BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

RICHIE WILLIAMS,	:	
Claimant,	:	File No. 5067813.02
vs.	:	ARBITRATION DECISION
ARCHER DANIELS MIDLAND,	:	
Employer, Self-Insured, Defendant.	:	Head Notes: 1803.1, 3001, 4000.2

STATEMENT OF THE CASE

The claimant, Richie Williams, filed a petition for arbitration and seeks workers' compensation benefits from Archer Daniels Midland, a self-insured employer. The claimant was represented by Andrew Giller. The defendant was represented by Peter Thill.

The matter came on for hearing on January 4, 2021, before Deputy Workers' Compensation Commissioner Joe Walsh in Des Moines, Iowa via Court Call videoconferencing system. The record in the case consists of Joint Exhibits 1 through 8; Claimant's Exhibits 1 through 8; and Defense Exhibits A through F. The record was held open for a period of time for the claimant to obtain a rebuttal report which was entered into evidence as Claimant's Exhibit 9 on January 18, 2021. The claimant testified at hearing, in addition to Tyler Albert and Nydel Cromwell. Stephanie Cousins was appointed and served as the official reporter for the proceedings. The matter was fully submitted on March 12, 2021 after helpful briefing by the parties.

ISSUES

The parties submitted the following issues for determination:

1. Whether the claimant is entitled to healing period benefits.

2. Whether the claimant is entitled to permanent partial disability benefits, and if so, the application of Iowa Code Section 85.34(7).

3. Whether the claimant is entitled to an IME under Section 85.39.

4. Whether the claimant is entitled to a penalty.

5. Whether Section 85.34(2)(x) is constitutional.

STIPULATIONS

Through the hearing report, the parties stipulated to the following:

1. The parties had an employer-employee relationship.

2. Claimant sustained an injury which arose out of and in the course of employment on November 19, 2018.

3. The parties agree that the stipulated injury is a cause of some temporary and permanent disability.

4. The parties have stipulated that the appropriate commencement date for permanent partial disability is December 20, 2019.

5. The claimant was single and entitled to 1 exemption at the time of injury.

6. Defendants have paid 32 weeks of PPD.

7. Affirmative defenses have been waived other than the defendant has raised the authority of the agency to address Constitutional issues.

FINDINGS OF FACT

Claimant Richie Williams was 39 years old as of the date of hearing. He is single with no children, and he resides in Cedar Rapids. He graduated from high school in 2000 and studied for one semester at Kirkwood Community College. Mr. Williams testified live and under oath at hearing. I find his testimony to be generally credible. There was nothing about his demeanor which caused any concern about his truthfulness. He was a relatively good historian.

Mr. Williams has a manual labor work history which is set forth in Claimant's Exhibit 4. He began working for Hawkeye International in 2002, filling work orders for auto parts. In 2004, he began working for First Fleet Diesel doing general maintenance and tire repair. In 2006, he performed general maintenance work for Freightliner. In 2008, he began working for CRST performing general maintenance work. Since 2008, he has also worked part-time, occasionally for B & J Cleaning Service, performing paint, drywall and repair work. His mother owns the business. After he was laid off from CRST, he worked for periods of time at Target and All American Scaffolding. He began working for Archer Daniels Midland (hereafter ADM) in 2013. He has continued working for ADM through the date of hearing. He works in the wash bay and the repair shop. He spends most of his time in the wash bay.

Mr. Williams testified in detail about the work in the wash bay and the repair shop. (Transcript, pages 36-48) The work can be heavy. His job description is in evidence as well. (Claimant's Exhibit 1, page 2) Mr. Williams earned $23.83 per hour and worked between 43 and 48 hours per week. (Defendant's Exhibit A, p. 1) He also earned a regular quarterly bonus which he alleges amounts to $65.62 per week when

prorated. The parties have submitted competing rate calculations. (Compare Def. Ex. A, with Cl. Ex. 3, p. 5) Claimant also submitted the actual wage records provided by the employer, however, I find these records are difficult to interpret and there is little context provided in the record. (See Cl. Ex. 3, pp. 1-4)

Mr. Williams had shoulder area problems prior to his work injury in this case. In 2017, he experienced some pain in his right shoulder area. In January 2018, he was evaluated by Kyle Switzer, D.O., who documented the following:

> Patient is a 36-year-old presents with a 4-6 month complaint of right shoulder pain. He denies any injury. He rates the pain up to an 8. It is aching, throbbing pain. It is intermittent, sharp stabbing sensations. Pain is constant. He states that the pain comes and goes. He complains of weakness of the shoulder. Is also complaining of some numbness and tingling into his hand. He states that he had an EMG demonstrating carpal tunnel. Pain is worse with lifting, reaching, twisting. It is better with ice and elevation. He has taken naproxen as well as hydrocodone without relief. He has done some home physical therapy was given to him by his primary care physician without relief.

(Joint Exhibit 4, p. 1)

An MRI was performed which demonstrated a SLAP tear and some joint arthritis. The diagnosis was traumatic right shoulder SLAP tear with symptomatic acromioclavicular joint. (Jt. Ex. 4, p. 2) Surgery was performed on March 5, 2018. (Jt. Ex. 6, pp. 3-4) Mr. Williams testified the surgery was successful. (Tr., p. 49) On July 31, 2018, Dr. Switzer returned him to work with no restrictions. (Jt. Ex. 4, pp. 12-14)

On November 19, 2018, Mr. Williams sustained an injury at ADM which arose out of and in the course of his employment. He was working on top of a hopper while connected to a harness. The harness caught and he fell backwards on his right side. He initially felt alright but later in his work shift he noticed right side shoulder area pain. (Tr., pp. 50-51) He reported the incident and wrote a statement of the accident. (Cl. Ex. 1, p. 1)

On the same day, Mr. Williams was evaluated at Work Well Clinic in Cedar Rapids. The clinic documented his injury and his previous history of shoulder problems. He rated his discomfort as a 10 of 10. (Jt. Ex. 2, p. 3) The working diagnosis was right shoulder injury and right upper extremity pain. The clinic recommended he ice the shoulder area and use over-the-counter medications as well as common sense limitations on activity use. (Jt. Ex. 2, pp. 3-4) He followed up in December after an MRI, which showed a number of tears in the shoulder area. (Jt. Ex. 2, p. 6) He was referred back to Dr. Switzer. Mr. Williams testified that ADM told him the appointment with Dr. Switzer was cancelled because he was not an approved physician. (Tr., p. 53) Mr. Williams utilized alternate care procedures to obtain an order in April 2019, authorizing the referral to Dr. Switzer. In any event, he finally saw Dr. Switzer on May 16, 2019.

Dr. Switzer recommended physical therapy and anti-inflammatory medications, in addition to restrictions limiting the use of his right arm. (Jt. Ex. 4, pp. 15-17) Mr. Williams underwent physical therapy and an injection, which helped for a short period of time. In July 2019, Dr. Switzer recommended surgery.

On September 9, 2019, Dr. Switzer performed surgery described as follows: "Right shoulder arthroscopy with extensive debridement including chondroplasty and labrum, biceps tenotomy, removal of suture anchors, bursectomy with lysis of adhesions in the subacromial space and decompression." (Jt. Ex. 7, p. 1)

Mr. Williams testified that from the date of his injury through the date of surgery he was working under medical restrictions on light-duty. He testified that he would call in on days when he was in too much pain. Regarding his work assignments, Mr. Williams testified that his supervisor, Tyler Albert, told him to find work to do within his restrictions.

> Q. Okay, so on a few occasions, Tyler would have something specific for you to do?
>
> A. Yes.
>
> Q. But most of the time, you were expected to find stuff on your own?
>
> A. Yes.
>
> Q. Okay. Did anybody ever put in writing what you were supposed to do while you were under restrictions?
>
> A. No.

(Tr., pp. 57-58)

In essence, Mr. Williams testified that his light-duty work was not structured and he was expected to simply do his regular job but within his restrictions. He testified that a superior on one occasion reprimanded him for "sitting around" when he could not find any work within his restrictions. (Tr., p. 59) In August 2019, claimant's counsel wrote to defense counsel outlining the problem. (Cl. Ex. 5, p. 1) He asked that ADM direct his light-duty work. This was largely ignored. The employer did respond listing some of the light-duty tasks Mr. Williams had been performing. (Cl. Ex. 5, p. 3) At hearing, Mr. Williams testified that he found those job assignments himself. (Tr., p. 58) At hearing, he did acknowledge that his direct supervisor, Tyler Albert, did assign him some specific job tasks during this time, but he mostly found the assignments himself.

Claimant's supervisor, Tyler Albert, also testified at hearing. His testimony is generally credible. He denied ever telling claimant that he needed to find his own work to do while on light-duty. (Tr., p. 99) In his testimony, however, he did not really describe how tasks were assigned to Mr. Williams. For example, he testified to the following:

> Q. And how did you decide what light duty jobs to assign to Mr. Williams?
>
> A. His job was kind of based on what we had in the – what was going on in the area, like running the garden hose over the top of hopper cars, clean them off, or clean up the floor with the garden hose. He had many jobs I gave him. Stenciling, rail reports. He did caulking on the wall. He sat on a little chair with wheels on it, so he didn't really have to use his right arm. Light duty jobs, he checked permits. He would go over all of our permits. He made the labels in the parts room. That took several weeks. Picked up nuts and bolts in the yard. I had him out in the yard with one of those grabber picker-up things, so he didn't have to bend over. He'd pick up nuts and bolts and garbage. Just numerous little jobs that we would assign him.

(Tr., pp. 98-99)

He acknowledged that Mr. Williams called in sick because of his shoulder on the dates listed in Defendant's Exhibit E, pp. 7-8. The employer did not provide any testimony to rebut Mr. Williams' allegation that one of his superiors admonished him and instructed him to find work within his restrictions.

Mr. Williams submitted Claimant's Exhibit 6, page 1, (also Claimant's Exhibit 4, page 3) which is a list of dates between the date of injury and the date of surgery which he claims he called in sick to work because his right shoulder was hurting and his mobility was limited. (Tr., p. 59) In the Hearing Report, claimant alleges this amounts to 52 days of lost pay between November 19, 2018 and September 17, 2019. He testified that he was not paid for the time off work. (Tr., p. 60) To the extent there is a relevant factual dispute here, I find the evidence shows that Mr. Williams was, in fact, offered light-duty work within his restrictions. I believe claimant's testimony that he felt compelled to find work within his restrictions at the plant. It appears that the employer's approach to the light-duty situation was informal. In any event, no physician, including claimant's own expert, recommended he be off work during the period between the date of his injury and the date of his surgery.

Following surgery, Mr. Williams was off work recuperating for a period of time and was paid healing period. He had a relatively normal post-surgery recovery. He underwent a course of beneficial physical therapy. On December 19, 2019, Dr. Switzer released Mr. Williams to return to full-duty work. (Jt. Ex. 4, p. 30) In January 2020, a claims adjustor acting on behalf of ADM requested an impairment rating from Dr. Switzer. (Def. Ex. B, p. 2) In July 2020, Mr. Williams underwent a functional capacity evaluation which found a number of functional deficits. The FCE placed Mr. Williams in the medium work category, however, recommended that he limit weighted overhead work, reduce the amount of tasks he performed with his arms extended and take breaks to allow his right shoulder to recover. (Jt. Ex. 8, p. 3)

In September 2020, claimant's counsel inquired about whether ADM intended to

have the right shoulder rated for impairment. (CL. Ex. 5, p. 4) Claimant's counsel made several further inquiries with defense counsel responding each time. (Cl. Ex. 5, pp. 5-8) With hearing deadlines approaching, defense counsel wrote to Dr. Switzer requesting a rating on December 1, 2020. (Def. Ex. B, p. 3) Claimant's counsel chose to go ahead and have claimant evaluated by Farid Manshadi, M.D. on November 19, 2020. A report was issued on November 30, 2020.

Dr. Manshadi reviewed the medical records and examined Mr. Williams. He took a history. Dr. Manshadi took range of motion measurements and performed other tests. He used the diagnosis of partial articular surface tear of the supraspinatus tendon, tendinosis of the supraspinatus and infraspinatus, a partial interstitial tear and thinning of the intra-articular and proximal vertical long-head of the biceps tendon, and a suspected SLAP tear of the superior labrum. (Cl. Ex. 2, p. 4) He opined that Mr. Williams sustained an 11 percent impairment of the right upper extremity per the AMA Guides to the Evaluation of Permanent Impairment, 5th edition. (Cl. Ex. 2, p. 4) Dr. Manshadi specifically opined that the work injury damaged the structures which are located at the proximal aspect of the torso. In his opinion, this places his disability and impairment into the body as a whole. (Cl. Ex. 2, p. 4)

Dr. Switzer did not provide an impairment rating until December 23, 2020. (Def. Ex. F) After Dr. Switzer provided the rating, permanency was paid. (Tr., p. 71) In his report, Dr. Switzer provided an alternate impairment rating of 8 percent of the right upper extremity. (Def. Ex. F, p. 11) He used a similar method to that used by Dr. Manshadi, however, decreased the measurements slightly to account for Mr. Williams lack of full (180 degree) range of motion in his left shoulder. (Def. Ex. F, p. 10) In any event, his rating was 3 percent lower than Dr. Manshadi's rating. The record was held open and Dr. Manshadi provided a compelling rebuttal report where he opined that his method of rating is superior to Dr. Switzer's. He opined the following:

> I do not believe that comparing the right and left shoulder is appropriate as indicated as Dr. Switzer in his report. The reason being is that it is unknown that if the left shoulder has any pathology or not. Further, as far as I know, prior to this work injury Mr. Williams had a full normal range of motion of the right shoulder. It is my assumption that Mr. Williams had full range of motion within normal limits prior to this work injury.

(Cl. Ex. 9, p. 1)

At the time of hearing, Mr. Williams continued to experience pain and symptoms in his shoulder. His pain increased with activity. He performs a number of his work assignments differently now. He takes over-the-counter medicine when his pain is severe. He testified his range of motion is limited, particularly in overhead activities. He is unable to engage in hobbies such as hunting and fishing and has difficulty performing other hobbies such as automotive work. (Tr., pp. 71-74) Mr. Williams testified that he would be unable to perform much of his past employment for which he is qualified.

CONCLUSIONS OF LAW

There are a number of factual and legal issues submitted for determination. The first question submitted is claimant's average weekly wages prior to his work injury.

Section 85.36 states the basis of compensation is the weekly earnings of the employee at the time of the injury. The section defines weekly earnings as the gross salary, wages, or earnings to which an employee would have been entitled had the employee worked the customary hours for the full pay period in which the employee was injured as the employer regularly required for the work or employment. The various subsections of section 85.36 set forth methods of computing weekly earnings depending upon the type of earnings and employment.

If the employee is paid on a daily or hourly basis or by output, weekly earnings are computed by dividing by 13 the earnings over the 13-week period immediately preceding the injury. Any week that does not fairly reflect the employee's customary earnings is excluded, however. Section 85.36(6).

The burden is on the claimant to prove his gross wages. Both parties have submitted wage calculations. (Compare Def. Ex. A, Cl. Ex. 3, p. 5) Claimant has also submitted the wage records provided by the employer. (Cl. Ex. 3, pp. 1-4) The defendant argues the gross wages were $1,103.55. Claimant argues the wages were $1,131.37. The parties calculated the wages entirely differently, making the application of the facts to the law particularly challenging here. For example, the claimant eliminated the weeks where claimant took vacation as "unrepresentative" and then somehow added a prorated calculation of the vacation pay back into the final rate. The claimant argues that the defendant excluded a regular bonus from his wage calculation. He argues that based upon the decision in Burton v. Hilltop Care Center, 813 N.W.2d 250 (Iowa 2012), it is appropriate to divide the total annual bonus by 52 and add a weekly prorated bonus back into the rate calculation. The claimant also apparently added prorated vacation pay taken (including from the weeks excluded as unrepresentative) back into the calculation in the same manner. The defendant argues that only bonuses which were paid during the 13-week representative period leading up to the injury should be included.

Having reviewed all of the evidence, including testimony related to the issue of gross wages, I find that the defendant has presented the best evidence of claimant's representative earnings prior to the work injury. I agree with claimant that his quarterly bonus should be included. The defendant did this by including the quarterly bonus that claimant actually received during the 13-week period prior to the work injury. I find it is not appropriate to exclude the weeks where claimant took vacation and then add the vacation pay back into the rate calculation. In other words, much of the reason there is such a significant difference between the calculations is because the claimant excluded weeks where he took vacation as unrepresentative but then added the vacation pay back in on a prorated basis over the entire year. The defendant simply included the vacation pay in each individual week, which brought the claimant very close to his average weekly total of hours worked. I therefore find that the claimant was on average

earning $1,103.55 per week prior to his work injury. Utilizing the correct rate book, I conclude that his appropriate rate of compensation is $665.74 per week.

The next issue is whether the claimant is entitled to any healing period benefits.

Section 85.34(1) provides that healing period benefits are payable to an injured worker who has suffered permanent partial disability until (1) the worker has returned to work; (2) the worker is medically capable of returning to substantially similar employment; or (3) the worker has achieved maximum medical recovery. The healing period can be considered the period during which there is a reasonable expectation of improvement of the disabling condition. See Armstrong Tire & Rubber Co. v. Kubli, 312 N.W.2d 60 (Iowa App.1981). Healing period benefits can be interrupted or intermittent. Teel v. McCord, 394 N.W.2d 405 (Iowa 1986). Once an injured worker is off work for an injury, the employer is obligated to pay benefits unless the employer can show the injured worker refused suitable work. When an employee is partially disabled and an employer "offers to the employee suitable work consistent with the employee's disability the employee shall accept the suitable work, …" Iowa Code section 85.33(3) (2019).

In this case, claimant's treatment was delayed after he was referred to Dr. Switzer by the employer's authorized treating physician. He did, however, return to work. During the period of time between the date of injury, November 19, 2018, and his surgery, September 9, 2019, the claimant called in sick on numerous occasions – slightly over 10 weeks total - because of pain and functional disability in his right shoulder. (Tr., p. 59-60; Cl. Ex. 6, p. 1) The claimant argues he was not offered suitable work during this period of time after he had been returned to work; instead, he was in essence told to find job tasks which fit within his restrictions. (Tr., pp. 56-57, 59, 109-110) Claimant argues this essentially gave him the license to call in sick at will and then claim healing period compensation.

I find that the employer's treatment of the claimant's light-duty assignment was informal and probably not a best practice in human resource management. The evidence is fairly clear that the claimant was never specifically offered a definite job which was within his restrictions. There is no written documentation of his return to work at all. Instead, he was returned to his regular job, which included tasks well outside his restrictions and abilities, and told not to perform work which fell outside of his restrictions. Because of the nature of his job, he probably felt compelled to find tasks on his own to stay busy. Through his attorney, in August 2019, claimant did communicate this problem to the employer which was largely ignored or dismissed.

The issue, however, is not whether the employer was utilizing best practices in human resource management. The legal issue presented is whether the employer offered the claimant suitable work during the period of time in question. I find that the employer did offer the claimant such work. It may have been informal and even possibly sloppy, but the employer allowed the claimant to show up for work and did not ask him to perform tasks outside his restrictions. In these circumstances, an injured worker does not have license to just call in when his injured body part is particularly sore and then later claim healing period for those dates. Ordinarily, an injured worker

must provide medical documentation that he was unable to work during the period in question. Allen v. Prairie Meadows Racetrack & Casino, File No. 5044185 (App. April 3, 2015).

The next issue is the nature and extent of claimant's permanent partial disability.

The claimant alleges his injury is industrial and should be compensated under Section 85.34(2)(v). The employer contends the disability is scheduled and must be compensated under Section 85.34(2)(n). The claimant raises factual and legal, including Constitutional, issues. It is stipulated that the date of the claimant's injury is November 18, 2018.

In Deng v. Farmland Foods, File No. 5061883 (Appeal September 29, 2020), the Commissioner held that the 2017 amendments to Chapter 85 were ambiguous as to the definition of the shoulder. He therefore undertook an effort to construe the statute by looking to the intent of the legislature. Id. at 5. He ultimately concluded the following:

> I recognize the well-established standard that workers' compensation statutes are to be liberally construed in favor of the worker, as their primary purposes is to benefit the worker. See Des Moines Area Reg'l Transit Auth. v. Young, 867 N.W.2d 839, 842 (Iowa 2015) (citations omitted); see also Jacobson Transp. Co. v. Harris, 778 N.W.2d 192, 197 (Iowa 2010); Xenia Rural Water Dist. v. Vegors, 786 N.W.2d 250, 257 (Iowa 2010) ("We apply the workers' compensation statute broadly and liberally in keeping with its humanitarian objective...."); Griffin Pipe Prods. Co. v. Guarino, 663 N.W.2d 862, 865 (Iowa 2003) ("[T]he primary purpose of chapter 85 is to benefit the worker and so we interpret this law liberally in favor of the employee."). This liberal construction, however, cannot be performed in a vacuum. As discussed above, several of the principles of statutory construction indicate the legislature did not intend to limit the definition of "shoulder" under section 85.34(2)(n) to the glenohumeral joint. For these reasons, I conclude "shoulder" under section 85.34(2)(n) is not limited to the glenohumeral joint.
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> Claimant's injury in this case was to the infraspinatus muscle. As discussed, the infraspinatus is part of the rotator cuff, and the rotator cuff's main function is to stabilize the ball-and-socket joint. As noted by both Dr. Bansal and Dr. Bolda, the rotator cuff is generally proximal to the joint. However, because the rotator cuff is essential to the function of the glenohumeral joint, it seems arbitrary to exclude it from the definition of "shoulder" under section 85.34(2)(n) simply because it "originates on the scapula, which is proximal to the glenohumeral joint for the most part." (Def. Ex. A, [Depo. Tr., 27]). In other words, being proximal to the joint should not render the muscle automatically distinct.
>
> Given the entwinement of the glenohumeral joint and the muscles that make up the rotator cuff, including the infraspinatus, and the importance of

> the rotator cuff to the function of the joint, I find the muscles that make up the rotator cuff are included within the definition of "shoulder" under section 85.34(2)(n). Thus, I find claimant's injury to her infraspinatus should be compensated as a shoulder under section 85.34(2)(n). The deputy commissioner's determination that claimant's infraspinatus injury is a whole body injury that should be compensated industrially under section 85.34(2)(v) is therefore respectfully reversed.

Deng, at 10-11.

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

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

Chavez, at 6.

I conclude the key holdings of Deng and Chavez are:

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

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

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

4. The well-established history of "liberal construction" of workers' compensation statutes is inapplicable here because to do so would be to ignore the legislature's intent to limit compensation to injured workers in the 2017 amendments.[1] Deng, at 10-11.

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

Applying this interpretation of the facts of this case, I find the claimant suffered an injury to his "shoulder" under Iowa Code section 85.43(2)(n). The claimant has preserved his Constitutional issues by appropriately raising such issues in the Hearing Report and at hearing.[2]

Having concluded that the disability is a scheduled member evaluated under Section 85.34(2)(n), the next issue is to assess the degree of disability to the claimant's right shoulder.

> In all cases of permanent partial disability described in paragraphs "a" through "t", or paragraph "u" 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 guides to the evaluation of permanent impairment, published by the American Medical Association, as adopted by the workers' compensation commissioner by rule pursuant to chapter 17A. Lay testimony or agency expertise shall not be utilized in determining loss or percentage of permanent impairment pursuant to paragraphs "a" through "t", or paragraph "u" when determining functional impairment and not loss of earning capacity.

Iowa Code section 85.34(2)(x) (2019).

Thus, the law, as written, is not concerned with an injured worker's actual functional loss or disability as determined by the evidence, but rather the impairment rating as assigned by the adopted version of The AMA Guides. The only function of the agency is to determine which impairment rating should be utilized.

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[1] The fundamental guiding principle of statutory construction in a workers' compensation case is that the statute is to be interpreted liberally in favor of the injured worker and their family. "*Any* doubt in its construction is thus resolved in favor of the employee." Teel v. McCord, 394 N.W. 2d 405, 407 (Iowa 1986). Workers' compensation laws are to be construed in favor of the injured worker. Myers. v. F.C.A. Services, Inc., 592 N.W.2d 354, 356 (Iowa 1999). The beneficent purpose is not to be defeated by reading something into the statute that is not there. Cedar Rapids Community School v. Cady, 278 N.W.2d 298 (Iowa 1979). This, combined with the legal principle that the legislature is presumed to know the prior construction of the law. State ex rel. Palmer v. Board of Supervisors of Polk County, 365 N.W.2d 35, 37 (Iowa 1985), would lead me to reach the alternative conclusion in this case. This, however, is not what the Commissioner held. As a Deputy Commissioner, I am bound to follow the rulings of the Commissioner as binding precedent.

[2] Cite Constitutional challenge cases.

Having reviewed all of the evidence in the record, I find the expert opinion of Dr. Manshadi to be the most compelling impairment rating in the record. Consequently, I conclude the claimant is entitled to 44 weeks of permanent partial disability compensation commencing on December 20, 2019.

The next issue is penalty.

Claimant also seeks an award of penalty benefits pursuant to Iowa Code section 86.13. Iowa Code section 86.13(4) provides:

> a. If a denial, a delay in payment, or a termination of benefits occurs without reasonable or probable cause or excuse known to the employer or insurance carrier at the time of the denial, delay in payment, or termination of benefits, the workers' compensation commissioner shall award benefits in addition to those benefits payable under this chapter, or chapter 85, 85A, or 85B, up to fifty percent of the amount of benefits that were denied, delayed, or terminated without reasonable or probable cause or excuse.
>
> b. The workers' compensation commissioner shall award benefits under this subsection if the commissioner finds both of the following facts:
>
> (1) The employee has demonstrated a denial, delay in payment, or termination in benefits.
>
> (2) The employer has failed to prove a reasonable or probable cause or excuse for the denial, delay in payment, or termination of benefits.
>
> c. In order to be considered a reasonable or probable cause or excuse under paragraph "b," an excuse shall satisfy all of the following criteria:
>
> (1) The excuse was preceded by a reasonable investigation and evaluation by the employer or insurance carrier into whether benefits were owed to the employee.
>
> (2) The results of the reasonable investigation and evaluation were the actual basis upon which the employer or insurance carrier contemporaneously relied to deny, delay payment of, or terminate benefits.
>
> (3) The employer or insurance carrier contemporaneously conveyed the basis for the

> denial, delay in payment, or termination of benefits to the employee at the time of the denial, delay, or termination of benefits.

In this case, the parties have stipulated that permanency was to commence on December 20, 2019. (See Hearing Report, Paragraph 5) Dr. Switzer released Mr. Williams from his care without restrictions on December 19, 2019. (Jt. Ex. 4, p. 30) This is the last time Mr. Williams was seen for treatment purposes for his right shoulder. I find that this visit was an evaluation of his permanent disability. "He would be okay to return to work without restrictions regarding right shoulder tomorrow." (Jt. Ex. 4, p. 30) The employer should have asked for a specific impairment rating at this time and in fact, did so through a third party, approximately a month later in January 2020. (Def. Ex. B, p. 2) For reasons which are not in evidence, no rating was obtained. The employer argues forcefully that it interpreted Dr. Switzer's December 19, 2019, evaluation as an opinion that claimant had sustained no disability or impairment from his work injury. (Def. Brief, p. 17) Dr. Switzer did opine that claimant's range of motion was excellent" and he had "full strength" in his rotator cuff. (Jt. Ex. 4, p. 30)

I would find this argument compelling because I do believe that claimant's visit to Dr. Switzer did amount to an evaluation of his permanent disability. The problem for the defendant is that the following month, the employer specifically requested an impairment rating. Furthermore, the employer never contemporaneously informed claimant that they assessed his disability to be zero or otherwise documented the same, at least in any records which are in evidence. Then in September, claimant's counsel began requesting a specific rating of impairment. Defense counsel did not inform claimant that they assessed his disability to be zero, but rather responded on November 6, 2020, with the following: "My adjuster called me today to let me know she spoke to PCI and Dr. Switzer is working on the impairment rating and we hope to have it by this time next week." (Cl. Ex. 5, p. 6) Defendant then paid Physician's Clinic of Iowa for the report and Dr. Switzer prepared a report indicating there was an impairment rating a few days later. (Def. Ex. D, pp. 5-6; Def. Ex. F) Shortly thereafter, defendant paid the 8 percent rating (32 weeks) in a lump-sum.

The question is whether the employer had a reasonable basis for failing to commence permanent partial disability payments from December 2019 through December 2020, and then conveyed this contemporaneously to the claimant. I find they did not. I find the greater weight of evidence supports a finding that the defendant simply failed to secure a report which contained a specific impairment rating which would provide them with a basis for paying the benefits. It appears in the record this occurred because the employer did not timely pay for the impairment rating report. The total amount of the permanent partial disability which was owed to the claimant by December 2020 exceeded $20,000.00. I find that a penalty of $10,000.00 is assessed to the defendant to deter it from engaging in such claims handling practices in the future.

The next issue is whether claimant is entitled to an independent medical evaluation under Section 85.39 and other expenses.

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

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

Defendant did not brief the IME expense and at hearing only stated that the defendant disputed the reasonableness of the charge. I find Dr. Manshadi's IME expenses of $1,400.00 to be fair and reasonable. (Cl. Ex. 7) Defendant is responsible for the IME expense, as well as the other reasonable costs in the amount of $366.95 set forth in Claimant's Exhibit 7.

ORDER

THEREFORE IT IS ORDERED

All weekly benefits shall be paid at the rate of six hundred sixty-five and 74/100 dollars ($665.74).

Defendant shall pay the claimant forty-four (44) weeks of permanent partial disability benefits commencing December 20, 2019.

Defendant shall pay a penalty in the amount of ten thousand and 00/100 dollars ($10,000.00) for the late payment of permanent partial disability benefits.

Defendant shall pay accrued weekly benefits in a lump sum.

Defendant shall pay interest on unpaid weekly benefits awarded herein as set forth in Iowa Code section 85.30.

Defendant shall be given credit for the thirty-two (32) weeks previously paid.

Defendant shall file subsequent reports of injury as required by this agency pursuant to rule 876 IAC 3.1(2).

IME expenses and other costs are taxed to defendant in the amount of one thousand seven hundred sixty-six and 95/100 dollars ($1766.95).

Signed and filed this ___3rd___ day of November, 2021.

JOSEPH L. WALSH
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Andrew Giller (via WCES)

Paul Powers (via WCES)

Peter Thill (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.