IN THE IOWA DISTRICT COURT IN AND FOR POLK COUNTY

SNAP-ON LOGISTICS COMPANY, a/k/a, SNAP-ON TOOLS MANUFACTURING COMPANY, **Petitioner/Cross Respondent** **vs.** **DAVIN RICHARD NORSTRUD** **Respondent/ Cross Petitioner**	**Case No. CVCV060791** **RULING ON PETITION FOR JUDICIAL REVIEW**

A. Statement of the Case.

This is a proceeding for judicial review of the final action of the Iowa Worker's Compensation Commissioner, filed August 25, 2020. Petitioner, Snap-On Tools Corporation ("Snap-On"), appeals from the Commissioner's decision that Claimant, David Richard Norstrud ("Claimant" or "Norstrud"), was not barred by the statute of limitations under Iowa Code section 85.26. Additionally, Snap-On appeals from the Commissioner's finding that Norstrud's left shoulder injury was caused by his work duties and it claims that the Commissioner erred in concluding that Norstrud sustained an industrial disability. Snap-On filed its petition on October 2, 2020. Norstrud replied and cross-petitioned on February 1, 2021. In its cross-petition, Norstrud alleges that the Commissioner erred when he found that he was not entitled to reimbursement by Snap-On for its own independent medical evaluation and for failing to tax as costs its medical report fee.

The parties convened for a virtual hearing on February 26, 2021. After hearing the arguments of counsel and reviewing the court file, including the briefs filed by both parties and the Certified Administrative Record, the Court now enters the following ruling.

Statement of Facts.

Norstrud is married and lives with his wife Jolene in Britt, Iowa. Ex. 2, p. 31; Ex. K, pp. 9-7. He began dating Jolene in July 2015 and they married in October 2017, after the work injury at issue. Tr., p. 10; Ex. K, pp. 7-8. Norstrud is right hand dominant. He was born on January 26, 1961, making him 60 years of age as of 2021. JE, p. 1. Norstrud attended school up to the tenth grade. Ex. 2, p. 32. After leaving high school, he worked in home construction, framing houses, pouring concrete, meat packing and for a plumbing company. Ex. 2, p. 33; Ex. K, pp. 10-11.

Norstrud began working for Snap-On at the Algona plant on September 10, 1979. Ex. 2, pp. 1, Tr., pp. 20-22. He has not worked for any other employer since 1979. Ex. K, p. 11. On December 1984, Norstrud earned a General Educational Development ("G.E.D") certificate. Ex. 2, p. 32. He also enrolled in two basic computer classes. Ex. 2, p. 32. Norstrud attained this education while working at Snap-On; he has not received any additional education.

Norstrud primarily worked in the paint department. Tr., p. 22. He worked as a painter helper from 1979 through 1986. Ex. 2, p. 2; Tr., p. 22. At that time, parts went through a liquid immersion process on a paint line. Tr., p. 23. This process required Norstrud to hang and take off drawers from the toolboxes from the line. Tr., p. 23. Norstrud performed overhead work while hanging and removing parts from the hooks on the line. Tr., pp. 23-24.

Norstrud primarily worked as a painter helper, but during his time at Snap-On, he also was employed as a spot welder, fork truck operator, drawer cell operator, weld operator, utility operator

and assembler from 1994 to 2008. Ex. 2, pp. 21- 26. In 2009, Norstrud returned to work as a painter helper up until the time of the claim. Ex. 2, p. 24.

During his employment with Snap-On, Norstrud complained of work-related left shoulder pain on several occasions. He reported a work injury on his left shoulder while hanging drawers on paint hooks on March 9, 1988; he was diagnosed with mild left shoulder overuse syndrome. Ex. 2, pp. 10, 35. Norstrud stated that he received a "cumulative trauma injury to the left shoulder form the repetitious hanging of drawers on paint hooks." Ex. 2, p. 35. He would later testify at the agency hearing that he felt completely better after receiving treatment for that injury. Tr., p. 26.

Norstrud testified that his shoulders would hurt while he worked on the line hanging and removing parts, but the pain would subside when he was not at work. Tr., p. 27. On March 9, 1991, Snap-On documented Norstrud complained that he experienced left shoulder pain while taking drawers off the line. Ex. 2, p. 9. Norstrud was working on press brakes that time. Tr., p. 29. On May 28, 1991, Snap-On documented that Norstrud reported left shoulder pain from latching a basket onto a cart. Ex. 2, p. 20. He again complained of left shoulder pain on June 2, 1991. *Id.* Norstrud testified that after he left the press brakes department, he worked as a fork truck operator through January 1999. Tr., p. 29. He stated that he was not doing any overhead work and did not have any problems with his left shoulder during that time. Tr., pp 29-30. Norstrud later switched from immersion paint to powder coat paint. Tr., p. 31. He would rotate with other employees between an upstairs or downstairs assignment. Tr., p. 32. While downstairs, Norstrud did not hang or remove parts from the paint line. When he worked upstairs, he would engage in the hanging motions.

Norstrud claimed he sustained a strain injury on June 16, 2003. Ex. 2, p. 36. On June 23, 2003, Norstrud completed an injury form stating that he was injured while "helping painters move collector." Ex. 2, p. 27.

On June 23, 2003, Norstrud reported to Stephen Richards, D.O. claiming he suffered an injury on June 16, 2003. JE 1, pp. 1-2. Dr. Richards diagnosed him with a painful shoulder/ shoulder strain, and released him to return to work on one-hand duty. JE 1, p. 1. Norstrud also attended physical therapy. During therapy, he reported that on the day of the injury he felt a sharp pulling and burning sensation in his left shoulder. JE 1, p.2. Dr. Richards released Norstrud to return to work with one hand duty only on July 3, 2003. JE 1, p.3. In an answer to his interrogatories, Norstrud stated that on June 16, 2003, he sustained a pop in his sternum, followed by pain in the left side of his chest, left upper extremity, and middle of his back while pulling trim. Ex. 2, p. 37. He did not receive any treatment for that incident. Ex. 2, p. 37.

On April 3, 2012, Norstrud reported a work injury alleging he injured his "back, muscle upper back between back bone and shoulder blade," while "pulling 690 lb. sludge cart out under sludge north press over uneven grading." Ex. H, p. 43. He indicated he would seek medical attention if his condition did not improve. *Id.* Claimant testified he was working on the lower paint downstairs at that time, and he was not having any problems with his left shoulder. Tr., pp. 33-35.

Claimant received treatment on October 1 and 22 and November 12, 2014, from the employer's physical therapist for bilateral shoulder pain, which was worse on the left than the right. Tr., pp. 37-38; JE 1, p. 4. The therapist documented that his pain was not constant and would come and go. JE 1, p. 4. During an appointment on November 12, 2014, the therapist documented Claimant reported his "shoulder pops & grinds. States he can't raise [his left] arm 90 [degrees]" without increasing pain. JE 1, p. 4. Norstrud testified that he worked as a painter's helper at the

time and his condition improved after November 25, 2014. Tr., pp. 37-39. Norstrud continued to work full-duty for Snap-On after November 2014.

On December 19, 2014, Norstrud reported to Snap-On that he suffered a work injury on his left shoulder from "many years of repetitious overhead work" at Snap-On. Ex. H, p. 44. Kathy Reddel, the safety manager for Snap-On, communicated with Dawn Heetland, a physical therapist at Mercy Health, about Claimant's condition. Ms. Heetland noted that conservative treatment for Claimant's left shoulder was appropriate. Ex. 2, p. 28.

Norstrud testified that he worked as a painter's helper downstairs from 2014 to 2016. Tr., p. 39. Norstrud's wife testified she started dating her husband in July 2015. Tr., p. 10. Mrs. Norstrud reported that when she first started dating Mr. Norstrud, he did not complain of any left shoulder pain. Tr., pp. 10-11. The Commissioner accepted Mrs. Norstrud's testimony. He found that Mrs. Norstrud's testimony was not contradicted and was consistent with the medical evidence.

Mrs. Norstrud testified that in 2016, Claimant complained about back pain and she recommended that he go see her doctor. Tr., p. 11. Claimant Norstrud attended an appointment with Dennis Colby, D.O., with complaints of neck pain and tenderness in the cervical thoracic regions. JE 1, pp. 17-18. During this appointment, the Norstruds mentioned to Dr. Colby that claimant had a bump on both shoulders in between claimant's neck and on the top of his shoulder, the bump on the left shoulder being the more pronounced of the two. Tr., p. 12. Dr. Colby ordered an x-ray of Norstrud's left shoulder. Dr. Colby impressions included a "Cervical spine degenerative change without evidence of acute injury", "[l]eft carotid bulb calcification. He further mentioned, "Left shoulder joint degenerative change without evidence of acute injury." JE 1, p. 20.

Mrs. Norstrud testified that Claimant showed her how to do squats with a long bar. Tr., p. 16. Norstrud worked out and lifted weights a couple of times per week. Tr., p. 17. However, the Commissioner found that there is no convincing medical evidence to attribute Norstrud's left shoulder injury to weight lifting.

The Norstruds went on a trip to California in June 2016. Tr., p. 14. Mrs. Norstrud testified that Claimant complained more about his shoulder pain and she encouraged him to return to Dr. Colby. Tr., p. 14. She further testified that Norstrud stopped lifting weights after the California trip and has not lifted since then. Tr., pp. 17-18. Norstrud testified that he stopped lifting weights after the California trip due to his shoulder pain. Tr., pp. 59-60.

Norstrud testified that after the California trip, Snap-On had him rotate between downstairs and upstairs shifts as a painter's helper. Tr., p. 40. He stated that whenever he worked upstairs, which included the hanging and removing motions, he started having problems. Tr., pp. 40-41. Norstrud reported that his left shoulder pain was constant, but would improve during his downstairs shifts. Tr., p. 49. The Commissioner found that based on the evidence his left shoulder pain became constant in June or July 2016, after he returned to work upstairs as a painter helper at Snap-On. App. Dec. p.6.

On November 7, 2016, Norstrud reported to Safety Manager Reddel that he had "'bumps' on top of his shoulders and swelling on his right clavicle due to repetitive over shoulder work over the last 25 years." JE 1, p. 5. Norstrud mentioned that he saw a doctor for pain 25 years ago, but he had no specific injury or incident that caused his condition, furthermore he mentioned that his condition became worse over time. JE 1, p. 5.

Charles Mooney, M.D., conducted an Independent Medical Examination ("IME") on Norstrud for his bilateral shoulder pain. JE 1, p. 26. Dr. Mooney reviewed claimant's medical

records and ordered a left shoulder exam. JE 1, p. 26-28. Dr. Mooney ultimately documented "[i]t is my opinion that this is predominantly a personal medical condition based on shoulder anatomy rather than any specific relationship to his work activities as described." JE 1, p. 27. Dr. Mooney requested a job analysis to develop his opinion on causation; he also recommended home exercises and released Norstrud back to full duty without restrictions. JE 1, pp. 27, 29.

John Krusich, Master of Science ("M.S."), performed an on-site job analysis of the painter helper, lower paint position on August 23, 2017. JE 1, p.31. Krusich opined based on his evaluation that "the causation of a pathological disorder about the bilateral shoulder regions due to the performance of the Painter Helper, Lower Paint position is biomechanically/medically implausible. JE 1, p. 32.

Dr. Mooney reviewed Krusich's job analysis and opined, "It remains my opinion that Mr. Norstrud's complaints of shoulder pain are an intrinsic and personal medical condition and unrelated to his work activities at Snap-On corporation." JE 1, p. 30. On October 5, 2017, a third-party administrator for Snap-On sent Norstrud a letter informing him that his claim was denied because of Dr. Mooney's opinion. JE 1, p. 14. Norstrud testified that after he received the denial, Snap-On did not rotate his assignments and he worked as a painter helper only upstairs. Tr., p. 47.

Norstrud saw Dr. Jason Hough D.O., on November 14, 2017. Norstrud complained of left shoulder pain with clicking and stiffness, which worsens when he moves his shoulder. Dr. Hough examined claimant and reviewed his x-rays. JE 1, p. 34. Following his examination. Dr. Hough recommended a left shoulder arthroscopy with subacromial decompression distal clavicle excision and biceps tenodesis. JE 1, p. 35.

Norstrud underwent the recommended procedure on January 5, 2018. Dr. Hough listed a post-operative diagnosis of left shoulder impingement syndrome with distal clavicle overgrow and

biceps tendinitis, with partial thickness rotator cuff tear. JE 1, p. 52. Norstrud returned to Dr. Hough on February 7, 2018. JE 1, p. 38. Dr. Hough documented that Norstrud was doing well but still complained of achiness. He recommended Norstrud to return part-time work for two weeks on March 7, 2018. JE 1, p. 38. Norstrud testified that he recovered well but never returned to 100 percent. Tr., pp. 48-49. He stated that once he returned to work, he worked in the lower paint area.

On August 21, 2018, Dr. Hough responded to a request by Norstrud's attorney, asking for his medical opinion in relation to his condition. The letter states:

> [i]n regards to your question, to a reasonable degree of medical certainty, is it or is it not probable that over a period of time the left shoulder condition you treated arose out of Mr. Norstrud's work activity and employment of Snap-On over a period of time, I would say with a high degree of medical probability that the patient's cumulative effect of his job and repetitive type work did cause his work-related injury to his left shoulder. In response to Item B, my rationale for this due to the impingement type setup within his shoulder, the repetitive type motion and weightbearing through the arm would cause repetitive microstructure damage to the rotator cuff, causing the partial-thickness tear. In regards to Item C, with a high degree of medical probability, Mr. Norstrud did sustain permanent impairment, in regards to Question D, the patient did reach maximum medical improvement on July 05, 2018. I would give the patient a permanent impairment rating of 3% upper extremity rating for his impingement-type syndrome, another 3% upper extremity rating for his rotator cuff, for a total of a 6% upper extremity rating, which would translate into a 4% whole-person rating as per the Fifth Edition. In regards to Item F, the charges from Spencer Hospital Therapy and myself were reasonable and necessary.

JE 1, p. 42

John Kuhnlein, D.O., conducted an IME at the request of Snap-On on January 3, 2019. Kuhnlein issued his report on January 28, 2019. Ex. A. He reviewed Norstrud's medical records and did a physical exam. Kuhnlein also reviewed the job analysis performed by Kruzich, but noted that the analysis only looked at the lower paint position and not the upper paint position that Norstrud believed caused the injury. Dr. Kuhnlein believed Dr. Mooney's opinion was suspect. Ex. A, p. 11. Dr. Kuhnlein wrote:

> [i]f other information becomes available, I would be happy to review it, but at this time, I have no reason to disbelieve what Mr. Norstrud tells me about his job. If the painter helper job is as described by Mr. Norstrud, it appears that he was exposed to shoulder stressors on a long-term basis while performing the job, so the left shoulder condition would be related to his work for Snap-On Tools. Based on what he says, his left shoulder condition including the impingement syndrome produced by the arthritic conditions and partial rotator cuff wear would be related to his work for Snap-On Tools on a cumulative basis.
> It does appear that Mr. Norstrud was aware of the cumulative work-relatedness of his left shoulder condition to his work for Snap-On Tools as far back as 1988, based on the April 4, 1988, First Report of Injury describing problems in the left shoulder possibly as a result of repeated overhead work, and a December 19, 2014, report of injury describing left shoulder pain from "many years of repetitious overhead work." There was no specific injury to his left shoulder on or about March 3, 2017.

Id.

On January 9, 2019, Mark Kirkland, D.O., conducted an IME at Norstrud's request and issued his report on January 16, 2019. Ex. 1. Dr. Kirkland reviewed Claimant's medical record and performed a physical exam. He noted Claimant's clavicle injury from 50 years ago when he fell down some steps. Kirkland noted also that Norstrud complained of pain in his left shoulder early on in his career at Snap-On, but that the pain would improve. Ex. 1, p. 7. Dr. Kirkland ultimately opined:

> [i]t is my opinion, within a reasonable degree of medical certainty, that Mr. Norstrud had distinct separate periods of cumulative trauma which arose out of Snap-On work activity during 1988, 2014, 2016, and 2017. Prior to 2014, Mr. Norstrud had episodes of pain in his left shoulder. However, his pain would improve and he was essentially asymptomatic. One of the reasons why he started getting continuous pain in his left shoulder is that he was forced to go up to do the paint line activities again. This job position probably is the pain generator in regard to his left and sometimes right shoulder. Again, Davin started having consistent and continuous pain from his work duties starting in 2016. This continued pain brought Davin to the operating room on January 5, 2018.

Ex. 1, p. 12. The Commissioner ultimately adopted Dr. Kuhnlein's permanent impairment rating. App. Dec. at 13. He found that Dr. Kuhnlein's opinion applied the AMA Guides, Fifth edition, more accurately than Dr. Kirkland. He also found Kuhnlein's report the most detailed, accurate, and convincing. The Commissioner concluded that Norstrud sustained permanent

functional impairment as a result of the left shoulder injury equivalent to 12 percent of the left upper extremity, or 7 percent of the whole person. *Id.*; Ex. A, p. 12.

The Commissioner determined the opinions of Kruzich and Dr. Mooney to be suspect. App. Dec. at 15. He reached that conclusion because their opinions took into account only an evaluation of the painter helper lower position, despite Norstrud's complaints stemming mostly from the upper position. The Commissioner accordingly placed less weight on those opinions due to their incompleteness. *Id*. at 16.

The Commissioner found that prior to June 2016, Norstrud would report symptoms, obtain treatment, and have the symptoms subside. However, after June 2016, Norstrud's symptoms became constant and he required significant medical treatment including surgery. Thus, the Commissioner found that the "claimant did not know, and should have not have known, prior to the June 2016 that his right shoulder condition was serious and likely to have a permanent adverse impact on his employment." *Id.* at 15.

Therefore, the Commissioner concluded that Claimant sustained a permanent disability as a result of his work-related shoulder injury. He considered Norstrud's age, employment history, severity of the injury, and other industrial disability factors that Norstrud. Based on such, the Commissioner concluded that Norstrud sustained a 20 percent loss of future earning capacity because of the 2014 left shoulder cumulative injury at Snap-On. *Id*. at 17

B. Scope and Standard of Review.

On judicial review of agency action, the district court functions in an appellate capacity to apply the standards of Iowa Code Section 17A.19. *Iowa Planners Network v. Iowa State Commerce Comm'n*, 373 N.W.2d 106, 108 (Iowa 1985). The court shall reverse, modify, or grant other appropriate relief from agency action if the agency action was based upon a determination

of fact clearly vested by a provision of law in the discretion of the agency that is not supported by substantial evidence in the record before the court when that record is viewed as a whole. Iowa Code section 17A.19(10)(f) "'Substantial evidence' means the quantity and quality of evidence that would be deemed sufficient by a neutral, detached, and reasonable person to establish the fact at issue when the consequences resulting from the establishment of that fact are understood to be serious and of great importance." Iowa Code section 17A.19(10)(f)(1).

> Evidence is substantial when a reasonable person could accept it as adequate to reach the same findings. Conversely, evidence is not insubstantial merely because it would have supported contrary inferences. The ultimate question is not whether the evidence supports a different finding but whether the evidence supports the findings actually made.

Reed v. Iowa Dept. of Transp., 478 N.W. 2d 844, 846 (Iowa 1992).

The court shall also reverse, modify, or grant other appropriate relief from agency action if such action was based upon an erroneous interpretation of a provision of law whose interpretation has not clearly been vested by a provision of law in the discretion of the agency. Iowa Code section 17A.19(10)(f)(c). The court shall not give deference to the view of the agency with respect to particular matters that have not been vested by a provision of law in the discretion of the agency. Iowa Code section 17A.19(10)(f)(b) However, appropriate deference is given when the contrary is true. Iowa Code section 17A.19(11)(c)(1). The agency's findings are binding on appeal unless a contrary result is compelled as a matter of law. *Ward v. Iowa Dept. of Transp.*, 304 N.W.2d 236, 238 (Iowa 1981).

Finally, a reviewing court must also reverse, modify, or grant other appropriate relief when the agency's decision is "[b]ased upon an irrational, illogical, or wholly unjustifiable application of law to fact that has clearly been vested by a provision of law in the discretion of the agency." Iowa Code section 17A.19(10)(m) "In order to determine an employee's right to benefits, which

is the agency's responsibility, the agency, out of necessity, must apply the law to the facts." *Mycogen Seeds v. Sands*, 686 N.W.2d 457, 465 (Iowa 2004). Because the agency has been entrusted with the responsibility of applying the law to the facts, the "agency's application of the law to the facts can only be reversed if we determine such an application was 'irrational, illogical, or wholly unjustifiable.'" *Id. Citing* Iowa Code section 17A.19(10)(m)).

C. Issues Presented.

1. **Whether Norstrud's Alleged Cumulative Work Injury is Barred by the Statute of Limitations Under Iowa Code Section 85.26.**

Iowa Code section 85.26 provides that a petition for workers' compensation benefits must be filed within two years of the date of the occurrence. Commissioner Cortese and Deputy Palmer agreed that Norstrud's cumulative work injury manifested on December 19, 2014. App. Dec., p. 21; Arb. Dec., p. 9. However, the Commissioner applied the discovery rule and held that the statute of limitations did not commence until June or July 2016. *Id*. Under the Commissioner's application of the discovery rule, Norstrud's April 5, 2018 Petition is timely.

Snap-On claims that the Commissioner incorrectly interpreted the law and applied the facts incorrectly to the law in respect to the seriousness component of the discovery rule. The discovery rule means that the two-year limitation period "does not begin to run until the employee discovers, or should discover in the exercise of diligence, the nature, seriousness and probable compensable character of the injury of disease. *Swartzendruber v. Schimmel*, 613 N.W.2d 646, 650 (Iowa 2000). In regards to the seriousness component of the rule, "every minor ache, pain or symptom" does not initiate the statute of limitations. *Id*.

Snap-On claims the Commissioner misinterpreted the seriousness component of the discovery rule when he interpreted that Norstrud became aware of the seriousness of his condition

when he experienced constant symptoms on June-July 2016. Furthermore, Snap-On contends that Commissioner Cortese did not discuss a series of events that Snap-On deems important to determine the seriousness component, which lead to a misapplication of law to the facts of this case. Snap-On Br. at 17. Snap-On contends that the statute of limitations began to run on March 19, 2016, the date which Norstrud visited Dr. Colby. It further argues, "Norstrud had not undergone any additional treatment or diagnostic studies during this time period to justify him knowing the seriousness of his condition in June/July 2016 versus March 19, 2016." *Id*. at 19.

First, the Iowa Supreme Court refrains "from pinpointing any specific event to establish the seriousness of an injury such as going to a physician or missing work." *Baker v. Bridgestone/Firestone*, 872 N.W.2d 672, 682 (Iowa 2015). Additionally, it is clear why the Commissioner did not decide March 19, 2016, as the date where the seriousness component is met. Dr. Colby's impressions of Norstrud's left shoulder on that date were, "Left shoulder joint degenerative change *without evidence of acute injury*". JE 1. p. 20. (Emphasis added). The Commissioner clearly understood the discovery rule when making his decision and his application of that rule to the facts when making the determination that the June-July 2016 as the date when Claimant discovered the seriousness of his injury. The Commissioner did not use Norstrud's impressions of constant pain to determine the date of when he discovered the seriousness of his injury, but rather that this is when a reasonable person would be aware that they have a serious problem. Therefore, the Court concludes there is substantial evidence in the record to support the Commissioner's determination.

Additionally, Snap-On claims that Commissioner Cortese did not apply all relevant facts bearing on the seriousness component. It goes on to cite a list of facts for the Court to consider. Snap-On Br. at pp. 15-16. However, the standard on appeal is "not whether the evidence supports

a different finding than the finding made by the commissioner, but whether the evidence 'supports the findings actually made'" *Meyer v. IBP, Inc*., 710 N.W.2d 213, 218 (Iowa 2006). It is clear here that the Commissioner's findings are supported by substantial evidence. Again, the Commissioner correctly applied the facts that Norstrud's pain was not constant until the California trip on June-July 2016. At that point, Norstrud's shoulder pain was different enough from its episodic nature that Norstrud should have reasonably understood that his condition was serious.

2. Whether the Commissioner Erred in Concluding Norstrud Sustained an Industrial Disability as a Result of his Work Duties.

The Court finds that Commissioner Cortese supported his findings that Norstrud sustained an industrial disability as a result of his work duties with substantial evidence. Commissioner Cortese found Dr. Kuhnlein and Dr. Kirkland's explanations of their impairment findings and ratings to be more specific than Dr. Mooney or Mr. Kruzich. The Commissioner held in particular,

> Dr. Kuhnlein also appears to more accurately apply the AMA Guides, Fifth Edition to his assigned impairment rating for claimant's distal clavicle excision by multiplying that rating by the relative value of the shoulder to the upper extremity as required on page 498 of the AMA Guides and implemented in Table 16-18 found on page 499 of the AMA Guides, Fifth Edition. Therefore, I find Dr. Kuhnlein's permanent impairment rating to be the most detailed, accurate, and convincing. I find claimant proved he sustained permanent functional impairment as a result of the left shoulder injury equivalent to 12 percent of the left upper extremity, or 7 percent of the whole person. (Ex. A, p. 12).

App. Dec. p. 13.

The Commissioner also cited substantial evidence for discounting Mr. Kruzich and Dr. Mooney's reports. The Commissioner found that the Kruzich's and Mooney's reports lacked the same weight as the Kuhnlein report because they based their findings only upon an evaluation of Norstrud's lower painter helper position. App. Dec. at p. 15.

The Court likewise concludes the Commissioner's determination that Norstrud sustained permanent disability because of the work-related left shoulder injury is supported by substantial

evidence in the record. There is substantial evidence to support the Commissioner's assessment of Claimant's industrial disability factors and the finding that he sustained 20 percent loss of future earning capacity because of the December 2014 left shoulder cumulative injury at Snap-On.

3. **Whether The Commissioner Erred by Finding and Concluding that Norstrud was Not Entitled to be Reimbursed by Snap-On for Dr. Kirkland's IME and Attendant Transportation Expenses.**

In Norstrud's cross-petition, he claims the Commissioner erred when he concluded that Norstrud was not entitled to a reimbursement from Snap-On for Dr. Kirkland's IME fee and Attendant Transportation Expenses. Under Iowa Code section 17A.19(10)(f) the court shall reverse an agency decision if it finds that the substantial rights of the person seeking judicial relieve have been prejudiced if : " Based on upon a determination of fact clearly vested by a provision of law in the discretion of the agency that is not supported by substantial evidence in the record before the court when that record is viewed as a whole."

> 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 issue here is that Dr. Kuhnlein, who conducted an IME of Norstrud on behalf of Snap-On, issued his report on January 28, 2019, one day before the deadline for serving expert reports. App. Dec. p.25. The Commissioner interpreted this late submittal as gamesmanship by Snap-On as it foreclosed Norstrud from the opportunity to submit the application for reimbursement. However, the Commissioner followed the express terms of Iowa Code section 85.39 and denied reimbursement as Norstrud's physician of choice, Dr. Kirkland, issued his written report before Dr. Kuhnlein's impairment rating report.

"Our legislature established a statutory process to govern examinations of an injured worker in order to obtain a disability rating to determine the amount of benefits required to be paid by the employer. Neither courts, the commissioner, nor attorneys can alter that process by adopting contrary practices." *DART v. Young*, 867 N.W.2d 839, 847 (Iowa 2015).

The court in *Young* concluded that Iowa Code section 85.39 is the sole method for reimbursement of an examination by a physician of the employee's choosing and that the expense of the examination is not included in the court of a report. *Id.* It additionally prescribed that, "If an employer unduly delays in seeking an examination under section 85.39, or fails to obtain an examination, the employee may request the commissioner to appoint an independent physician to examine the employee and make a report." *Id.*

Norstrud contends that he followed the requirements of section 85.39 because he believed that the valuation was too low. He followed the sequential requirement as Kuhnlein performed an IME at the behest of Snap-On on January 3, 2019. Kirkland performed his IME at Norstrud's request on January 9, 2019. App. Dec. p. 11. However, the Court concludes that the Commissioner was correct in denying reimbursement. The court in *Young* outlined that if this sequential problem does occur, the employee may request the commissioner to appoint an independent physician to examine the employee and *make a report*. *Young*, 867 N.W.2d at 847. Following that ruling, it appears that the Iowa Supreme Court took the report to be an essential part of the medical examination and it additionally prescribed a method to treat these sequential problems. The court in *Young* also mentioned that it cannot alter the legislative process. *Id*. Therefore, the Court concludes there is substantial evidence in the record to support the Commissioner's decision to deny Norstrud reimbursement for his IME. This was not an error of law and the Commissioner's application of the law to the facts in this regard is not irrational, illogical, or wholly unjustifiable.

4. Whether the Commissioner Erred by Failing to Tax as Costs Dr. Hough's Report Fee.

Norstrud seeks taxation of the $500.00 fee charged by Dr. Hough to obtain a written report. He claims that Dr. Hough's report was offered by him and received into evidence "in lieu of" testimony. However, Snap-On subsequently deposed Dr. Hough. Ex J-51. It claims that Dr. Hough's subsequent testimony does not negate the fee incurred as a taxable cost.

The Commissioner ultimately found that Dr. Hough's report instead was offered in addition to Dr. Hough's testimony. Iowa Code section 86.40 states, "All costs incurred in the hearing before the commissioner shall be taxed in the discretion of the commissioner." Based on this provision, the Court concludes the Commissioner's application of the law to the facts in this regard was not "irrational, illogical, or wholly unjustifiable" and as such the Court defers to the Commissioner's decision that Dr. Hough's fee is not taxable to Snap-On.

D. Conclusion and Disposition.

For all of the reasons set forth above, the Court concludes there was substantial evidence in the record to support the Commissioner's findings that (1) Norstrud became aware of the seriousness of his condition on June or July of 2016 (2) Norstrud met his burden to show he sustained an industrial disability on his left shoulder arising out of and in the course of his employment, (3) Norstrud is not entitled to reimbursement for his IME and transportation expenses (4) Dr. Hough's report fee was not received into evidence "in lieu of" testimony, therefore it was not eligible for taxation . The Court further concludes none of the Commissioner's application of the law to these factual findings was irrational, illogical, or wholly unjustifiable. Accordingly, Petitioners' Petition for Judicial Review is hereby **DENIED.**

State of Iowa Courts

Case Number	**Case Title**
CVCV060791	SNAP ON LOGISTICS CO VS DAVIN R NORSTRUD
Type:	OTHER ORDER

So Ordered

Scott D. Rosenberg

Scott D. Rosenberg, District Court Judge, Fifth Judicial District of Iowa

Electronically signed on 2021-04-05 16:08:34