulnar neuropathy appeared as Mr. Halstead was involved in an altercation with police officers in Marion. Then he also had a motor vehicle accident as well. I did not find any records by Dr. Pardubsky to indicate that there was any evidence of ulnar neuropathy.

(Cl. Ex. 1, p. 9)

Dr. Manshadi found Halstead at MMI for his right-arm injury on August 15, 2019. (Cl. Ex. 1, p. 9) He then provided the following passage on permanent disability:

> For the sake of the impairment, I used the American Medical Association's Guides to the Evaluation of Permanent Impairment, 5th Edition, specifically Table 16-27, as well as Pages 472 – 474. As such, under Table 16-27 a radial head isolated arthroplasty is eight (8) percent impairment of the right upper extremity. Then using Figure 16-34, Page 472, Mr. Halstead has -60 degrees of extension, which is six (6) percent impairment of the right upper extremity. He also has 78 degrees of elbow flexion, which is ten (10) percent impairment of the right upper extremity. Supination of 20 degrees is three (3) percent impairment of the right upper extremity. Twenty-five degrees of pronation is three (3) percent impairment of the right upper extremity. Then using the Combined Values Chart, Page 604, the total range of motion impairment would be twenty (20) percent. Then combining that with eight (8) percent impairment for radial head arthroplasty, the total would be twenty-six (26) percent impairment of the right upper extremity.

(Cl. Ex. 1, pp. 9-10) Dr. Manshadi also recommended work restrictions consisting of Halstead not lifting more than 5 to 10 pounds with his right arm and "any activity which

requires repetitious flexion and extension or pushing or pulling with the right upper extremity." (Cl. Ex. 1, p. 10)

Dr. Manshadi also addressed Halstead's ulnar neuropathy. He cautioned:

> Please note that it is really unknown when this ulnar neuropathy at the elbow first came on from a timing standpoint as I do not find any records to indicate that he was having issues with numbness and tingling involving his right hand and the altercation he had with the Marion police at least did not cause any damages structurally as reported by the plain x-ray of the right elbow performed by Dr. Pardubsky, and there were no changes in that. However, whether the motor vehicle accident or altercation with the Marion Police Department caused some damage to the ulnar nerve, that needs to be further investigated.

(Cl. Ex. 1, p. 10)

On October 18, 2019, defense counsel wrote a letter to Dr. Pardubsky; a check-box letter. (Jt. Ex. 2, pp. 59–60) With the letter, defense counsel sought Dr. Pardusbky's expert medical opinion regarding whether Halstead could return to substantially similar employment; what symptoms of ulnar neuropathy, if any, Halstead displayed during his care; and whether Halstead's physical limitations due to the injury necessitated a ten-pound lifting restriction. (Jt. Ex. 2, pp. 59–60) Dr. Pardubsky provided his expert opinion to the defendants by completing the check-box letter indicating Halstead could return to substantially similar work, had not exhibited any symptoms of ulnar neuropathy during his care; and did not require a ten-pound lifting restrictions. (Jt. Ex. 2, pp. 59–60) He signed and dated his response October 21, 2019. (Jt. Ex. 2, p. 60)

Dr. Pardubsky's response to defense counsel's check-box letter is the second time he responded to the defendants' solicitation of his services by providing them with his expert medical opinion. This instance entailed helping them develop their defense to Halstead's case. The expert medical opinions Dr. Pardubsky provided the defendants in this case were in service to them.

Halstead's attorney sent a letter to Dr. Manshadi dated December 9, 2019. (Cl. Ex. 1, p. 12) He included with the letter, medical records from Mercy Medical Center dated August 1, 2019. (Cl. Ex. 1, p. 12) He asked Dr. Manshadi to review the records and advise how, if at all, they would change the opinion contained in his IME report. (Cl. Ex. 1, p. 12)

Dr. Manshadi reviewed the medical records and sent Halstead's attorney a letter dated December 10, 2019. (Cl. Ex. 1, p. 13) In the letter, he opined:

> In my IME [report,] I indicated that it was unclear what the etiology was for the right ulnar neuropathy at the elbow. This E.R. report from Mercy Medical Center dated 08/01/19 clearly indicates that on that particular date Mr. Jager Halstead was at work using a shovel to dig a hole and he hit a

> rock with the shovel when he was forcefully pushing the shovel down and felt a pop in his right elbow. The pain shot down to his ulnar fingers. Subsequently he experienced lack of sensation in his right and small finger on the right side. Further, he also indicated to the emergency room physician that he feels a pop with any movement of the elbow.
>
> As such, it appears that the ulnar nerve neuropathy at the elbow which I have already rated in my IME report of 09/09/19 is appropriate. The right ulnar neuropathy is related to a work injury which occurred on 08/01/19.

(Cl. Ex. 1, p. 13)

As Dr. Manshadi noted in his IME report, the medical records from Dr. Pardubsky contained no indication Halstead was displaying symptoms of ulnar neuropathy during his treatment. Dr. Pardubsky informed defense counsel that he observed no such symptoms. Moreover, Dr. Manshadi opined that Halstead's ulnar neuropathy was caused by his August 1, 2019 work injury, which he sustained with a different employer. Consequently, there is an insufficient basis in the evidence from which to conclude that Halstead's ulnar neuropathy is related to the right-arm injury he sustained while working for CC. Rather, it is more likely than not Halstead's ulnar neuropathy was caused by his August 1, 2019 injury.

The August 1, 2019 injury also undermines Dr. Manshadi's permanent impairment rating of Halstead's right arm. Dr. Manshadi found Halstead to have reached MMI on August 15, 2019, after the later injury that has caused ulnar neuropathy. Dr. Manshadi made no mention of the August 1, 2019 injury in his IME report because he apparently did not know about it. Consequently, there is no discussion of how, if at all, the August 1, 2019 injury impacted Dr. Manshadi's permanent disability opinion. For these reasons, Dr. Pardubsky's impairment rating is more credible on the question of what level of permanent disability Halstead sustained due to his June 28, 2018 work injury while working for CC. It is therefore adopted.

The evidence Halstead submitted regarding the allegedly unpaid medical bills consists of an unsigned affidavit. (Cl. Ex. 3) Halstead cites the affidavit for the truth of the matter it asserts, the amounts owed to providers of care for his work injury, so it constitutes hearsay. Under Iowa law, hearsay evidence is admissible in administrative proceedings such as this, with its status as hearsay going to weight.

The evidence establishes Halstead's contention with respect to the outstanding balance due to Physicians' Clinic of Iowa (PCI) is correct because its credibility is bolstered by Defendants' Exhibit H, a billing document from PCI that is dated November 14, 2019. The evidence establishes two unpaid balances that are dated September 17, 2018, that equal $334.00 combined. (Def. Ex. L, p. 44)

The defendants' post-hearing brief describes Defendants' Exhibit H as a "payment log." (Def. Hrg. Brief, § III(1)) Defendants' Exhibit H is hearsay, with little information available as to how it was created, by whom, or when. It is therefore less

credible than the PCI billing statement. The evidence therefore establishes it is more likely than not that the defendants owe PCI up to $334.00 for care relating to Halstead's stipulated work injury.

Halstead alleges the defendants have not paid $245.00 to Radiology Clinic of Iowa (RCI) for care relating to his work injury. (Cl. Ex. 3, p. 36) Defendants' Exhibit L contains a billing statement from RCI, dated October 18, 2019, showing no outstanding balance. (Def. Ex. L, pp. 47–48) The evidence shows it is more likely than not that the defendants have paid for all of the care RCI provided Halstead for his work injury.

Halstead contends the defendants owe Linn County Anesthesiologists (LCA) $2,860.00 for care relating to the work injury. (Cl. Ex. 3) Defendants' Exhibit L, Page 50, is a billing statement from LCA dated February 6, 2020. It shows the defendants have paid the LCA bill in full. (Def. Ex. L, p. 50) Consequently, the evidence establishes LCA has been paid in full for the care it provided relating to Halstead's stipulated work injury.

## CONCLUSIONS OF LAW

In 2017, the legislature amended the Iowa Workers' Compensation Act. See 2017 Iowa Acts ch. 23. These changes to the statute govern in cases in which the claimant sustained a work injury on or after July 1, 2017. Id. at § 24(1); see also Iowa Code § 3.7. Because the date of Halstead's stipulated work injury is June 28, 2018, the 2017 amendments apply in this case.

### 1. Rate

Workers' compensation is based on "the weekly earnings of the injured employee at the time of the injury." Iowa Code § 85.36. Under the statute, "[w]eekly earnings means gross salary, wages, or earnings of an employee to which such employee would have been entitled had the employee worked the customary hours for the full pay period in which the employee was injured . . . ." Id. Section 85.36 sets forth how to calculate an employee's weekly wage under certain circumstances. See id. at §§ 85.36 (1)–(12).

In the current case, the parties dispute whether the defendants correctly calculated Halstead's earnings when determining the weekly rate of workers' compensation for his injury. As discussed above, Halstead failed to prove by a preponderance of the evidence that he was a full-time employee at CC in 2018, working 40 hours each week. Consequently, the defendants' position with respect to his earnings and benefit rate is adopted by this decision.

Halstead was single at the time of the work injury. He was entitled to one exemption. The evidence shows Halstead's average gross earnings were $258.08 per week. Using this average weekly wage, Halstead's weekly rate under Iowa law is $201.69.

**2. Benefits**

Iowa Code section 85.34(1) governs healing period benefits. Section 85.34(2) applies in cases of permanent disability. The parties have stipulated that Halstead sustained a permanent partial disability resulting from the stipulated injury. The parties' dispute regarding PPD and healing period (HP) benefits stems in part from a disagreement regarding Halstead's earnings and benefit rate. They also dispute whether the opinion on permanent disability from Dr. Pardubsky or Dr. Manshadi is correct.

As discussed above, the evidence establishes Halstead did not sustain neuropathy due to the stipulated injury at issue in this case, which makes the question of permanent disability in this case focused on the impairment Halstead sustained to his right arm. Iowa Code section 85.34(2) governs permanent partial disabilities. The statute lists certain body parts as part of a schedule. Iowa Code § 85.34. Disabilities to scheduled members, such as the right arm, are compensated based only on the injured employee's functional loss. See Mortimer v. Fruehauf Corp., 502 N.W.2d 12, 15 (Iowa 1993); see also Sherman v. Pella Corp., 576 N.W.2d 312 (Iowa 1998).

> One of the major functions of our Work[ers'] Compensation Act is to provide prompt payment to a covered employee in the event of injury arising out of and in the course of employment. Such an award is necessitated by the statute upon the occurrence of a specific injury and is to be made in strict accordance with the payment schedule provided therefor. For such injuries the statute does not purport to repose discretionary power in the industrial commissioner.

Blizek v. Eagle Signal Co., 164 N.W.2d 84, 85–86 (Iowa 1969).

In 2017, the legislature amended the Iowa Workers' Compensation Act to limit the factors an agency may use to determine permanent disability to a scheduled member such as Halstead's right arm. Under Iowa Code section 85.34(2)(*x*), "when 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 [Fifth Edition of the AMA Guides]. Lay testimony or agency expertise shall not be utilized in determining loss or percentage of permanent impairment . . . ."

Here, both doctors used the Fifth Edition of the AMA Guides, so the determination of permanent disability is an either-or proposition. Because this decision finds Dr. Pardubsky's impairment rating is more credible than Dr. Manshadi's on the question of permanent disability resulting from the stipulated injury, it is adopted as Halstead's permanent disability. Halstead sustained a 14 percent permanent impairment to his right upper extremity due to the stipulated work injury.

Halstead also contends that he is entitled to more PPD and HP benefits because the defendants' incorrectly computed his earnings and therefore his benefit rate. Because this decision has determined Halstead failed to prove by a preponderance of

the evidence that his earnings were greater than the defendants calculated them to be and therefore also failed to meet his burden on the question of entitlement to a higher rate, he is not entitled to additional PPD or HP benefits under Iowa law. The defendants have correctly paid Halstead's disability benefits for the stipulated work injury.

**3. Medical Expenses**

Iowa Code section 85.27 governs care for compensable work injuries. It requires an employer to "furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance, and hospital services and supplies therefor and shall allow reasonably necessary transportation expenses incurred for such services." Iowa Code § 85.27(1). The employer must hold the claimant harmless for the cost of such reasonable care. Id. § 85.27(4).

Here, the parties do no dispute whether the care at issue was reasonable or related to Halstead's work injury. Rather, they disagree on whether the defendants have paid all of the bills for Halstead's care. As found above, the evidence establishes the defendants must pay PCI up to $334.00 under Iowa Code section 85.27.

**4. IME Reimbursement**

The question is whether the Iowa Supreme Court's opinion in IBP, Inc. v. Harker, 633 N.W.2d 322 (Iowa 2001), controls the outcome in the current case. Harker dealt with the intersection of a Nebraska law, which gave an employee who sustains a work injury the right to choose the employee's treating physicians, and Iowa law, which allows no such right but requires employers to pay for an IME if an injured employee disagrees with the permanent disability opinion of a doctor "retained" by the employer. 633 N.W.2d at 324. The defendants here advocate expanding Harker so that it governs in cases in which an injured employee chose emergency care after being unable to contact the employer under Iowa Code section 85.27(4).

In Harker, the claimant did not sustain an injury that necessitated emergency care. 633 N.W.2d at 324. After the claimant's work injury in Harker, the claimant was able to notify the employer. Id. After the claimant did so, the employer informed him of his right to choose his treating physician under Nebraska law. Id. The claimant considered his options and chose the doctor who had performed the physical on him at the start of his employment. Id. The claimant's chosen doctor then referred him to a specialist who in turn referred him to another specialist. Id. The court observed "'retain' does not necessarily mean 'pay for'; it may also mean 'in one's service.'" Id. at 326. It went on to conclude that the Commissioner's interpretation of "retain" to mean "to pay for" was incorrect under the statute, which was designed with the intent to balance the interests of the employer and injured worker. Id. at 326–27. The court concluded:

> "[W]hen the statute is considered in its entirety, it is apparent that the legislature intended to balance the competing interests of the employee and employer with respect to the *choice* of doctor. We think, therefore, that the legislature meant to allow the employee to obtain a disability

> rating from a physician of his "own choice" when the physician *chosen by* the employer gives a disability evaluation unsatisfactory to the employee. Accordingly, the industrial commissioner and the district court erred in interpreting the language "retained by the employer" to mean "paid by the employer."

Id. at 327 (emphasis in original) (internal footnote omitted). Thus, the court held that the employer paying a treating physician chosen by the employee is not enough to mean the employer "retained" the doctor under section 85.39. In order for a doctor to be "retained" by the employer, insurance carrier, or third-party administrator, the doctor must act in service to the employer, insurance carrier, or third-party administrator when providing a permanent disability rating. See id.

The court then considered whether the employer retained the treating doctors under the undisputed facts of the case. Using the "substantial evidence" standard under the Iowa Administrative Procedure Act, the court concluded that there was not substantial evidence in the record to support the agency's conclusion that the employer had retained the treating physicians under the statute. Id. The court reversed the agency's decision on the question of whether the claimant was entitled to reimbursement for the IME under section 85.39. Id.

The Commissioner has focused on the passivity of the defendant(s) when considering IME reimbursement in the wake of Harker. In the recent Sandun v. Mid American Construction decision, the Commissioner noted that in Harker, "there was essentially no involvement by the employer other than telling [the] claimant he was free to choose his own provider for treatment." File No. 5806495 (App. Jan. 27, 2021) (citing Harker, N.W.2d at 324). The Commissioner also observed that in the Harker arbitration decision, there is no reference to the defendants requesting an impairment rating from a treating physician. Id. (citing File No. 1169917 (Arb. Feb. 10, 2000)). The Commissioner concluded that the sequence of events in Sandun dictated a different outcome under section 85.39 because the defendants requested an impairment rating from the treating physician, were told that the treater did not provide them, and then pursued a referral to a different physician for an impairment rating. Id.

Thus, under Harker and Sandun, the determination of whether an employer has retained a doctor under Iowa Code section 85.39 (and is therefore responsible for reimbursement of the claimant's IME costs if the claimant feels the treating physician's impairment rating is too low) hinges on consideration of the circumstances surrounding how the treating physician:

1) Became a provider of care relating to the work injury; and

2) Came to issue an opinion on permanent disability.

In the current case, the circumstances surrounding the care and the treating physician's impairment rating are distinguishable from those in Harker and dictate a different result under Iowa Code sections 85.27 and 85.39.

In contrast to the circumstances in Harker, Halstead did not sustain the work injury at issue in a state that gives an injured worker the right to choose care. Halstead was injured in Iowa, where employers largely have the right to choose reasonable care. Further, Halstead was not able to discuss care with CC before getting it. Halstead sustained a traumatic injury in Iowa that required emergency care and he went to the ER after not being able to immediately notify CC.

Under Iowa Code section 85.27(1), "The employer, for all injuries compensable under this chapter or chapter 85A, shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance, and hospital services and supplies therefor and shall allow reasonably necessary transportation expenses incurred for such services." And section 85.27(4) states "the employer is obliged to furnish reasonable services and supplies to treat an injured employee, and has the right to choose the care." However, the legislature also codified an emergency care exception to the employer's right to choose care: "In an emergency, the employee may choose the employee's care at the employer's expense, provided the employer or the employer's agent cannot be reached immediately." See also Bell Bros. Heating & Air Conditioning v. Gwinn, 779 N.W.2d 193, 203–04 (Iowa 2010) (discussing Iowa Code section 85.27(4)). This subsection of the Iowa Code also empowers an injured employee to apply for alternate care with the agency if the employee disagrees with the employer's choice of care is unreasonable. See id.

At issue here is the emergency care exception to the employer's right to control care under section 85.27(4). The statute expressly authorizes an injured employee to choose care only if both of the following conditions are met:

- The work injury and need for care constitute an emergency; and
- The employer or the employer's agent cannot be reached immediately.

The statute is thus narrowly tailored to ensure timely emergency care even if the injured worker is unable to contact the employer or the employer's agent.

The employer's right to choose care and the exception allowing an injured employee to choose emergency care must be read together. The narrow drafting of this statute creates a clear harmony between the general rule (employer choice of doctor) and the exception (employee choice of emergency care when the employer cannot be reached). Section 85.27(4) does not expressly or impliedly open the door to the injured worker choosing care after the emergency ceases to exist. An employer does not lose the right to choose care for an employee's work injury just because the injury and need for care constituted an emergency and the employer or the employer's agent could not be immediately reached. Rather, the right to control care reverts back to the employer when the emergency need is no longer present or the employee notifies the employer or the employer's agent of the injury and care. And any disagreement between the parties with respect to care following an emergency may be addressed using the traditional alternate care process before the agency.

Here, Halstead fell off a ladder onto concrete, broke his arm, and went to the ER with the help of his mom because CC or its agent could not immediately be reached. Because of the circumstances of Halstead's injury, he had the right to choose emergency care under section 85.27(4). The Mercy ER provided that emergency care. While at the hospital, Halstead used a phone at the hospital to notify Connerley of his injury and the care he was receiving. The Mercy ER then referred Halstead to Dr. Pardubsky, and he notified Connerley of the referral. The alternate care procedures are not at issue because the employer did not assert its right to control care after the emergency ended and the parties did not disagree about any of the care Halstead received.

While the emergency care provider referred Halstead to Dr. Pardubsky, which makes the chain of care somewhat similar to the referrals at issue in Harker, the referral in the current case was not from one emergency care provider to another emergency care provider. Based on the timeline, there is an insufficient basis from which to conclude Halstead required emergency surgery, either at the ER or at a facility to which he was immediately transferred from the ER. The care at Mercy ER, chosen by Halstead, constitutes emergency care covered by section 85.27(4). However, Dr. Pardubsky's surgery, which occurred about a week after the injury occurred, does not qualify as emergency care under the statute. Consequently, the defendants had the right to choose care in the form of a second opinion from a different specialist, so long as doing so was reasonable. See, e.g., Ramirez-Trujillo v. Quality Egg, L.L.C., 878 N.W.2d 759, 770–75 (Iowa 2016) (discussing the balance between the employer's right to choose care and the employee's right to apply for alternate care). But Connerley, acting as the decision-maker for CC, elected not to take action to pursue this right or notify Society.

The chain of care and the statutory right to choose care are different in the current case than in Harker, where the claimant's chosen doctor referred him to two other specialists who provided opinions on permanent disability. 633 N.W.2d at 324. Every provider in Harker fell under the umbrella of the right the claimant had under Nebraska law to choose the care provider of treatment relating to his work injury. Halstead's choice of doctor in the current case is limited only to emergency care under section 85.27(4). Because Dr. Pardubsky's surgery occurred about a week after the injury and after Halstead conferred with Connerley about his work injury and recommended care, it does not fall under the limited right the statute gives an injured employee to choose emergency care if the employee is unable to communicate with the employer or the employer's agent. The end of the emergency and the discussions with Connerley, the owner/operator of CC, extinguished Halstead's limited right to choose emergency care under section 85.27(4). The legal rights of the parties in the current case are therefore fundamentally different from those in Harker.

Moreover, the Iowa Code requires an injured employee to give notice to the employee's employer. Halstead did this. First, his mother contacted Connerley. Then Halstead did. Halstead satisfied his responsibility under the law by giving CC notice by way of its owner/operator on the day of the injury and of the Mercy ER's referral before

he saw Dr. Pardubsky. It was CC that delayed notifying its insurance carrier because Connerley intended to hide the injury and need for care from CC's insurer in an attempt to save the company money. It would be unjust to punish Halstead for any communication issues between CC and its insurance carrier that led to a delay in the employer notifying the insurance carrier of the work injury and its care. This dynamic further distinguishes the events surrounding care in this case from those in Harker.

The care provided by Dr. Pardubsky is further distinguishable from that in Harker. The claimant chose care in Harker and there is no indication the employer or insurance carrier deployed a representative to be present at the care facility during appointments. In the current case, however, the defendants assigned a nurse case manager to Halstead and that individual communicated with Dr. Pardubsky regarding Halstead's care. (Jt. Ex. 1, pp. 40, 44, 47; Def. Ex. I) Thus, unlike in Harker, the defendants here had an authorized representative actively participating in the care Halstead received from the doctor who ultimately fulfilled their request for an opinion on permanent disability.

Further, even assuming *arguendo* Halstead had a continuing right to choose care under section 85.27(4), the circumstances surrounding the opinions on permanent disability at issue in Harker are distinguishable from those in the current case. The claimant in Harker felt the treating physicians' opinions with respect to his permanent impairment were incorrect, so he obtained an IME for which he ultimately sought reimbursement under Iowa Code section 85.39 in a proceeding before the Iowa Workers' Compensation Commissioner. Id. The Commissioner concluded the employer had to reimburse the claimant for the IME under section 85.39 because the claimant's treating physicians were "retained" by the employer under the statute. Id. The employer sought judicial review under the Iowa Administrative Procedure Act, Iowa Code chapter 17A, and ultimately appealed the case to the Iowa Supreme Court on the question of, under the undisputed facts of the case, "whether the physicians giving the 'low' disability evaluations were 'retained by the employer' within the meaning of the statute." Id. at 326.

The defendants sent a letter on May 20, 2019, to Dr. Pardubsky regarding Halstead's permanent disability relating to the work injury. On July 19, 2019, Dr. Pardubsky responded with an opinion on Halstead's permanent partial disability using the Fifth Edition of the AMA Guides. The defendants then paid Halstead permanent partial disability benefits based on Dr. Pardubsky's rating. Dr. Pardubsky provided the defendants the service of an opinion on Halstead's permanent disability that they used to determine the amount of PPD benefits to pay him for his work injury under Iowa law.

On October 18, 2019, defense counsel sent Dr. Pardubsky a check-box letter soliciting his expert opinion on any symptoms of neuropathy Halstead had exhibited, his ability to return to substantially similar employment, and work restrictions. Dr. Pardubsky filled out the check-box letter, signed it, and dated his response October 21, 2019. Thus, the defendants twice solicited Dr. Pardubsky's services to provide an expert medical opinion in regards to Halstead's work injury. They did more than just pay him.

The defendants' interactions with Dr. Pardubsky make this case factually distinct from Harker. In that case, there is no indication the defendants solicited expert opinions from the treating physicians chosen by the claimant. See Sandun, File No. 5806495 (App. Jan. 27, 2021). The defendants here requested the opinion from Dr. Pardubsky and then followed up with him regarding additional questions within the purview of his expertise that had arisen in the case. The evidence establishes the defendants chose Dr. Pardubsky to provide a permanent impairment rating for this case even though they had the right to choose another doctor and Dr. Pardubsky provided expert opinions in service to the defendants. The evidence therefore establishes the defendants retained Dr. Pardubsky under section 85.39.

For the reasons discussed above, this case is distinguishable from Harker legally and factually. The differences between this case and Harker are enough that Harker does not control. The evidence establishes that Dr. Pardubsky does not constitute Halstead's chosen doctor under Iowa Code section 85.27(4) because the surgery was not emergency care and it occurred after he communicated on multiple occasions with Connerley, the owner/operator of CC, about his work injury and care. Further, the evidence establishes Dr. Pardubsky was retained by (i.e., acted in the service of) the defendants with respect to Halstead's workers' compensation claim when it came to an opinion on permanent disability, symptoms of neuropathy, and functional limitations. Because the defendants retained Dr. Pardubsky for an opinion on the permanent disability caused by Halstead's work injury and Halstead believed the rating to be too low, the defendants must reimburse Halstead one thousand eight hundred and 00/100 dollars ($1,800.00) for of the cost of Dr. Manshadi's IME under Iowa Code section 85.39.

**5. Costs**

"All costs incurred in the hearing before the commissioner shall be taxed in the discretion of the commissioner." Iowa Code § 86.40. "Fee-shifting statutes using 'all costs' language have been construed 'to limit reimbursement for litigation expenses to those allowed as taxable court costs.'" Des Moines Area Reg'l Transit Auth. v. Young, 867 N.W.2d 839, 846 (Iowa 2015) (quoting City of Riverdale v. Diercks, 806 N.W.2d 643, 660 (Iowa 2011)). Statutes and administrative rules providing for recovery of costs are strictly construed. Id. (quoting Hughes v. Burlington N. R.R., 545 N.W.2d 318, 321 (Iowa 1996)).

Under the administrative rules governing contested case proceedings before the Commissioner, hearing costs shall include:

- Attendance of a certified shorthand reporter or presence of mechanical means at hearings and evidential depositions;
- Costs of service of the original notice and subpoenas; and

- Filing fees when appropriate, including convenience fees incurred by using the payment gateway on the Workers' Compensation Electronic System (WCES).

876 IAC 4.33.

In the current case, Halstead has not prevailed on the question of entitlement to PPD and HP benefits or whether the defendants must pay for care by RCI and LCA. However, Halstead has prevailed on the question of entitlement to reimbursement for Dr. Manshadi's IME under Iowa Code section 85.39 and whether the defendants must pay for care by PCI. While the decision is a mixed result for Halstead, he nonetheless prevailed on enough of the disputed issues to merit taxation of costs against the defendants. The following costs are taxed to the defendants under Iowa Code section 86.40 and rule 876 IAC 4.33:

- One hundred and 00/100 dollars ($100.00) for the filing fee;
- Thirteen and 55/100 dollars ($13.55) for service of the petition; and
- Seventy-eight and 75/100 dollars ($78.75) for the deposition reporting fee dated November 28, 2018.

ORDER

IT IS THEREFORE ORDERED:

1) The claimant shall receive no further benefits.

2) The defendants shall pay up to three hundred thirty-four and 00/100 dollars ($334.00) to PCI for care relating to Halstead's stipulated work injury.

3) The defendants shall reimburse Halstead one thousand eight hundred and 00/100 dollars ($1,800.00) for Dr. Manshadi's IME and reports under Iowa Code section 85.39.

4) The defendants shall pay to the claimant the following amounts for the following costs:

    a. One hundred and 00/100 dollars ($100.00) for the filing fee;

    b. Thirteen and 55/100 dollars ($13.55) for service of the petition; and

    c. Seventy-eight and 75/100 dollars ($78.75) for the deposition reporting fee dated November 28, 2018.

5) The defendants shall file subsequent reports of injury as required by rule 876 IAC 3.1(2).

Signed and filed this 13th day of April, 2021.

BENJAMIN G. HUMPHREY
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Gary B. Nelson (via WCES)

Stephen W. Spencer (via WCES)

Tyler Smith (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.