BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

DAN KLENDWORTH, Claimant, vs. QUAKER OATS COMPANY, Employer, INDEMNITY INSURANCE COMPANY OF NORTH AMERICA, Insurance Carrier, Defendants.	File No. 22000591.01 ARBITRATION DECISION Headnotes: 1803

I. STATEMENT OF THE CASE.

Claimant Dan Klendworth seeks workers' compensation benefits from the defendants, employer Quaker Oats Company (Quaker Oats) and insurance carrier Indemnity Insurance Company of North America (Indemnity). The undersigned presided over an arbitration hearing on October 11, 2022. Klendworth participated personally and through attorney Andrew M. Giller. The defendants participated by and through attorney Timothy W. Wegman. The case was fully submitted on November 22, 2022, with the filing of the parties' post-hearing briefs.

II. ISSUES.

Under rule 876 IAC 4.19(3)(*f*), the parties jointly submitted a hearing report defining the claims, defenses, and issues submitted to the presiding deputy commissioner. 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) Did Klendworth sustain an injury to his left shoulder[1] arising out of and in the course of his employment with Quaker Oats on July 9, 2020, or August 1, 2020?

[1] This case included claims of carpal tunnel syndrome and a leg injury. Some of the documentary evidence includes references to these alleged work injuries. However, the parties' focus at hearing and in briefing is the alleged injury to Klendworth's left shoulder. This decision does the same.

2) Did Klendworth give timely notice of the alleged injury?

3) What is the nature and extent of permanent disability, if any, caused by the alleged injury?

4) What is the commencement date for permanent partial disability benefits, if any are awarded?

5) If Klendworth is entitled to permanent partial disability benefits, are the defendants entitled to apportionment?

6) Is Klendworth entitled to alternate care?

7) Is Klendworth entitled to taxation of costs against the defendants?

III. STIPULATIONS.

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

1) An employer-employee relationship existed between Klendworth and Quaker Oats at the time of the alleged injury.

2) At the time of the stipulated injury:

   a) Klendworth's gross earnings were $2,351.24 per week.

   b) Klendworth was married.

   c) Klendworth was entitled to three exemptions.

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

IV. FINDINGS OF FACT.

The evidentiary record in this case consists of the following:

- Joint Exhibits (Jt. Ex.) 1 through 7;
- Claimant's Exhibits (Cl. Ex.) 1 through 5;
- Defendants' Exhibits (Def. Ex.) A through M; and
- Hearing testimony by Klendworth.

After careful consideration of the evidence and the parties' post-hearing briefs, the undersigned enters the following findings of fact.

Klendworth was forty-nine years of age at the time of hearing. (Hrg. Tr. p. 15) He lived about twenty-five miles north of Cedar Rapids, in Walker, Iowa. (Hrg. Tr. p. 16) After high school, Klendworth took classes at Kirkwood Community College but did not obtain a postsecondary degree or credential. (Hrg. Tr. p. 16; Def. Ex. C, p. 3) Klendworth obtained a commercial driver's license in 1991. (Cl. Ex. C, p. 4)

In 2014, Klendworth injured his left shoulder while working for Dayton Freight Lines as a pickup and delivery driver. (Hrg. Tr. p. 17) He was moving a pallet in his trailer when the pallet got caught, causing a pop in his shoulder. (Hrg. Tr. p. 17) The injury caused Klendworth to experience shoulder pain and numbness and tingling in his hand. (Hrg. Tr. p. 17)

Lisa Coester, M.D., an orthopedic surgeon, treated Klendworth for the injury and diagnosed a superior labrum anterior and posterior (SLAP) tear. (Hrg. Tr. p. 18; Cl. Ex. 1, p. 3) Dr. Coester performed arthroscopic surgery on Klendworth's left shoulder, including debridement of the labrum and rotator cuff, SLAP repair, subacromial decompression, and rotator cuff repair. (Cl. Ex. 1, p. 3) The procedure alleviated Klendworth's symptoms, and he returned to work at Dayton Freight without restrictions. (Cl. Ex. 1, p. 3; Hrg. Tr. p. 18)

Klendworth entered into a compromise settlement under Iowa Code section 85.35(3) with Dayton Freight Lines and its insurance carrier regarding the 2014 work injury to his left shoulder. (Def. Ex. I)

Klendworth applied for a job at Quaker Oats and the company hired him in 2015. (Hrg. Tr. p. 19) Klendworth experienced no symptoms in his left shoulder between the time Dr. Coester released him from care for his 2014 injury and beginning work with Quaker Oats. (Hrg. Tr. p. 19) Consequently, he also did not seek care for his left shoulder during this time period. (Hrg. Tr. p. 19) Klendworth passed a pre-employment physical before starting his job with Quaker Oats. (Hrg. Tr. p. 19)

After three years working at Quaker Oats, Klendworth began work in shipping as a palletizer operator. (Hrg. Tr. p. 21) Klendworth was working in this job at the time of the alleged injury from which this case stems. (Hrg. Tr. p. 24) Klendworth was working overtime on a weekend at the time of the injury. (Hrg. Tr. p. 24)

One of Klendworth's duties as a palletizer operator was to resolve product jams on conveyor lines. (Hrg. Tr. p. 22) While Klendworth was working there was a jam on a conveyor line. (Hrg. Tr. p. 24) He had to use a ladder to reach the jam, which was caused by a case of product. (Hrg. Tr. p. 25) Klendworth then had to reach over another conveyor line to get to the case that had caused the jam. (Hrg. Tr. p. 25) He grabbed the case with his left arm, pulled on it and lifted, which caused him to feel pain and burning. (Hrg. Tr. p. 25)

There is a question of the date on which Klendworth sustained the injury. He identified July 9, 2020, as the date of injury in the petition. The defendants identified August 1, 2020, in their first report of injury (FROI), which was filed with the agency.

July 9, 2020, was a Thursday and August 1, 2020, was a Saturday. As Klendworth stated in his hearing testimony, August 1, 2020, aligns more with his recollection of events than July 9, 2020. (Hrg. Tr. pp. 23–24, 28–29) The weight of the evidence establishes the date of the work injury was more likely than not August 1, 2020.

Klendworth called and notified Ben Miller, the supervisor on duty that weekend, and also reported to the health center at the job site. (Hrg. Tr. p. 27) He then finished his shift. (Hrg. Tr. p. 27) The defendants accepted Klendworth's claim for workers' compensation purposes and provided care. (Hrg. Tr. p. 28)

Klendworth underwent magnetic resonance imaging (MRI) that showed a partial tear of the anterior infraspinatus tendon and calcific tendonitis at the supraspinatus tendon insertion. (Jt. Ex. 2, pp. 6–7) Darren Davenport, M.D., interpreted the MRI and compared it to the imaging Klendworth had done on September 17, 2014. (Jt. Ex. 2, pp. 6–7) Dr. Davenport found:

> Screw tracks from bioabsorbable suture anchors are identified in the humeral head at the insertion of the supraspinatus tendon and in the bony glenoid at the attachment of the superior glenoid labrum. There are a few degenerative cysts in the humeral head at the insertion of the rotator cuff. Mild osteophyte formation and joint space loss are seen in the AC joint. The bone marrow signal is otherwise normal.
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> A small articular surface partial tear is identified in the anterior infraspinatus tendon, best seen on series 8 image 17 and series 11 image 12. It measures about 3 mm anterior to posterior and about 5 mm medial to lateral. I would estimate that 90% of the tendon thickness is torn. The remainder of the infraspinatus tendon and the repaired supraspinatus tendon are intact. There is a small area of signal void in the distal supraspinatus tendon just proximal to its insertion. This is well seen on series 10 image 20, series 12 image 15, and series 9 image 20. This is suggestive of calcific tendinitis. The subscapularis and teres minor tendons are unremarkable.
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> The repaired superior glenoid labrum is intact. The anterior and posterior glenoid labrum are unremarkable. The biceps tendon and biceps anchor are intact. Muscle signal is overall normal.

(Jt. Ex. 2, p. 6)

The defendants chose Dr. Coester to treat the injury. (Hrg. Tr. p. 30; Jt. Ex. 3, p. 20) Dr. Coester saw Klendworth on September 14, 2020. (Jt. Ex. 3, p. 20) She reviewed the MRI and diagnosed Klendworth with rotator cuff tendonitis, left impingement syndrome with probable tiny high-grade articular surface partial tear and anterior

infraspinatus tendon. (Jt. Ex. 3, p. 21) Dr. Coester performed a corticosteroid injection into Klendworth's injured shoulder and referred him to physical therapy. (Jt. Ex. 3, p. 22)

At times relevant to this case, Klendworth performed work in addition to that for Quaker Oats. He owns a side business installing floors, with which his sons and father help. (Hrg. Tr. pp. 37–39) The work ebbs and flows based on whether he has secured a job. (Hrg. Tr. p. 37) His sons and father do most of the heavy work with Klendworth performing the re-sanding with a self-propelled sander. (Hrg. Tr. pp. 38–39)

Klendworth also helped his father-in-law farming, which included helping plant, harvest, and haul crops. (Hrg. Tr. p. 43) In the autumn, Klendworth would drive the semi-truck for a couple hours each night he worked, hauling harvested crops such as corn. (Hrg. Tr. p. 47) Klendworth had no set schedule to work at the farm; he helped out when his father-in-law asked. (Hrg. Tr. p. 47)

In November of 2020, Klendworth was in physical therapy. (Hrg. Tr. pp. 42–43) He told the physical therapist he had worked on a flooring job for his personal business and harvesting for his father-in-law's farm. (Hrg. Tr. p. 43)

Klendworth returned to Dr. Coester on December 2, 2020. (Jt. Ex. 3, p. 29) He complained that the effects of the injection had worn off and his symptoms had returned. (Jt. Ex. 3, p. 29) Dr. Coester recommended barbotage treatment with radiology for the left shoulder. (Jt. Ex. 3, p. 30)

The defendants arranged for Robert Broghammer, M.D., to perform a records review of Klendworth's claim. (Def. Ex. A) Dr. Broghammer issued an IME report, dated January 5, 2021, based on the review. (Def. Ex. A) In addition to records relating to Klendworth's care with Dr. Coester, Dr. Broghammer reviewed the records relating to Klendworth's physical therapy from October 23, 2020, October 26, 2020, November 3, 2020, November 6, 2020, November 11, 2020, and November 13, 2020. (Def. Ex. A, pp. 1–3) Dr. Broghammer opined the work injury at Quaker Oats caused Klendworth to strain his left shoulder, aggravating his partial rotator cuff tear and calcific tendinitis in the shoulder. (Def. Ex. A, p. 4)

On February 9, 2021, Jarrod Yates, D.O., performed an ultrasound-guided calcium barbotage of the left supraspinous tendon, which entailed injecting Klendworth with a needle to the level of the calcific deposit and pushing solution into and around the deposit. (Jt. Ex. 2, pp. 8–9) The procedure was successful with Klendworth reporting during a follow-up appointment with Dr. Coester on March 10, 2021, that he hardly had any symptoms in his shoulder at all. (Jt. Ex. 3, p. 32)

In or around September 2021, Klendworth began to experience symptoms again. (Jt. Ex. 3, p. 36) The symptoms eventually led him to seek additional treatment from Dr. Coester on March 18, 2022. (Jt. Ex. 3, p. 36) She opined Klendworth may need surgical intervention, but they elected to try an injection instead. (Jt. Ex. 3, p. 37) On April 18, 2022, Klendworth reported back to Dr. Coester that the injection did not improve his symptoms as much as he would have liked. (Jt. Ex. 3, p. 40)

On June 20, 2022, Klendworth saw Dr. Coester again. (Jt. Ex. 3, p. 42) His shoulder was bothering him enough that he stated he was ready to pursue surgery. (Jt. Ex. 3, p. 42) Dr. Coester and Klendworth discussed what surgery would entail. (Jt. Ex. 3, p. 43)

The defendants arranged for Klendworth to undergo an examination on July 12, 2022, with Peter Matos, M.D., under Iowa Code section 85.27(1). (Def. Ex. B) Dr. Matos opined, "Based on the documentation and my IME, I do not find evidence that Mr. Klendworth left shoulder as it relates to the work injury of July 29, 2020." (Def. Ex. B, p. 5) Dr. Matos did not state the basis for this conclusion in the IME report. (Def. Ex. B) Dr. Matos did not identify what he believes caused Klendworth's left-shoulder symptoms to flare up immediately after the work injury or to be present at the time of examination. (Def. Ex. B) In a letter from defense counsel to claimant's counsel dated August 2, 2022, the defendants informed Klendworth that they were denying causation of his left shoulder injury as it pertained to the surgery proposed by Dr. Coester. (Def. Ex. L)

Claimant's counsel arranged for Klendworth to undergo an independent medical examination with Mark Taylor, M.D., on August 24, 2022, under Iowa Code section 85.39(2). (Cl. Ex. 1) Dr. Taylor examined Klendworth and reviewed medical records relating to alleged injuries including his left shoulder. (Cl. Ex. 1, pp. 12–20) On the question of causation, Dr. Taylor opined:

> Mr. Klendworth previously underwent shoulder surgery in October 2014. He recovered and did well. He stated that he returned to normal activities at home and at work and there were no restrictions or limitations on his activities. The injury occurred when he was awkwardly reaching out and over the line to grab a box or case. Dr. Broghammer performed a record review and opined that the work incident was a prevailing factor as far as the shoulder condition, and even mentioned that if Mr. Klendworth remained symptomatic after the barbotage, then surgery may be necessary.
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> Given the history, and the currently available medical records, it is my opinion that Mr. Klendworth's persistent left shoulder condition is directly and causally related to the July 9, 2020, incident at work. In light of his prior history, it could also be viewed as an aggravation of a pre-existing condition. Regardless, it is my opinion that the work injury represented a substantial factor as far as the symptoms that occurred and that have remained.

(Cl. Ex. 1, p. 23) Dr. Taylor recommended that Klendworth return to Dr. Coester and complete any recommended treatment. (Cl. Ex. 1, p. 23)

Dr. Taylor submitted an invoice to claimant's counsel for the IME. (Cl. Ex. 4, p. 54) The invoice includes two line items relating to Dr. Taylor's in-person examination and two line items relating to the IME report. (Cl. Ex. 4, p. 54) The fifth line is a "rush fee" of $600. (Cl. Ex. 4, p. 54)

The *Guides* outline a standard method to determine permanent impairment. See *Guides*, ch. 2. The *Guides* require a history, id. at 21, which Dr. Taylor performed with the records review and discussion with Klendworth during the in-person evaluation, which is another itemized cost. The *Guides* also mandate an evaluation of the individual, which would also be included under the itemized cost for Taylor's in-person evaluation. Further, the *Guides* direct the physician to issue a written report with all the required information in it, id. at 21–24, which Dr. Taylor has itemized. However, the *Guides* do not address a "rush fee." The rush fee is not a reasonable cost. However, the rest of Dr. Taylor's actions and report in performing an evaluation of permanent impairment are in accordance with the framework in the *Guides* and reasonable under the weight of the evidence.

Claimant's counsel conferenced with Dr. Coester and sent a follow-up check-box letter dated September 13, 2022. (Jt. Ex. 3, p. 46) The letter contains a series of statements claimant's counsel believed to be true based on his conversation with Dr. Coester and space underneath each statement for her to respond. (Jt. Ex. 3, p. 46) Dr. Coester indicated she agreed with multiple statements, signed the letter, and dated her signature September 20, 2022. (Jt. Ex. 3, pp. 46–47)

Dr. Coester affirmed that she performed surgery to repair Klendworth's rotator cuff and SLAP in 2014. (Jt. Ex. 3, p. 46) She affirmed that he did not need any work restrictions after reaching full recovery from the surgery. (Jt. Ex. 3, p. 47) Dr. Coester also affirmed she did not provide Klendworth with medical treatment between the date when she released from him care following the 2014 shoulder surgery and when he returned on September 14, 2020, with complaints relating to the incident at Quaker Oats. (Jt. Ex. 3, p. 47)

Dr. Coester indicated she understood the mechanism of injury to be what is described above in the findings of fact. (Jt. Ex. 3, p. 47) Dr. Klendworth indicated that she had diagnosed Klendworth with tendinopathy of the left rotator cuff and calcific tendinitis of the left shoulder. (Jt. Ex. 3, p. 46) She affirmed that the MRI showed Klendworth may have a partial tear of his infraspinatus. (Jt. Ex. 3, p. 46) Dr. Coester also indicated her agreement with the following:

> Given [Klendworth's] history of a good result after the 2014 surgery, returning to work without restrictions, and then becoming symptomatic after the July 9, 2020 incident, it is more likely than not that the July 9, 2020 incident was a significant contributing factor leading to [his] current left shoulder condition and need for surgery.

(Jt. Ex. 3, p. 47)

The defendants contend that Klendworth's activities during October and November 2020 are the most likely cause of Klendworth's shoulder issues. Dr. Matos reviewed Klendworth's records and examined him. While Dr. Matos concluded Klendworth did not injure or aggravate a preexisting condition when he sustained the injury at the center of this case, he offered no alternative theory of causation. Instead,

Dr. Matos makes the conclusory assertion that Klendworth's work did not cause the rotator cuff tear or calcific tendinitis without detailing the reasoning behind this opinion. The conclusory nature of Dr. Matos's opinion makes it unpersuasive.

However, the MRI pre-dated these activities, and it showed a small tear to the rotator cuff and calcific tendinitis. Dr. Broghammer and Dr. Taylor both opined on causation. Dr. Broghammer did so after a records review and Dr. Taylor after an examination and records review. Both doctors had access to the physical therapy records that document Klendworth stating he worked his normal job and hauling grain in a truck and that he "overdid it" over the weekend before November 11, 2020. Neither physician opined this activity likely caused his initial symptoms, which pre-dated the farming and flooring activities in question, or ongoing symptoms. Further, Klendworth's symptoms became less severe shortly thereafter as documented in later physical therapy records. Both physicians reached the conclusion that the incident at Quaker Oats was the most likely cause of Klendworth's left shoulder injury, symptoms, and need for ongoing care.

Moreover, Dr. Coester is the surgeon who treated Klendworth after both injuries and performed multiple procedures on his left shoulder. No physician who has examined Klendworth has greater familiarity with his injury history and course of treatment. This makes Dr. Coester's opinion particularly valuable in this case. And Dr. Coester opined it is more likely than not the work injury at Quaker Oats was a significant contributing factor leading to Klendworth's symptoms and need for care as of September 20, 2022. This also makes her opinion on causation the most recent in time. For these reasons, the evidence establishes Dr. Coester's opinion is the most credible. It is more likely than not the incident during which Klendworth strained his left shoulder while clearing a line jam at Quaker Oats was a significant contributing factor leading to his left shoulder complaints that need additional care.

V. CONCLUSIONS OF LAW.

In 2017, the Iowa legislature amended the Iowa Workers' Compensation Act. See 2017 Iowa Acts, ch. 23. The 2017 amendments apply to cases in which the date of an alleged injury is on or after July 1, 2017. Id. at § 24(1); see also Iowa Code § 3.7(1). Because the injury at issue in this case occurred after July 1, 2017, the Iowa Workers' Compensation Act, as amended in 2017, applies. Smidt v. JKB Restaurants, LC, File No. 5067766 (App. Dec. 11, 2020).

A. Causation.

An employer covered by the Iowa Workers' Compensation Act must "provide, secure, and pay compensation according to the provisions of this chapter for any and all personal injuries sustained by an employee arising out of and in the course of the employment, and in such cases, the employer shall be relieved from other liability for recovery of damages or other compensation for such personal injury." Iowa Code § 85.3(1). "[W]here an accident occurs to an employee in the usual course of his employment, the employer is liable for all consequences that naturally and proximately

flow from the accident." Oldham v. Scofield & Welch, 266 N.W. 480, 482, opinion modified on denial of reh'g, 222 Iowa 764, 269 N.W. 925 (Iowa 1936). This includes, but is not limited to, a mental health condition caused by a work injury. See Coghlan v. Quinn Wire & Iron Works, 164 N.W.2d 848, 852–53 (Iowa 1969).

"[T]he burden of proof is on the claimant to prove some employment incident or activity was a proximate cause of the health impairment on which he bases his claim." Anderson v. Oscar Mayer & Co., 217 N.W.2d 531, 535 (Iowa 1974). "[A] possibility is insufficient; a probability is necessary." Id. The claimant must prove causation by a preponderance of the evidence. See, e.g., St. Luke's Hosp. v. Gray, 604 N.W.2d 646, 652 (Iowa 2000) (citing Quaker Oats Co. v. Ciha, 552 N.W.2d 143, 150 (Iowa 1996)).

"'Whether an injury has a direct causal connection with the employment or arose independently thereof is essentially within the domain of expert testimony.'" IBP, Inc. v. Harpole, 621 N.W.2d 410, (Iowa 2001) (quoting Dunlavey v. Econ. Fire & Cas. Co., 526 N.W.2d 845, 853 (Iowa 1995)). The agency, "as the fact finder, determines the weight to be given to any expert testimony." Sherman v. Pella Corp., 576 N.W.2d 312, 321 (Iowa 1998). The agency must weigh the evidence in a case and accept or reject an expert opinion based on the entire record. Dunlavey, 526 N.W.2d at 853. The agency may accept or reject an expert opinion in whole or in part. Sherman, 576 N.W.2d at 321.

As found above, three physicians opined Klendworth's shoulder injury at Quaker Oats caused the symptoms that necessitated care. This includes Dr. Broghammer, who did not examine Klendworth and performed only a records review; Dr. Taylor, who performed an IME that included an examination and records review; and Dr. Coester, the surgeon who treated Klendworth for his 2014 shoulder injury and the injury at the center of this case. Dr. Matos is the lone dissenting expert in this case and his contrary opinion is limited to a conclusory assertion without explanation, which makes reaching a finding regarding his reasoning an act of speculation. As found above, the weight of the evidence establishes Klendworth's left shoulder symptoms were caused by the injury he sustained while working at Quaker Oats.

B. Medical Benefits.

Under Iowa Code section 85.27, for all injuries compensable under the Iowa Workers' Compensation Act, the employer "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." Klendworth has proven by a preponderance of the evidence he sustained an injury arising out of and in the course of his employment with Quaker Oats. The defendants are therefore responsible for furnishing reasonable surgical care. Klendworth is therefore entitled to be held harmless for surgery by Dr. Coester, the defendants' chosen doctor, and reasonable follow-up care relating to the surgery.

C. Permanent Disability.

The evidence does not support the determination that Klendworth has sustained a permanent disability to his left shoulder resulting from the work injury at Quaker Oats. Klendworth is entitled to additional care under the Iowa Workers' Compensation Act. The question of the nature and extent of permanent disability, if any, is best left until after he has completed care and reached MMI. Therefore, this decision does not address the questions of permanent disability or apportionment. The question of the nature and extent of permanent disability caused by the work injury is bifurcated for determination after a future hearing.

D. Rate.

The parties stipulated Klendworth's gross earnings on the stipulated injury date were $2,351.24 per week. They also stipulated he was married and entitled to three exemptions. Based on the parties' stipulations, Klendworth's workers' compensation rate is $1,428.67 per week.

E. IME Reimbursement.

In 2017, the legislature amended Iowa Code section 85.39 so that it now consists of two subsections, the second of which states:

> If an evaluation of permanent disability has been made by a physician retained by the employer and the employee believes this evaluation to be too low, the employee shall, upon application to the commissioner and upon delivery of a copy of the application to the employer and its insurance carrier, be reimbursed by the employer the reasonable fee for a subsequent examination by a physician of the employee's own choice, and reasonably necessary transportation expenses incurred for the examination. The physician chosen by the employee has the right to confer with and obtain from the employer-retained physician sufficient history of the injury to make a proper examination. An employer is only liable to reimburse an employee for the cost of an examination conducted pursuant to this subsection if the injury for which the employee is being examined is determined to be compensable under this chapter or chapter 85A or 85B. An employer is not liable for the cost of such an examination if the injury for which the employee is being examined is determined not to be a compensable injury. A determination of the reasonableness of a fee for an examination made pursuant to this subsection, shall be based on the typical fee charged by a medical provider to perform an impairment rating in the local area where the examination is conducted.

Before September 1, 2021, the Commissioner recognized a distinction between a medical opinion on causation and one on the nature and extent of permanent disability when determining whether the cost of an IME may be reimbursed to the claimant under Iowa Code section 85.39. Barnhart v. John Deere Dubuque Works of Deere &

Company, File No. 5065851, p. 2 (App. Mar. 27, 2020) (citing Reh v. Tyson Foods, Inc., File No. 5053428 (App. Mar. 26, 2018)). Under this agency precedent, an injured employee could only obtain reimbursement for an IME in response to an opinion on permanent impairment by an employer-chosen doctor. Id. No reimbursement was available if the employer-chosen doctor opined only on causation. Id.

On September 1, 2021, the Iowa Court of Appeals issued its opinion in Kern v. Fenchel, Doster & Buck, P.L.C., 966 N.W.2d 326 (Iowa App. 2021) (Table). The court reversed an agency decision denying IME reimbursement because the employer-chosen doctor had opined only on causation and had not addressed what, if any, disability the claimant had sustained. See id. at *3–*5. The court concluded that an employer-chosen doctor's opinion finding that a workers' alleged injury or condition did not arise out of and in the course of the workers' employment is "tantamount to a zero percent impairment rating" and therefore reimbursable under section 85.39. Id. at *3; see also Hines v. Tyson Foods, Inc., File No. 20700462.01 (Arb. Jan. 18, 2022) aff'd (App. May 13, 2022).

The Iowa Court of Appeals recently issued another opinion construing Iowa Code section 85.39(2). In MidAmerican Construction LLC v. Sandlin, the court opined that the 2017 amendment that defined "reasonable cost" as the "typical fee charged by a medical provider to perform an impairment rating in the local area where the examination is conducted" means that the statute limits reimbursement to only those expenses relating to the "impairment rating." 2023 WL 2148754 *4 (Feb. 22, 2023) (Table). In a footnote, the court made clear that its construction of section 85.39(2) excludes the medical history and report. Id. at n. 1. The holding by the Court of Appeals in Sandlin appears to conflict with the court's earlier holding in Kern. Nonetheless, the Sandlin panel did not discuss or even reference Kern, let alone give lower courts, the agency, or counsel representing clients in workers' compensation cases under the Iowa Workers' Compensation Act guidance on how to navigate the two decisions. See id.

Further complicating matters is the fact that the Sandlin court did not consider the Iowa Workers' Compensation Act as a whole when construing the subsection now codified at section 85.39(2). In the 2017 amendments, the legislature mandated use of the *Guides* for the determination of functional impairment. As their title would suggest, the *Guides* contain clear instructions for the steps a physician should take when evaluating permanent impairment. *Guides*, chs. 1–2. The evaluation process is inextricably intertwined with the impairment rating because the former is the end result of the latter. See id. The Sandlin opinion does not delve into why codifying a requirement to use only the *Guides* when determining permanent impairment in section 85.34(2)(*v*) is compatible with the court's construction of the section 85.39(2) as not allowing for reimbursement relating to medical history or the report, which the *Guides* expressly direct a physician to include as part of the evaluation of permanent impairment. Compare Sandlin, at *4, with *Guides*, ch. 2.

All of this is to say the Sandlin opinion has created confusion. Its failure to follow stare decisis and consider the statutory scheme as a whole or recent caselaw from the

Court of Appeals in Kern leaves the agency in the position of attempting to reconcile two conflicting Court of Appeals opinions. The undersigned will attempt to do so.

The IME report at issue in Sandlin did not include an opinion on causation. The IME report in Kern did. Therefore, Kern expressly considered the question of whether an IME is reimbursable following an opinion of no causation just like the one issued by Dr. Matos in this case. Because the facts in this case are so similar to those in Kern, the undersigned concludes Kern governs.

Further, this agency follows the principle of stare decisis with respect to Iowa Supreme Court decision. The Iowa Supreme Court has held the entire Iowa Workers' Compensation Act must be considered when construing one of its provisions. The Sandlin court did not consider the entirety of the Iowa Workers' Compensation Act or even the 2017 amendments when interpreting section 85.39(2). Further, the Iowa Supreme Court has held that absurd results are to be avoided when construing the Iowa Workers' Compensation Act. It would be absurd to construe the 2017 amendments to preclude reimbursement for an examination that follows the process set forth in the *Guides* for determining permanent impairment when the same legislation mandates use of only the *Guides* for the determination of permanent impairment.

For these reasons, this decision applies Kern in this case. Klendworth is entitled to reimbursement for the reasonable cost of Dr. Taylor's IME. This includes the medical history, examination, and report, which are included in the directives contained in the *Guides* for evaluating permanent impairment. However, it excludes the "rush fee," which is not found in the *Guides* and is therefore not a reasonable cost under the statute.

VI. ORDER.

Based on the above findings of fact and conclusions of law, it is ordered:

1) The defendants shall furnish reasonable care for Klendworth's left shoulder injury, including but not limited to the surgery recommended by Dr. Coester and reasonable follow-up care related to the procedure.

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

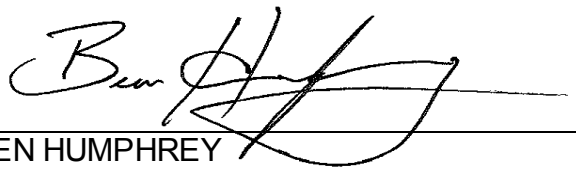
3) The defendants shall pay to Klendworth the following amounts for the following costs:

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

4) The defendants shall pay to Klendworth four thousand two hundred thirty-seven and 50/100 dollars ($4,237.50) for the reasonable cost of Dr. Taylor's IME.

5) The parties shall be responsible for paying their own hearing costs. Each party shall pay an equal share of the cost of the transcript.

Signed and filed this 25th day of April, 2023.



BEN HUMPHREY
Deputy Workers' Compensation Commissioner

The parties have been served, as follows:

Andrew M. Giller (via WCES)

Timothy W. Wegman (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.