BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

BRETT F. COX, Claimant, vs. BRIDGESTONE AMERICAS, INC., Employer, and OLD REPUBLIC INSURANCE COMPANY, Insurance Carrier, Defendants.	File No. 19003499.01 ARBITRATION DECISION Head Note Nos.: 1803, 1803.1

STATEMENT OF THE CASE

The claimant, Brett Cox, filed a petition for arbitration seeking workers' compensation benefits from Bridgestone Americas, Inc. ("Bridgestone"), and its insurer Old Republic Insurance Company. Richard Schmidt appeared on behalf of the claimant. Timothy Wegman appeared on behalf of the defendants.

The matter came on for hearing on October 21, 2020, before Deputy Workers' Compensation Commissioner Andrew M. Phillips. An order issued on March 13, 2020, and updated June 1, 2020, and August 14, 2020, by the Iowa Workers' Compensation Commissioner, In the Matter of Coronavirus/COVID-19 Impact on Hearings (Available online at: https://www.iowaworkcomp.gov/order-coronavirus-covid-19 (last viewed August 14, 2020)) amended the hearing assignment order in each case before the Commissioner scheduled for an in-person regular proceeding hearing between March 18, 2020, and November 20, 2020. The amendment makes it so that such hearings will be held by Internet-based video, using CourtCall. The parties appeared electronically, and the hearing proceeded without significant difficulties. Originally, briefing was due on December 7, 2020; however, the claimant filed a motion to extend the deadline to December 14, 2020. The undersigned granted the motion. The matter was fully submitted on December 14, 2020, after briefing by the parties.

The record in this case consists of Joint Exhibits 1-10. Neither the claimant, nor defendants submitted any additional exhibits. Testimony under oath was also taken

from the claimant, Brett Cox. Amy Rose was appointed the official reporter and custodian of the notes of the proceeding.

STIPULATIONS

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

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

2. The claimant sustained an injury arising out of, and in the course of, employment, on May 22, 2018.

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

4. The alleged injury is a cause of permanent disability.

5. The commencement date for permanent partial disability benefits, if any are awarded, is March 23, 2020.

6. The claimant's gross earnings were $955.16 per week. The claimant was single, and entitled to one exemption. The resulting weekly rate of compensation is $569.06.

7. Prior to the hearing, the claimant was paid 40 weeks of permanent partial disability compensation at $569.06 per week.

8. The costs requested by the claimant have been paid.

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

The parties are now bound by their stipulations.

ISSUES

The parties submitted the following issues for determination:

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

2. Whether the disability is a scheduled member disability to the shoulder pursuant to Iowa Code section 85.34(2)(n) or an industrial disability.

3. Whether Iowa Code section 85.34(2)(v) applies to disability benefits.

4. If the claimant's injuries are found to be an industrial disability and/or whole body injury, whether the defendants are entitled to apportionment with a prior workers' compensation claim.

5. Whether the claimant is entitled to payment of medical expenses. At hearing, the parties clarified that the claimant is seeking payment for out-of-pocket expenses, such as deductibles and copays.

6. Whether the claimant is entitled to reimbursement for an independent medical examination ("IME") pursuant to Iowa Code section 85.39.

7. Whether the claimant is entitled to an assessment of costs.

FINDINGS OF FACT

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

Brett Cox, the claimant, was 50 years old at the time of the hearing. (Testimony). He graduated from Saydel High School in 1988. (Testimony). Mr. Cox then attended one and a half years of college. (Testimony). He is single, and was single at the time of the work incident. (Testimony). He has no dependent children. (Testimony).

Prior to Mr. Cox's employment at Bridgestone, he served time in prison for a felony conviction from 1992 to 1993. (Testimony). After his release from prison, he worked for Archer TV & Appliance doing sales and delivery. (Testimony). He then worked for Rex TV & Appliance as a store manager. (Testimony). He then worked as a subcontractor for Regency Homes doing construction cleanup. (Testimony).

Mr. Cox is employed at Bridgestone. (Testimony). He has worked there since 2004. (Testimony). He currently works as a rubber trucker. (Testimony). As a rubber trucker, he operates a forklift to haul 3,000 pound skids of folded rubber around the tire factory to keep machines loaded. (Testimony). At times he exits the forklift in order to adjust rubber if it falls down. (Testimony). He currently makes $22.45 per hour. (Testimony). He works about the same amount of hours as he did at the time of the injury. (Testimony).

In May of 2018, at the time of his work injury, Mr. Cox worked in a position titled "relief." (Testimony). He worked in this position for 12 to 13 years. (Testimony). As a relief person, he travelled the production line and allowed fellow employees to take a break three to five times per day. (Testimony). He earned $21.83 per hour at the time of his injury. (Testimony). Positions on the production line included: operating, mill tending, booking, painting, and tray trucking. (Testimony). In the operating position, the employee loads preformed steel into a machine, and allows rubber to come through the preformed steel. (Testimony). The rubber is then measured for width and weight. (Testimony). The rubber proceeds down the line to the mill tending position. (Testimony). The mill tender loads the rubber into a mill, transfers the rubber from a mill

to a conveyer to another mill and down the line. (Testimony). The rubber proceeds to booking. (Testimony). Bookers lead the rubber through a knife, and swing it into trays. (Testimony). They also measure the length, width, and weight of the rubber and swing the pieces into a tray. (Testimony). The tray trucker then moves those trays to storage for a tire builder to retrieve. (Testimony). A painter paints the ends of rubber pieces so that they can be stuck together during the tire building process. (Testimony). Mr. Cox testified that the relief position is much more physically demanding than the rubber trucker position. (Testimony).

Mr. Cox moved to the rubber trucker position at the recommendation of Dr. Troll. (Testimony). Mr. Cox testified that, in order to change jobs to an open position, a Bridgestone employee must sign up to show interest in the position. (Testimony). The position is awarded based upon seniority. (Testimony). In this case, Mr. Cox told his supervisor of his issues, and was told of the rubber trucker opening. (Testimony). He applied for, and received, the position. (Testimony).

Mr. Cox opined that if he remained in the relief position, he would now earn $25.30 per hour. (Testimony). However, he felt that he could no longer do the relief job because he could not tend a mill and could not be an operator. (Testimony). These positions involve lifting that he believes he could not perform anymore. (Testimony).

Mr. Cox had a previous work injury to his right side. (Testimony). He had a surgery to his right shoulder, and no longer has difficulties to his right shoulder. (Testimony). He entered into a settlement for his right shoulder for 15 percent industrial disability, which equates to 75 weeks of permanency benefits. (Testimony).

Some medical records related to Mr. Cox's previous work injury were included in the joint exhibits included in the record. Mark Fish, D.O., F.A.O.A.O. issued a letter dated January 13, 2015, to the claimant's attorney. (Joint Exhibit 1:1). Dr. Fish noted that he last saw Mr. Cox on November 17, 2014. (JE 1:1). Dr. Fish assessed Mr. Cox with a 13 percent impairment rating to his right shoulder. (JE 1:1).

On May 18, 2018, Mr. Cox worked on a mill known as "Tuber 7," which operated differently than other mills. (Testimony). As he pulled a strip of rubber off of the mill and onto a conveyer, he felt pain in his left shoulder and top chest area. (Testimony). He reported to medical immediately and informed Dr. Troll of his issue. (Testimony). Dr. Troll recommended that he "ice it down." (Testimony).

Mr. Cox reported to Bridgestone's in-house healthcare providers on May 22, 2018. (JE 2:3). Dr. Troll examined the claimant. (JE 2:3). Mr. Cox initially thought that the pain was in his clavicle region, but he found it was now more superior to that in the trapezius region. (JE 2:3). Mr. Cox reported to Dr. Troll that he moved to a new machine requiring different movements, at which time his pain increased. (JE 2:3). Dr. Troll diagnosed Mr. Cox with left shoulder impingement syndrome. (JE 2:3). Dr. Troll recommended that Mr. Cox work at his own pace and come to the medical department to ice his shoulder two times per shift. (JE 2:3).

On May 24, 2018, Mr. Cox reported to Dr. Troll with continued left shoulder complaints. (JE 2:2-3). Dr. Troll found impingement signs in Mr. Cox's left shoulder and noted that Mr. Cox returned for a re-evaluation. (JE 2:3). Mr. Cox indicated that the pain occurred in the anterior aspect of his left shoulder. (JE 2:3). Dr. Troll noted that Mr. Cox should continue to work at his own pace and use ice and topical agents for the pain. (JE 2:3). Dr. Troll told Mr. Cox to return for care as needed. (JE 2:3).

On June 26, 2018, Mr. Cox reported to Pete Goshorn, R.N. at Bridgestone requesting ice to his left shoulder. (JE 2:2). Nurse Goshorn recommended that Mr. Cox visit Dr. Troll in the morning. (JE 2:2).

Mr. Cox again reported to Dr. Troll on June 27, 2018, with left shoulder pain. (JE 2:2). Dr. Troll noted that he previously diagnosed Mr. Cox with impingement syndrome in May, but noted that a re-examination indicated that Mr. Cox's symptoms were suggestive of biceps tendonitis with mild impingement. (JE 2:2). Mr. Cox indicated that his current job required different shoulder positions and reaching. (JE 2:2). Mr. Cox told Dr. Troll that ice relieved his pain. (JE 2:2). Mr. Cox rejected steroid injections, as they interfered with his diabetes. (JE 2:2). Dr. Troll's impression was: "[p]ersistent left shoulder pain with some impingement signs and possible rotator cuff tendonitis." (JE 2:2). Dr. Troll recommended that Mr. Cox continue working at his own pace, and suggested that Mr. Cox pursue a different job within the plant to prevent further shoulder symptoms. (JE 2:2).

On March 7, 2019, Dr. Troll examined Mr. Cox for shoulder pain that began in April of 2018. (JE 2:1-2). Dr. Troll noted that Mr. Cox ultimately switched to a forklift job, but continued to have pain and a decreased range of motion in his left shoulder. (JE 2:2). Mr. Cox indicated that his shoulder pain caused difficulty sleeping. (JE 2:2). Dr. Troll found decreased range of motion in Mr. Cox's left shoulder. (JE 2:2). Dr. Troll diagnosed Mr. Cox with persistent left shoulder pain, and noted that Mr. Cox had positive impingement signs. (JE 2:2). Dr. Troll recommended obtaining an MRI. (JE 2:2).

Based upon Dr. Troll's order, Mr. Cox reported to Mercy Medical Imaging for a left shoulder MRI on March 25, 2019. (JE 3:1). Kraig Kirkpatrick, M.D. interpreted the MRI. (JE 3:1). Dr. Kirkpatrick's impressions included:

1. Moderate tendinosis involving the superior aspect of the subscapularis and the anterior aspect of the supraspinatus tendon. There is no full-thickness rotator cuff tear or atrophy of the cuff musculature.

2. Moderate tendinosis along the intra-articular course of the biceps tendon.

3. Degenerative fraying of the superior labrum.

(JE 3:1).

On April 3, 2019, Mike Dreibelbeis, A.T.C., P.T., noted that Mr. Cox arrived with "long-term complaints of limited left shoulder range of motion and pain." (JE 2:1). Mr. Dreibelbeis found reduced range of motion in the left shoulder. (JE 2:1). Mr. Dreibelbeis informed Mr. Cox that he should avoid overdoing activity, and provided an exercise program. (JE 2:1). Dr. Troll reviewed MRI results with Mr. Cox, which showed moderate tendinosis involving the subscapularis tendon, supraspinatus tendon, and the biceps tendon. (JE 2:1). Dr. Troll recommended that Mr. Cox undertake an exercise program provided by a physical therapist. (JE 2:1). Neither provider gave Mr. Cox any work restrictions. (JE 2:1).

Mr. Cox followed up with Mr. Dreibelbeis June 19, 2019. (JE 2:4). Mr. Cox reported falling asleep in a recliner chair, and upon awakening, experienced shoulder soreness. (JE 2:4). Mr. Dreibelbeis suspected that the soreness was due to an irritation of his biceps and supraspinatus area. (JE 2:4). Mr. Dreibelbeis worked with Mr. Cox on shoulder mobility exercises. (JE 2:4).

Mr. Cox visited Dr. Troll at Bridgestone again on July 8, 2019. (JE 2:4). Mr. Cox worked with physical therapy to restore range of motion. (JE 2:4). Dr. Troll noted that the previous MRI showed degenerative changes including tendinosis and fraying at the labrum. (JE 2:4). Dr. Troll concluded, "I think he is likely as good as he is going to get given the status of his degenerative shoulder." (JE 2:4). Dr. Troll returned Mr. Cox to regular duty with no restrictions. (JE 2:4). Mr. Dreibelbeis also worked with Mr. Cox on physical therapy. (JE 2:4). Mr. Cox reported that his exercises were not progressing and that he felt as though he was not improving. (JE 2:4). Mr. Dreibelbeis found that Mr. Cox's range of motion was good and his strength was adequate. (JE 2:4).

Brandon Madson, M.D., of CIA DSM Parks Area FM, examined Mr. Cox on October 14, 2019, for Mr. Cox's complaints of left shoulder pain. (JE 4:1). Mr. Cox told Dr. Madson that he had an MRI showing "frayed tendons and tendonosis." (JE 4:1). Dr. Madson noted Mr. Cox's previous physical therapy visits. (JE 4:1). Mr. Cox told Dr. Madson that he was informed that nothing further could be done for him. (JE 4:1). Mr. Cox requested a referral to Dr. Crites at Capitol Orthopedics. (JE 4:1). Dr. Madson provided the referral, as requested. (JE 4:1).

On October 28, 2019, Mr. Cox returned to Dr. Fish's office with complaints of left anterior and posterior shoulder pain, along with pain in his left biceps. (JE 1:3-4). Mr. Cox indicated that his pain began in May or June of 2018, and occurred without incident. (JE 1:3). He told Dr. Fish that he performed a lot of overhead and rowing type activities at work. (JE 1:3). He also complained of pain into his neck. (JE 1:3). Dr. Fish reviewed the MRI of Mr. Cox's left shoulder. (JE 1:3). The MRI showed type II acromion, mild to moderate AC arthrosis, and partial articular-sided tearing of the anterior supraspinatus. (JE 1:4). The MRI also showed partial tearing of the subscapularis superiorly, "consistent with a rotator cuff interval type tear." (JE 1:4). Dr. Fish noted that Mr. Cox attended physical therapy for adhesive capsulitis. (JE 1:4). Mr. Cox complained of difficulty sleeping and pain while driving. (JE 1:4). Dr. Fish opined that Mr. Cox's rotator cuff symptomatology caused his pain. (JE 1:4). Dr. Fish opined that conservative care would no longer provide complete relief, and Mr. Cox would

benefit from a shoulder arthroscopy with rotator cuff repair. (JE 1:4). The surgery could also include other procedures to Mr. Cox's shoulder. (JE 1:4). Mr. Cox wanted to discuss the surgery with his fiancée. (JE 1:4).

On November 26, 2019, Mr. Cox reported to the Surgery Center of Des Moines. (JE 5:1-3). Dr. Fish performed a left shoulder arthroscopy, biceps tenotomy, debridement of the labrum, subacromial bursectomy, subacromial decompression, distal claviculectomy, and arthroscopic supraspinatus tear. (JE 5:1). Dr. Fish's postoperative diagnoses were: "[b]iceps tedinosis with impingement, AC arthrosis with full-thickness anterolateral supraspinatus tear with rotator interval tear." (JE 5:1).

Mr. Cox returned to Dr. Fish's office on December 12, 2019, for his first postoperative visit. (JE 1:6-7). He did well post-surgery, and wore a sling. (JE 1:7). X-rays taken during the visit showed evidence of subacromial decompression and a distal clavicle excision. (JE 1:7). Dr. Fish initiated physical therapy and requested that Mr. Cox return in four weeks. (JE 1:7).

On January 9, 2020, Mr. Cox returned to Dr. Fish's office for continued post-surgical monitoring. (JE 1:13-14). Mr. Cox remained in his sling, and worked with physical therapy. (JE 1:14). Mr. Cox complained of cramping and muscle knots, but improved slowly. (JE 1:14). Dr. Fish allowed Mr. Cox to discontinue use of the sling, and continue with physical therapy. (JE 1:14). Dr. Fish requested that Mr. Cox return in six weeks. (JE 1:14).

Dr. Fish responded to a letter from Mr. Wegman with a letter dated February 12, 2020. (JE 1:16-17). Dr. Fish noted that Mr. Cox never related a specific incident that caused his injury or pain, but that he related that he performed repetitive activities at Bridgestone. (JE 1:16). Dr. Fish opined that Mr. Cox should reach maximum medical improvement ("MMI") between three and six months after the November 26, 2019, surgery. (JE 1:16). Dr. Fish confirmed that he treated Mr. Cox for a condition limited to the shoulder and shoulder girdle complex. (JE 1:17). The injury did not include the neck or any other part of the body. (JE 1:17).

On February 20, 2020, Dr. Fish examined Mr. Cox for an additional post-surgical follow up. (JE 1:18-20). Mr. Cox reported continued physical therapy, and that the recovery with his left shoulder resulted in more pain than his right. (JE 1:19). Mr. Cox expressed displeasure with his healing progress. (JE 1:19). Dr. Fish found supraspinatus tendinosis, and noted that Mr. Cox's diabetes could contribute to his stiffness and delayed healing. (JE 1:19).

Mr. Cox followed up with Dr. Fish on March 23, 2020. (JE 1:21-23). Dr. Fish reviewed Mr. Cox's history and noted that Mr. Cox continued to work with physical therapy. (JE 1:22). Mr. Cox denied any pain in the shoulder, and indicated that he returned to all of his activities of daily living with no difficulties. (JE 1:22). Dr. Fish allowed him to return to work. (JE 1:22).

On May 15, 2020, Dr. Fish wrote a letter to Mr. Wegman indicating that he "essentially" placed Mr. Cox at MMI on March 23, 2020, and returned him to full duty. (JE 1:24). Dr. Fish provided an impairment rating, and indicated that based upon a range of motion analysis, Mr. Cox experienced a one percent impairment for his flexion, zero percent impairment for his abduction and four percent impairment for his internal rotation. (JE 1:24). Dr. Fish found some reductions in strength, as well. (JE 1:24). Considering all of the aspects of an impairment rating, Dr. Fish provided Mr. Cox with an eight percent impairment rating to his left upper extremity. (JE 1:24). He equated this to a five percent whole person impairment rating. (JE 1:24).

Mr. Cox returned to Dr. Fish's office on June 4, 2020, complaining of continued pain in the anterior aspect of his left shoulder. (JE 1:25-28). According to Dr. Fish, Mr. Cox pointed "specifically to the insertion of the proximal bicep tendon." (JE 1:26). Dr. Fish injected Celestone with assistance from ultrasound into Mr. Cox's left shoulder. (JE 1:27). Dr. Fish opined that Mr. Cox had symptomatology of adhesive capsulitis and scapulothoracic dysfunction. (JE 1:28). Dr. Fish told Mr. Cox that adhesive capsulitis is more common in diabetics. (JE 1:28). Dr. Fish prescribed meloxicam and requested that Mr. Cox return in four to five weeks. (JE 1:28).

Charles A. Wenzel, D.O., J.D., M.P.H., C.I.M.E., performed an IME on Mr. Cox on June 18, 2020. (JE 6:1-14). Dr. Wenzel noted that he refers to different portions of the shoulder area as the shoulder area or as their specific anatomic structures. (JE 6:1). Dr. Wenzel reviewed Mr. Cox's job functions and his medical history. (JE 6:1-5). Mr. Cox told Dr. Wenzel that the injection performed on June 4, 2020, did not provide any relief. (JE 6:5). Mr. Cox complained of pain 3/10 that did not increase with his work activities. (JE 6:5). When he reached overhead, his pain increased to 8-9/10. (JE 6:5). Mr. Cox reported working full time with no restrictions. (JE 6:5). Mr. Cox also told Dr. Wenzel that he could no longer ride his motorcycle. (JE 6:7). Dr. Wenzel examined Mr. Cox and found deficits in range of motion for his left glenohumeral joint. (JE 6:7-8). Dr. Wenzel diagnosed Mr. Cox as follows:

1. Left impingement syndrome
2. Left supraspinatus tear
3. Left labral tear
4. Left biceps tendon tear
5. Status post left shoulder arthroscopy, biceps tenotomy, labral debridement, subacromial bursectomy, subacromial decompression (acromioplasty and coracoacromial release), distal clavicle excision, and supraspinatus repair on 11/26/2019

(JE 6:8). Dr. Wenzel opined that Mr. Cox was injured on May 22, 2018, when he lifted or moved rubber pre-forms while working. (JE 6:8). He related the left impingement syndrome and left "supraspinatus/labral/biceps tendon tears" to Mr. Cox's work with

Bridgestone. (JE 6:8). Testing during the IME revealed "possible ongoing labral and biceps pathology." (JE 6:8). Based upon this, Dr. Wenzel recommended a second orthopedic opinion regarding Mr. Cox's ongoing left shoulder pain and functional deficits. (JE 6:8). Based upon the second opinion, Dr. Wenzel found that Mr. Cox had not reached MMI. (JE 6:8).

Dr. Wenzel provided a detailed left shoulder impairment rating analysis. (JE 6:13). Dr. Wenzel's analysis was as follows:

- 6 percent upper extremity impairment for flexion of 90 degrees
- 2 percent upper extremity impairment for extension of 20 degrees
- 3 percent upper extremity impairment for abduction of 110 degrees
- 1 percent upper extremity impairment for adduction of 20 degrees
- 2 percent upper extremity impairments for external rotation of 15 degrees
- 2 percent upper extremity impairments for internal rotation of 50 degrees

(JE 6:13). Dr. Wenzel combined these for a 16 percent upper extremity impairment rating for abnormal motion. (JE 6:13). Dr. Wenzel placed a 10 percent upper extremity impairment rating for Mr. Cox's distal clavicle resection, which was multiplied with a modifier to provide a 3 percent right upper extremity impairment rating. (JE 6:13). Dr. Wenzel combined the 16 percent impairment rating and 3 percent impairment rating for a 19 percent upper extremity impairment rating, pursuant to the combined values chart of the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition. (JE 6:13). Dr. Wenzel converted this to an 11 percent whole person impairment rating. (JE 6:13).

Dr. Wenzel provided Mr. Cox with temporary restrictions since his opinion was that Mr. Cox had not reached MMI. (JE 6:13). The restrictions included lifting 10 pounds occasionally over Mr. Cox's shoulder or away from his body, and occasional work at or above the shoulder height. (JE 6:13).

At the time of the hearing, Mr. Cox testified that pain occurred in the top of his chest, from his collarbone to his neck and surrounding the shoulder capsule on a daily basis. (Testimony). He did not report any difficulty working as a rubber trucker. (Testimony).

CONCLUSIONS OF LAW

Permanent Disability

Under the Iowa Workers' Compensation Act, permanent partial disability is compensated either for a loss of use of a scheduled member under Iowa Code 85.34(2)(a)-(u) or for loss of earning capacity under Iowa Code 85.34(2)(v). The extent of scheduled member disability benefits to which an injured worker is entitled is

determined by using the functional method. Functional disability is "limited to the loss of the physiological capacity of the body or body part." Mortimer v. Fruehauf Corp., 502 N.W.2d 12, 15 (Iowa 1993); Sherman v. Pella Corp., 576 N.W.2d 312 (Iowa 1998).

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

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

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

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

> scapula, which is proximal to the glenohumeral joint for the most part." (Def. Ex. A, [Depo. Tr., 27]). In other words, being proximal to the joint should not render the muscle automatically distinct.
>
> Given the entwinement of the glenohumeral joint and the muscles that make up the rotator cuff, including the infraspinatus, and the importance of the rotator cuff to the function of the joint, I find the muscles that make up the rotator cuff are included within the definition of "shoulder" under section 85.34(2)(n). Thus, I find claimant's injury to her infraspinatus should be compensated as a shoulder under section 85.34(2)(n). The deputy commissioner's determination that claimant's infraspinatus injury is a whole body injury that should be compensated industrially under section 85.34(2)(v) is therefore respectfully reversed.

Deng at 10-11.

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

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

Chavez at 6. In Chavez, the claimant suffered injuries to her supraspinatus, infraspinatus, and subscapularis muscles. Id. at 3. She also suffered a tear to the biceps tendon and labrum, as discovered during an arthroscopic surgery. Id. She had a surgical repair of her rotator cuff, along with "extensive debridement of the labrum, biceps tendon, and subacromial space with biceps tenotomy, subacromial decompression." Id.

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

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

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

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

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

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

In the instant case, Dr. Fish's post-operative diagnoses included: biceps tenodesis with impingement, AC arthrosis with full-thickness anterolateral supraspinatus tear with rotator interval tear. (JE 5:1). Dr. Wenzel, the claimant's IME doctor, diagnosed Mr. Cox with left impingement syndrome, left supraspinatus tear, left labral tear, left biceps tendon tear, and status post-operatively. (JE 6:8). Dr. Fish conducted a left shoulder arthroscopic surgery on Mr. Cox. (JE 5:1). Within the bounds of the arthroscopic procedure, Dr. Fish performed the following: biceps tenotomy, debridement of the labrum, subacromial bursectomy, subacromial decompression, distal claviculectomy, and an infraspinatus repair. (JE 5:1; 6:8).

Dr. Fish noted that he treated Mr. Cox for an injury to his shoulder and shoulder girdle complex. (JE 1:17). He noted that the injury did not include the neck or any other part of Mr. Cox's body. (JE 1:17). Dr. Wenzel attempts to explain his way around the shoulder and shoulder girdle, but his explanations do not comport with the rulings in Deng and Chavez.

In this case, as in Deng and Chavez, the claimant suffered injuries to the infraspinatus, supraspinatus, biceps tendon, and labrum. Also like in Deng and Chavez, the claimant underwent a subacromial decompression and biceps tenotomy. The biggest difference in this case is that the claimant also had a distal claviculectomy and a subacromial bursectomy. Dr. Wenzel notes that the subacromial bursa lies under the acromion on top of the supraspinatus muscle. He notes that the subacromial bursa, "acts as a cushion to reduce friction on the underlying supraspinatus muscle as it moves the glenohumeral joint." (JE 6:10-11). Dr. Wenzel further notes that the distal end of the clavicle forms the acromioclavicular joint overlying the glenohumeral joint. (JE 6:9). Based upon the anatomic descriptions and images in Dr. Wenzel's report, I find that the acromioclavicular joint and the distal claviculectomy performed by Dr. Fish and thus the resulting disability are "closely entwined with the glenohumeral joint both in location and function." See e.g. Chavez at 5. Finally, Dr. Fish notes that he treated Mr. Cox for his shoulder and shoulder girdle complex. (JE 1:17). Clearly, Dr. Fish considered the treatment provided to be to the shoulder and/or areas closely connected to the shoulder, such as the shoulder girdle.

Considering the foregoing, the claimant's injury should be compensated pursuant to Iowa Code section 85.34(2)(n) as disability to a shoulder. Thus, this is a scheduled disability case, and Iowa Code section 85.34(2)(v) does not apply. Accordingly, there is no need to assess the defendants' arguments regarding apportionment, as this is a separate and distinct injury from claimant's prior right shoulder injury.

Since this case involves disability to a scheduled member under Iowa Code 85.34(2)(n), the extent of impairment is "limited to the loss of the physiological capacity of the body or body part." Mortimer v. Fruehauf Corp., 502 N.W.2d 12, 15 (Iowa 1993); Sherman v. Pella Corp., 576 N.W.2d 312 (Iowa 1998). The two impairment ratings provided in this case pertain to the upper extremity. In Deng, the Commissioner applied the upper extremity impairment rating to the shoulder injury at issue because the rating physician in that case utilized the upper extremity rating in order to provide an impairment rating. Deng at 11-12. Additionally, the Commissioner noted in Deng, that the agency has historically not utilized a whole person impairment rating for a single scheduled member injury. Id. Dr. Fish provided an 8 percent impairment rating to the upper extremity. Dr. Wenzel provided a 19 percent impairment rating to the upper extremity.

Having considered the evidence in the record, I find that the claimant suffered an 8 percent functional impairment to his left shoulder, as assigned by Dr. Fish. I find Dr. Fish's opinion more credible and consistent with other evidence in the record. Dr. Fish treated the claimant for not only this injury, but also for an injury to Mr. Cox's right shoulder. He also performed surgery on the claimant. He examined the claimant prior to the surgery, and after the claimant returned to work. While Dr. Wenzel provided a thorough report, the claimant's history with Dr. Fish, and the expertise of Dr. Fish as an orthopedic surgeon was more credible than that of Dr. Wenzel in this matter. The claimant is entitled to 8 percent of 400 weeks, or 32 weeks of compensation commencing on March 23, 2020.

Reimbursement of Medical Expenses

The hearing report indicated that the claimant's outstanding medical expenses are located in Joint Exhibit 7. In reviewing the evidence, it appears that additional medical expenses are contained in Joint Exhibit 8.

The employer shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance, and hospital services and supplies for all conditions compensable under the workers' compensation law. The employer shall also allow reasonable and necessary transportation expenses incurred for those services. The employer has the right to choose the provider of care, except where the employer has denied liability for the injury. Iowa Code 85.27. Holbert v. Townsend Engineering Co., Thirty-second Biennial Report of the Industrial Commissioner 78 (Review-Reopening, October 1975).

Pursuant to Iowa Code 85.27, claimant is entitled to payment of reasonable medical expenses incurred for treatment of a work injury. Claimant is entitled to an

order of reimbursement if he/she has paid those expenses. Otherwise, claimant is entitled only to an order directing the responsible defendants to make such payments directly to the provider. See Krohn v. State, 420 N.W.2d 463 (Iowa 1988).

In cases where the employer's medical plan covers the medical expenses, claimant is entitled to an order of reimbursement only if he has paid treatment costs; otherwise, the defendants are ordered to make payments directly to the provider. See Krohn, 420 N.W.2d at 463. Where medical payments are made from a plan to which the employer did not contribute, the claimant is entitled to a direct payment. Midwest Ambulance Service v. Ruud, 754 N.W.2d 860, 867-68 (Iowa 2008) ("We therefore hold that the commissioner did not err in ordering direct payment to the claimant for past medical expenses paid through insurance coverage obtained by the claimant independent of any employer contribution."). See also Carl A. Nelson & Co. v. Sloan, 873 N.W.2d 552 (Iowa App. 2015) (Table) 2015 WL 7574232 15-0323.

The employee has the burden of proof to show medical charges are reasonable and necessary, and must produce evidence to that effect. Poindexter v. Grant's Carpet Service, I Iowa Industrial Commissioner Decisions, No. 1, at 195 (1984); McClellon v. Iowa Southern Utilities, File No. 8904090 (App. Dec. January 31, 1992).

The employee has the burden of proof in showing that treatment is related to the injury. Auxier v. Woodard State Hospital School, 266 N.W.2d 139 (Iowa 1978), Watson v. Hanes Border Company, No. 1 Industrial Comm'r report 356, 358 (1980) (claimant failed to prove medical charges were related to the injury where medical records contained nothing related to that injury) See also Bass v Vieth Construction Corp., File No 5044438 (App. May 27, 2016) (Claimant failed to prove causal connection between injury and claimed medical expenses); Becirevic v Trinity Health Corporation, File No. 5063498 (Arb. December 28, 2018) (Claimant failed to recover on unsupported medical bills).

In this case, the claimant seeks reimbursement for medical expenses as listed in Joint Exhibits 7 and 8. Mr. Cox's employer-provided health insurance paid for his medical care. The parties stipulated that the claimant's injury arose out of and in the course of employment on May 22, 2018. The parties also stipulated that the alleged injury caused temporary disability during a period of recovery and that the alleged injury caused permanent disability. No evidence was presented that the billing was unreasonable. In this case, the treatment for which the billing was incurred is treatment for the left shoulder. The left shoulder injury was caused by the claimant's work at Bridgestone. The claimant requests reimbursement for out–of-pocket expenses for copayments or deductibles.

The defendants are ordered to reimburse the claimant for the following bills and amounts:

Capital Orthopaedics & Sports Medicine (JE 7:3; 8:8; 8:9) - $145.00

ILH Outpatient "Therapy" (JE 8:3, 5) - $550.00

UnityPoint Physical Therapy (JE 8:4, 6) - $241.40

Surgery Center of West Des Moines (JE 8:10-11) - $674.94

The total reimbursement is thus one thousand six hundred eleven and 34/100 dollars ($1,611.34).

Reimbursement for an IME pursuant to Iowa Code section 85.39

Iowa Code section 85.39(2) states, in pertinent part:

> If an evaluation of permanent disability has been made by a physician retained by the employer and the employee believes this evaluation to be too low, the employee shall, upon application to the commissioner and upon delivery of a copy of the application to the employer and its insurance carrier, be reimbursed by the employer the reasonable fee for a subsequent examination by a physician of the employee's own choice, and reasonably necessary transportation expenses incurred for the examination.

Iowa Code 85.39(2).

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

Iowa Code section 85.39 was amended in 2017 to state:

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

Iowa Code section 85.39(2).

The claimant requests reimbursement for the IME of Dr. Wenzel. Joint Exhibit 8:2 includes the invoice for Dr. Wenzel's IME and report, which totals $3,310.50. Dr. Fish provided an impairment rating on May 15, 2020. Dr. Wenzel examined the

claimant and provided an impairment rating on June 18, 2020. While Dr. Fish was not retained by the defendants explicitly for a rating, Dr. Fish still provided a rating and was the treating physician. Dr. Wenzel's examination and rating occurred after Dr. Fish's examination and rating. Therefore, the claimant is entitled to reimbursement for the $3,310.50 IME costs of Dr. Wenzel.

Costs

Claimant seeks the award of costs as outlined in Joint Exhibit 8:1. Costs are to be assessed at the discretion of the deputy commissioner hearing the case. See 876 Iowa Administrative Code 4.33; Iowa Code 86.40. 876 Iowa Administrative Code 4.33(6) provides:

> [c]osts taxed by the workers' compensation commissioner or a deputy commissioner shall be (1) attendance of a certified shorthand reporter or presence of mechanical means at hearings and evidential depositions, (2) transcription costs when appropriate, (3) costs of service of the original notice and subpoenas, (4) witness fees and expenses as provided by Iowa Code sections 622.69 and 622.72, (5) the costs of doctors' and practitioners' deposition testimony, provided that said costs do not exceed the amounts provided by Iowa Code sections 622.69 and 622.72, (6) the reasonable costs of obtaining no more than two doctors' or practitioners' reports, (7) filing fees when appropriate, including convenience fees incurred by using the WCES payment gateway, and (8) costs of persons reviewing health service disputes.

The administrative rule expressly allows for taxation of costs for the filing fee of $100.00. In my discretion, I decline to award costs in this matter.

ORDER

THEREFORE, IT IS ORDERED:

The defendants are to pay unto claimant thirty-two (32) weeks of permanent partial disability benefits at the rate of five hundred sixty-nine and 06/100 dollars ($569.06) per week from the commencement date of March 23, 2020.

The defendants shall reimburse the claimant one thousand six hundred eleven and 34/100 dollars ($1,611.34) for payments made by the claimant pertaining to copayments and deductibles regarding medical treatment.

The defendants shall reimburse the claimant three thousand three hundred ten and 50/100 dollars ($3,310.50) for Dr. Wenzel's IME pursuant to Iowa Code section 85.39.

The parties shall bear their own costs.

That defendants shall be given credit for benefits previously paid, as stipulated.

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

Signed and filed this 9th day of March, 2021.

ANDREW M. PHILLIPS
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Richard R. Schmidt (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.